

A new scenario for Italy: the compulsory mediation of civil and commercial disputes

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New legislation

In March 2010 the government approved a legislative decree to implement the EU Mediation Directive (2008/52/EC). Legislative Decree 28/2010 introduced a compulsory mediation stage for resolving civil and commercial disputes.

The decree's ambitious aim is to reduce the number of cases pending before the Italian courts and thereby cut the duration of a typical lawsuit - at present, the average period from the beginning of a first instance claim to the issuance of a final judgment by the Supreme Court is approximately eight years.

The legislative decree states that from March 20 2011, mediation will be compulsory for disputes involving:

- property rights;
- division of assets;
- succession and inheritance;
- family agreements;

- disagreements between landlords and tenants;
- loans;
- firm tenancy;
- medical malpractice;
- defamatory statements in the media; or
- insurance, banking or other financial contracts.

From March 20 2012 mediation proceedings will be mandatory for cases concerning property rights disputes between neighbours (which are the most common disputes in Italy) and disputes arising out of motor vehicle and boating accidents.

For the purpose of such disputes, mediation becomes a *condizione di procedibilità* (ie, a precondition for proceeding with the case). Thus, the court may not consider and decide a case unless the parties have previously tried to resolve the dispute by mediation.

Mediation proceedings

The legislative decree outlines a mediation procedure which begins with a party filing a claim before a mediation body. The mediation body in question must be registered with the Ministry of Justice under Decree 180/2010, which sets out the criteria and terms of a mediator's admission to such a body.

After the filing, the chairman of the mediation body appoints a mediator to seek a solution to the case. He or she must arrange a first meeting with both parties within 15 days. During the meeting the mediator assists the parties in clarifying their positions – potentially in separate sessions with each party – before asking them to formulate a range of options for resolving their dispute.

If the process is successful, the mediation terminates with the drafting of an agreement that, once validated by the court, is enforceable in the same way as a court judgment.

The mediator has discretion to formulate a written proposal to resolve the dispute – this must be accepted or rejected within seven days. If the mediation process is unsuccessful, the mediator must note the failure in his or her report.

Mediation proceedings may last no longer than four months from the initial filing. A rule of confidentiality applies.

Incentives

The new rules provide incentives to reach an agreement through mediation. Legal aid is available for the conduct of the proceedings, provided that the conditions in Section 76 DPR 115/02 are met. In addition, Sections 17 and 20 of the legislative decree provide for the following tax benefits:

- All acts, documents and measures related to mediation proceedings are exempt from stamp duty and any other charge or tax (with the exception of the fees due to the mediator and the mediation body);



- The agreement document is exempt from registration fees up to a threshold of €50,000 – if the sum in question exceeds the threshold, only the excess is payable; and
- Parties that meet the conditions for indemnity for qualified persons authorised to carry out mediation proceedings are eligible for a tax credit commensurate with the indemnity up to €500 in the event of success – only half of the tax credit applies if the mediation fails.

Implications for subsequent litigation

The legislative decree has been criticised for the consequences of failure to reach a resolution or to participate.

Since mediation is a compulsory step, a judge who hears subsequent court proceedings may draw conclusions from a party's failure or refusal to participate in mediation without just cause. Unfortunately, the legislative decree does not identify the just causes for which a party may refuse to participate in an attempt at mediation. As a consequence, it is advisable for parties to participate in mediation in any case in order to avoid negative consequences in the litigation that may follow.

Moreover, the right to reject a mediator's proposal (which is expressly provided in the legislative decree) may nonetheless have negative consequences in a subsequent lawsuit before the civil courts. If the mediator's proposal entirely corresponds to the subsequent court judgment, the judge will not allow the winning party to recover its trial costs if that same party previously rejected the mediator's proposal.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

