New Mediation law in Italy

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1. Italy implements mediation in Civil and Commercial Disputes

By Legislative Decree No. 28 dated 4 March 2010 (the Decree), the European Mediation Directive 2008/52/EC (the Directive) has been implemented in Italy. The directive is part of a European-wide initiative to promote and regulate the development of mediation throughout the EU for cross-border disputes in civil or commercial matters. At the same time, however, there is nothing in the Directive that would prevent Member States from also applying such provisions to domestic proceedings.

The mediation procedure as provided by the Decree applies to all rights which can be freely disposed of by the parties involved ("Diritti Disponibili").

Thus a new law requiring mediation to be used in both domestic and cross-border commercial cases came into effect in Italy on the 20 March 2011. This new law and procedures have been announced as a significant potential change to the dispute resolution landscape in Italy because the scope of the law is to reduce the caseload of Italian Courts, where over 5 million commercial and civil cases are currently pending[2]. The procedure should be useful for significantly decreasing the more than 1 million cases filed each year in the domain of disputes where mediation will now be mandatory. ADR practitioners and supporters, like Arbitral Institutions and Chambers of Commerce, have played a key role in promoting the introduction of mediation and expect that the new law will realistically lead to the fulfillment of the promise of better and faster resolutions of disputes.

Under the Decree, which regulates "mediation" aimed at the "conciliation" of civil and commercial issues, the term "mediation" is for the procedure used by the mediator with the parties, while the term "conciliation" (conciliazione) is defined to mean the result of the mediation proceeding.

The new law provides in effect for two different kinds of "mediation" proceedings:

- **mandatory proceedings:** for disputes relating to insurance, banking and financial agreements, real property, division of assets, inheritance issues and family estates, leases in general, gratuitous loans, leases of going concern, damage as a result of car/nautical accidents, medical liability or defamation/libel, joint ownership (i.e. *condominiums*). These mandatory mediation provisions came into force on 20 March 2011, except for disputes in relation to joint ownership and damage due to car/nautical accidents, which will be operative as of 20 March 2012. Pursuant to the Decree, when mediation is mandatory, the commencement or continuation of arbitral or court proceedings is conditional on a previous attempt at mediation (condition of admissibility). An objection must be raised by the defendant or the by court, of its own motion, not later than at the first hearing, if mediation has not been

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[2] In Italy, the average period from the beginning of a first instance claim to the issuing of a final award by the Supreme Court is approximately eight years.

attempted. Thus, a court or arbitrators may not consider or decide a case unless the parties have previously tried to settle the dispute by mediation. In particular, if the parties approach the court or an arbitral tribunal before attempting mediation, the Decree provides for the judge or arbitrator can delay the proceedings for a period of up to four months so the parties can attempt mediation[3].

- **delegate proceedings by the court**: there is also provision under the new law for a judge to invite the parties to mediate at other stages during the proceedings, but this is not part of the mandatory procedure. When court proceedings have been initiated, even in the court of appeal, before the final hearing, a judge, having regard to all the circumstances of a case, including the stage of the proceedings and the parties' behaviour, may invite the parties try to reach a settlement of the dispute through mediation. If the parties accept the judge's invitation, the proceedings will be delayed for no longer than necessary.

The Decree regulates institutional mediation, but it also allows and encourages non-mandatory mediation proceedings in any civil and commercial disputes other than those mentioned above, both before and during the dispute resolution process.

2. New procedure for mandatory mediation.

The legislative Decree outlines a new mediation procedure which can be described as follows:

i. **Duty to inform**: lawyers are required, when accepting a mandate and having powers of attorney signed (which give them authority to act), to inform their clients about mandatory mediation and the tax incentives (mentioned below). Should a lawyer fail to do this, the Decree provides that the power of attorney the lawyers have been given will be considered void. It remains to be seen whether lawyers comply and enter into the spirit of giving clear information and explanation to their clients, or whether this is regarded as another bureaucratic obligation as is often the case with lawyers' duties of confidentiality.

ii. **Starting proceedings:** a party must file a mediation request to an independent and qualified professional mediation provider accredited by the Ministry of Justice, unless a specific organization (or procedure) has been identified in the contract. The chosen mediation provider appoints an independent mediator[4], and sets up an initial meeting between the parties within 15 days of the request. Should one of the parties fail to appear at a mediation meeting, without a valid reason, this may be used against the party in the subsequent trial.

iii. **Duration:** mediation proceedings may last no longer than **four months** from the submission of the request.

iv. **Settlement agreement:** If the parties reach an agreement, the mediator drafts the minutes of the meeting, which must be signed by all the parties. The settlement agreement, once approved by the President of the court where the mediation provider is based, will be binding on the parties and enforceable.

v. **Mediator's proposal:** when no agreement is reached by the parties, the mediator may make a written proposal which the parties are free to accept or refuse. If

[3] This rule does not apply to proceedings where time is of the essence in the relief, *inter alia,* as injunctions for payment and for urgent or interim measures.

[4] The law requires mediators to be accredited by mediation providers that are listed in a special registry created and monitored by the Ministry of Justice.

mutually requested by the parties, the mediator is obliged to make a nonbinding proposal. In any case and before a proposal is made, the mediator must inform the parties of the possible legal consequences of non-acceptance (discussed below). If the parties (or one of them) refuse the mediator's proposal, the mediation attempt is considered as having failed and any party may commence court or arbitral proceedings (as appropriate). However, if the judgment is entirely in accordance with the mediator's proposal, that may affect the allocation of the judicial expenses because the court will exclude the recovery of costs incurred by a successful party that had previously refused the proposal. Even if the judgment does not completely coincide with the proposal that has been made, in serious and extraordinary circumstances, the court can refuse the successful party recovery of costs. Unless the parties have agreed otherwise, this rule does not apply to arbitral proceedings.

vi. **Confidentiality:** the parties, the mediator and anyone involved in the mediation shall at all times treat all matters relating to the mediation proceedings as confidential. In addition, the new Decree provides that mediators cannot be called as witnesses in any subsequent judicial or arbitral proceedings and that statements made or information obtained during the mediation proceeding may not used in court or in arbitration, unless the parties agree otherwise.

vii. **Contract Clauses:** the new law also provides that when a mediation clause is included in a contract between the parties, or in a statute, and an attempt to mediate has not been made before commencing a judicial proceeding or arbitration, the judge or the arbitrator may set a 15-day deadline so that the parties can submit a request for mediation to a mediation provider.

viii. **Tax incentives:** mediation proceedings and all acts, documents and agreements related to those proceedings are not subject to stamp duty or taxes or charges of any kind or nature. A settlement agreement is exempt from registration fees up to a maximum value of Euro 50,000.

3. COMMENTS

The attention paid by the Italian legislator to the Decree marks a very interesting, positive shift in the development of mediation in Italy and, in particular, provides the Italian public (corporate and individual) every opportunity and encouragement to try alternative dispute resolution before going to court or arbitration. Of course, there is also a strong incentive to try to reduce the incredible backlog of civil cases pending in Italy.

Nevertheless, the new law has generated intense criticism, and strong opposition in some quarters. I like the words recently written by Mr. Michael McIlwrath, on http://www.karlbayer.com/blog: "*But this is Italy, where change is often introduced so that things will stay the same, as Giuseppe Tomasi di Lampedusa famously wrote in The Leopard (Il Gattopardo)*. Indeed, not everyone approves of this new legislative initiative. Last month, Italy's national union of lawyers, referred to as the OUA (Organismo Unitario dell'Avvocatura), opposed the legislation and called for a national strike. After the recourse proposed by Italy's OUA jointly with some Bar Associations, some parts of the Decree have been referred to the Italian Constitutional Court by the Administrative Tribunal of Lazio. The court, in fact, has indicated it considers significant and not manifestly unfounded, among others, the question of the constitutionality of providing for mandatory mediation before going to court or arbitration. It has also considered the provision that disputants can try to settle the controversy without the use of lawyers may be open to challenge. Pending the final decision of the Constitutional Court, however, the mediation procedure goes on.

This strong reaction shows that the new mediation law is not being ignored in Italy. Rather it is going be increasingly considered as a means to resolve the country's judicial inefficiencies.

Italian lawyers know that there is an inexorable trend towards the need to resolve disputes with greater efficiency. I would suggest, rather than continuing this fierce negative reaction, lawyers, mediator providers, and mediators should work together to look at providing the best possible route for clients. It is well recognized that mediation may not be the solution for all cases. However most, if not all, cases do ultimately settle out of court. With a combined effort, mediators, mediator providers and lawyers could provide an efficient service that works towards saving costs and time, while still providing a significant workload for everyone involved.

As I am finishing this article, news comes from Italy. It seems that on 10 May 2011 an agreement was reached between the Minister of Justice, representatives of the Italian Bar Council (CNF) and other local Bar Associations, on some crucial points which were the object of the Italian lawyers' protest. In particular, agreement was reached that assistance of lawyers would be necessary in cases of mandatory mediation only for amounts in dispute over 7,000-10,000 Euro, and the introduction of limits on the value for mandatory mediation or, alternatively, the fixing of graduated rates. Now it remains to be seen what will happen in the next days because I guess this new agreement will not satisfy all parties involved and further protests are very well possible.

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