

Russian and foreign legal entities and individuals, control their fulfillment, represent Tander in courts of general jurisdiction and commercial ones with all rights of the parties at all stages of the proceedings.

The authority to conclude an arbitration agreement and control their fulfillment also means, in view of the SCC, the authority to receive notifications regarding arbitral proceedings and to participate in them. Russian legislation does not require to indicate specifically in the power of attorney the authority to appear in arbitral proceedings.

The SCC also considered that Tander was given due notice because the head of its branch received notifications regarding arbitral proceedings for the following reasons. Further to article 55.2 of the Civil Code of the Russian Federation (the "Civil Code"), a branch is a separate subdivision of a legal entity, located in a place other than the place of a legal entity itself and exercising all or part of its activities, including its representation. Under article 55.3 of the Civil Code, heads of representative offices and branches are appointed by a legal entity and act pursuant to its power of attorney.

#### **b) lack of notarization of the power of attorney**

The SCC disagreed with Tander's argument regarding deficiency of the power of attorney issued by the head of Tander's branch, due to the lack of its notarization. The key issue, as per the court, was whether there had been a violation of a right to judicial protection, i.e. that Tander had not been aware about arbitral proceedings and had not been given the possibility to present its arguments, whereas the fact of improper representation was irrelevant. Tander indeed knew about the proceedings initiated against it from other sources and it could choose another representative for the proceedings. Consequently, the lack of notarization could not be considered as a ground for refusal to issue the enforcement order.

#### **Ruling of the Russian Supreme Commercial Court**

Thus, the SCC vacated both rulings of lower courts as being contrary to public interests and violating uniformity of interpretation and application of rules of law by commercial courts. It also ordered the Commercial Court of Krasnodar Region to issue the enforcement order to enforce the award rendered by the Arbitration tribunal at Ulyanovsk Chamber of Commerce and Industry.

## **Mediation in Italy**

**by Alessandro Bruni**

### **Introduction**

Even though mediation in its multiple meanings (family, civil, commercial, corporate, environmental, social, etc.) is well known in Italy for many years, Italy can be regarded as one of those countries where mediation in its modern form is emerging for the past few decades and only now, a general and common culture with professional discipline and ethics is existent for almost all forms of mediation. However in certain cases, there are still barriers to the use of mediation and lawyers specifically are divided between those "in favour of mediation" and others who are "absolutely contrary" to it.

The European Commission recently published a written resolution, taking a clear positive stand towards the Italian legislation on mediation, which clarifies the possibility that the legislature may provide for an obligation to attempt mediation, without this option preventing the free access to

the ordinary court.

The Legislative Decree no. 28 of 4<sup>th</sup> March 2010 and the Law no. 69 of 2009 impose an obligation for all lawyers to advise in writing to their clients when mediation is suitable for their cases. This provision has been instrumental in increasing the practice of lawyers to assist their clients in mediation procedures.

Mediation has experienced a luckier period in Italy and from 2007, a majority of the courses relating to mediation training have been approved by the Italian Ministry of Justice for quality assurance and appropriateness. These are advanced level professional training courses for the training of civil and commercial mediators who are expected to occupy top positions (in fact, if they are requested by all parties to a mediation, they are obliged to issue a non-binding proposal about the possibility of resolution of the dispute, and, before writing a negative written minutes paper, they can issue a non-binding proposal, even if they are not requested to do it by the parties).

### **The Framework of Mediation in Italy**

As already recalled, mediation is known in Italy for a long time, but has only started to receive attention as a means of dispute resolution over the last fifteen years or so.

Before the latest Italian law on mediation (the Legislative Decree no. 28 of 4<sup>th</sup> March 2010) was passed, the mediation procedure had been more commonly known as "conciliazione", since mediation (mediazione) traditionally had another meaning, closer to brokerage and/or to family law. Apart from the new law, the word "mediazione" (translated: mediation) has made inroads amongst the Italian operators and this word is officially adopted in the Italian official text of the EU Directive 2008/52 on civil and commercial matters. The new Italian law has introduced a multi-step procedure: while mediation is the process in which a professional mediator helps the counterparties to hopefully solve their dispute, the conciliation (conciliazione) is the result (positive or negative) of the mediation process.

Currently, the word "mediazione" is applied in civil, commercial, corporate, financial, banking, insurance, family, environmental, criminal and social disputes. The word "conciliazione" is still applied in labour and consumers disputes.

The role played by the Italian Chambers of commerce and by a few leading private ADR bodies in the diffusion of mediation procedures both, before and after, the Law no. 580/1993 is undeniable. In many sectors there appeared a possibility to try to mediate a case and, in some cases, the outcome of the mediation procedure, if positive, started to have binding effects on the parties.

Generally, judges are not permitted by law to refer cases to mediation. They only can "advise" the parties, during the process, to try to mediate their case before them. Only in some cases, as provided in the Legislative Decree no. 274/2000 (relating to the criminal competence of the Italian Judges of Peace) the Judge of Peace promotes mediation, or refers the parties to a public or private Mediation Centre. In other cases judges may only advise the parties to try mediation, without permitting the judge to choose the mediator and/or the mediation provider (as in the Legislative Decree no. 28 of 4<sup>th</sup> March 2010).



Only in certain disputes the law requires a previous mandatory mediation attempt. Starting from the 1990's the legislature began to require mediation or conciliation and inserted provision in this respect while passing laws that dealt with reforms in various sectors. Some of these earlier attempts were poorly designed palliatives to the chronically ill civil justice system, but the legislative trend has continued and improved certain areas.

The resort to mediation is considered by the Italian law no. 28/2010 as "voluntary" for all disputes but it is a condition for admissibility of a judicial action, and therefore "mandatory", for disputes relating to: condominium; property rights; division; hereditary succession; family agreements; leasing, loan; renting of companies; damages for medical liability and defamation through the press or through other means of publicity; damages derived from driving vehicles and boats; insurance; banking and financial agreements. The parties, in those cases, must first attempt to solve their disputes through mediation before submitting it to the Italian Judicial System. If a party initiates proceedings before the court without first resorting to mediation, the judge shall suspend the case and order the parties first to mediate. Such mediation has to be conducted by one of the ADR Providers accredited by the Italian Ministry of Justice.

The mediation proceeding can last for up to four months, after which the mediation attempt can be considered to be satisfied.

The entire proceeding in this case can be described as follows:

a) The parties (or one of them) submit a written mediation request to an "independent qualified professional- an ADR provider accredited by the Ministry of Justice";

b) The chosen ADR Provider designates an independent mediator (chosen from amongst the mediators accredited by the ADR Provider) and arranges the initial meeting between the parties;

c) The date, location and the name of the chosen mediator are communicated to other parties by the ADR Provider and by the party who initiated mediation, if he/she wants to insure that other parties have received the communication;

d) At this point two different scenarios are possible, depending on the choices open to the parties involved in the mediation. (I) If the parties are able to reach an agreement, the mediator drafts the minutes of the meeting that must be signed by all the parties. Once approved by the President of the court of the district where the chosen ADR Provider has its seat, the signed minutes will be binding on the parties and the agreement will be enforceable. (II) If no agreement is reached by the parties and the mediator is asked by them, he/she is obliged to issue a non-binding proposal about resolution of the dispute, which the parties may choose to accept or refuse. If the parties (or one of them) refuse the mediator's proposal, the mediation is considered to have failed and every party of that mediation may commence a lawsuit but, then, if the judicial decision is identical to the previous mediator's proposal, such decision may affect the allocation of judicial expenses because the court will refuse to award all the costs and the expenses to the winning party if that party has previously rejected the

mediator's proposal. In such circumstances, the court will order the winning party to pay the losing party's costs and court fees (here, the new Decree follows the model used for company disputes by the Legislative Decree no. 5/2003, which has been repealed).

Furthermore, the Legislative Decree provides for a soft-entry into the Italian civil procedure system of the so called "mediation delegated by the court" (judicial mediation). The judge may invite the parties to attempt to solve the dispute through mediation at any stage, but before the last hearing.

Judges have another authority: the new Legislative Decree provides that the unmotivated failure of a party to appear at the mediation procedure can be assessed by the judge in the subsequent judicial proceeding and trigger negative inferences, on the basis of Article 116(2) of the Code of Civil Procedure. Additionally, a new legislation (Law no. 148 of 14 September 2011) provides that, in the above-mentioned case, a party who failed to appear will be obliged to pay an amount (equal to the one that a party has to pay to the State when he/she participates in a judicial proceeding) to the State as a sort of sanction.

If a mediation clause is contained in advance in a contract, in a company's statutes or in a company's constitution and if a party has commenced a judicial proceeding without trying to mediate first, the judge or the arbitrator - not automatically but only upon request of the interested party - must postpone the proceeding pending before him/her and fix a time, maximum up to 15 days, so that the parties can request mediation by an accredited provider.

All mediators shall keep confidential any information arising out of (or in connection with) the mediation, including the fact that the mediation exists and has been conducted between the parties.

In addition, the Decree provides that mediators cannot be called as witnesses and the parties to mediation are not allowed to use any communications made and any information collected during mediation in the subsequent judicial proceedings.

Besides, the law confers authority to the Bar Associations to establish, within their territorial jurisdiction, chambers of mediation, directly managed by a Bar Association staff. These bodies may be included in the Register, which is kept by the Ministry of Justice, of the bodies authorized to conduct mediation of civil and commercial disputes.

Other professional associations may also establish mediation chambers to resolve disputes relating to specific subjects. Such chambers will be included in the above mentioned Register.

Finally, the text provides an obligation for lawyers to inform their clients, before the commencement of judicial proceedings, about the possibility of using mediation and involving mediation providers. The parties are granted fiscal benefits: all documents and measures related to the mediation process are exempt from stamp duty and all expenses, taxes or charges of any kind or nature. The mediation minutes are exempt from the registration fee.

Before enactment of the Decree no. 28 of 2010 the most significant innovation over the last few years

for the development of mediation was in the Legislative Decree no. 5/2003 (now repealed by the above-mentioned Law no. 69/2009, and by the subsequent Decree no. 28/2010 that has taken its place and has broadened the scope of mediation to all civil and commercial disputes). The Decree no. 5/2010 has provided for both mediation and arbitration for, among others, disputes within a company, banking and financial disputes.

With the new Decree (as in the repealed Decree no. 5/2010), a formal form of registration with the Ministry of Justice is required for those wanting to conduct mediation in compliance with the new law. Training bodies, such as "CONCILIA", one of the leading Italian ADR providers, headquartered in Rome ([www.concilia.it](http://www.concilia.it)), are also required to register, to submit their training programmes, and to implement a system of quality control by reporting back to the Ministry of Justice.

The system means that, at present, only those ADR bodies listed on the Ministry Register can act as an ADR Provider (with their accredited mediators) in civil and commercial mediations and other disputes covered by the current legislation.

Which means that parties who entrust their civil and commercial dispute to an unregistered mediator risk not being able to enforce any resulting agreement. It seems like the legislator believes that this interventionist regulatory approach is the best for Italy, and that this is the most appropriate way to implement the EU Directive no. 2008/52 in the Italian judicial system.

## Conclusion

From the above mentioned, it can be deduced that mediators are highly-qualified specialists who are continuously controlled by the ADR providers and indirectly by the Ministry of Justice. According to the law, the minimum requirement for civil and commercial mediators is to attend a 50-hours basic training course on mediation. In addition to the course they have to attend a minimum 18-hours training course for refreshment every two years. Every course must be organized by an ADR provider accredited for training by the Italian Ministry of Justice.

The preparation of mediators for civil and commercial matters is extremely important as they can be requested by all parties to make a non-binding proposal agreement and each party will have to indicate if it agrees with this proposal. However, the parties will not be able to rely on any civil and/or commercial mediation agreement unless mediation has been conducted through a registered ADR-Provider. Thus, neither mediation-training, nor mediation-providers are likely to be useful, unless they satisfy the requirements of the Ministry of Justice.

## CEDIRES - New Center for Arbitration and Mediation in Belgium!

A new center for arbitration and mediation has been launched in Belgium at the end of 2011: **The Center for Dispute Resolution** (CEDIRES, [www.cedires.be](http://www.cedires.be)).

The objectives of CEDIRES is to offer high quality dispute resolution services in order to allow individuals and companies to solve their disputes rapidly and at acceptable costs.

What distinguishes CEDIRES from traditional centers for mediation and arbitration, is its exceptional flexibility, its speedy procedures, its ability to offer low-cost mediation and arbitration services for small and medium-sized businesses, combined with its ability to offer the highest quality mediation and arbitration services for the most complex and high-stake national and international disputes.

CEDIRES has rapidly grown to become a team of approximately 30 members, some of whom are amongst Belgium's most famed legal professionals. Members also include five university professors, and six (former) heads of bar associations ("stafhouders" / "bâtonniers"). CEDIRES has immediate access to a vast international network, facilitated by its member Mr. Johan Billiet, President of the Association for International Arbitration. The Center for Dispute Resolution was founded by its President Dr. Kris Wagner (LL.M., Harvard) and H  l  ne de Loos-Corswarem its current Vice-President.

The people who constitute the center are obviously its most valuable asset. However, in addition to the remarkable team constituting CEDIRES, the association has other aces distinguishing it from its competitors. The CEDIRES Rules of Procedures, for instance is a sophisticated yet simple set of rules, easily understandable, even for foreign lawyers, since the CEDIRES Rules of Procedures are to a large extent based on the UNCITRAL Rules, which have withstood the test of time. For the sake of simplicity and transparency, CEDIRES uses only one set of Rules, both for mediation as well as arbitration. A mediation attempt before CEDIRES which happens to fail, would however not be a pointless effort since the procedure continues in that case as an arbitration. The parties, therefore have the guarantee that eventually their dispute will be resolved.

The absence of an appeal and the possibility for company lawyers to plead, can in many cases contribute to important cost savings.

CEDIRES mediation and arbitration proceedings can be organized anywhere in the world. The center is located at a 45 minute travel towards the south of Brussels, in the town of Buvrines. Mediations and arbitrations can take place in the charming and spacious Ch  teau du Bois d'Angre, the seat of the CEDIRES.

Perhaps because of lack of serious competitors, certain traditional arbitration institutions have to some extent corrupted the reputation of arbitration in the eyes of many members of the business community. As a consequence, many people are of the opinion that arbitration is excessively expensive, and that the procedures are not that much faster than ordinary court proceedings (or in any case, not expedient enough). CEDIRES intends to stir things up and harness the true potential of arbitration and mediation. For those looking for high quality mediation and arbitration services, who wish to obtain value for their money, without watching the seasons change as their dispute lingers on, CEDIRES is the place to be!