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«Mediation in Civil and Criminal Cases to Foster European Wide Settlement of Disputes»

Chapter IV

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Legal Regulation of Mediation and Involved Institutions: Italy

SUMMARY: Introduction. – 1. Normative sources of mediation regulation. – 2. Mediation organizations in Italy. – 3. Basic terms and definitions. – 4. Initiation of mediation: how mediation process is triggered. – 5. Regulation of mediation process. – 6. Recognition, credentialing and accreditation of mediators. – 7. Confidentiality and admissibility of mediation evidence. – 8. Mediated outcomes and enforceability. – 9. Duties and obligations during mediation. – 10. Expected developments in mediation regulation. – 11. Available statistics on mediation.

Introduction

Italian legal systems presents many types of “mediation”: as it will be showed in the following paragraphs, we can distinguish:

- (i) from the perspective of the relationship with the process, *out-of-court* mediation from *judiciary* (court-annexed) mediation;
- (ii) from the perspective of the material content, mediation in *civil and commercial matters*, *family* mediation and *criminal* mediation;
- (iii) finally, if we take into account the compulsoriness, there are some cases occurring in which mediation has to be attempted (*mandatory* mediation) and some other situations where the mediation is totally discretionary (*optional* mediation).

More precisely, the Italian law (*decreto legislativo* No. 28/2010) regulates, for the first time, the out-of-court mediation in civil and commercial matters. It defines mediation as an activity carried out by a neutral and impartial third party - the professional mediator - with the aim to assist two or more parties in reaching a possible and amicable agreement and a resolution to a dispute (*accordo di conciliazione*).

In order to reach an agreement between the parties, a “formal” mediation must be carried out by professional and independent (public or private) mediation providers that are accredited in a registry maintained and controlled by the Italian Ministry of Justice.

In October 2012 the Italian Constitutional Court declared the unconstitutionality of the Legislative Decree No. 28/2010 in part where it provided for compulsory mediation in civil and commercial matters, finding that the Government had exceeded the scope of both the EC Mediation Directive No. 2008/52 and domestic law No. 69/2009, which empowered the Italian government to adopt a “*decreto legislativo*” introducing civil and commercial mediation procedures.

On 20 September 2013, the so-called “mandatory mediation” (re)entered into force into the Italian legal system: Italian Government, following the above-mentioned declaration of unconstitutionality of

Decree No. 28/2010 (in the section which introduced the mandatory attempt of mediation)¹, reintroduced this procedure, even though partially amended, by means of *decreto legge* No. 69/2013 on «*Urgent dispositions to relaunch the economy*». Such amended and reintroduced attempt of mediation in civil and commercial cases is considered by law as “mandatory” for some matters and for an experimental period of four years, during which the Ministry of Justice is carrying out a follow-up survey on the results concretely detected in the praxis.

The law of 9 August 2013, No. 98 (converting Decree No. 69/2013), contains the new framework of rules regulating and promoting the use of mediation in civil and commercial disputes in Italy. The law was enacted with the goal to ease the overwhelming caseload in front of the Italian courts and preventing no longer tolerable excessive delays in Italian judicial proceedings.

Finally, in order to relieve the backlog of Italian courts, starting from February 2015, a pre-trial negotiation between the parties (*negoziiazione assistita*) with the aid of the respective attorneys is mandatory for certain disputes (e.g. if the dispute value is lower than 50,000 € or in a case of a legal action against the insurance companies for damages resulting from road traffic, regardless of value). Please consider that the parties to a dispute may make a *negoziiazione assistita* by the intervention of just one lawyer, who clearly must act in a neutral position. Furthermore, judges are now empowered to determine on their own motion that a summary judgment without a trial is appropriate to promptly and expeditiously dispose of the case brought before them. Moreover, such agreements have to be approved by the public prosecutor: so it is possible that the application to the court remains necessary, if he refuses the approval².

1. Normative sources of mediation regulation³

• Judiciary mediation

ADR methods have generally been known about in Italy for a long time, but mediation in particular has only started to receive attention for its serious development as a means of dispute resolution over the last 15 years.

Before the implementation of the EC Mediation Directive No. 2008/52,⁴ in the Italian legal system, for a long time, the term *conciliazione*⁵ referred to a non-adjudicatory dispute resolution procedure in civil and commercial matters; the word *mediation* referred, on the other hand, to procedures in family and criminal matters which were not necessarily adjudicatory in nature and whose aim was the resolution of disputes through the delivery of assistance, also therapeutic, to the parties in conflict.

¹ Corte costituzionale, decision of December 6th 2012, No. 272.

² See *decreto legge* No. 132/2014, approved by Law 162/2014 (Articles from 2 to 11). In literature, see P. FARINA, *La negoziiazione assistita dagli avvocati: da praeambolum ad litem ad outsourcing della decisione del giudice*, in *Riv. dir. proc.*, 2015, p. 514; G. FREZZA, “*Degiurisdizionalizzazione*”, *negoziiazione assistita e trascrizione*, in *Le nuove leggi civ. comm.*, 2015, p. 18; S. CHIARLONI, *Minime riflessioni critiche su trasferimento in arbitrato e negoziiazione assistita*, in *Riv. trim. dir. proc. civ.*, 2015, p. 221.

³ A first overview on mediation in Italy is given by the European e-Justice Portal: https://e-justice.europa.eu/content_mediation_in_member_states-64-it-en.do?init=true&member=1. The official website (held by the Ministry of Justice) for the civil mediation in Italy is <https://mediazione.giustizia.it/>.

⁴ On the role of mediation in Italy before Directive No. 2008/52, see G. ALPA, *Riti alternativi e tecniche di risoluzione stragiudiziale delle controversie in diritto civile*, in *Politica del diritto*, 1997, p. 403; F. CUOMO ULLOA, *La conciliazione: modelli di composizione dei conflitti*, Padova, 2008; C. PUNZI, *Conciliazione e tentativo di conciliazione*, in *Enciclopedia del diritto - Agg. IV*, 2001, p. 327; V.G. ROMUALDI, *La conciliazione amministrata: esperienze e tendenze in Italia*, in *Rivista dell'arbitrato*, 2005, p. 401. On mediation after the adoption of the Directive No. 2008/52: F. CUOMO ULLOA, *La mediazione nel processo civile riformato*, Bologna, 2011; G. FINOCCHIARO, *Dal 2011 si parte con il tentativo obbligatorio*, in *Guida al diritto*, 12-2010, p. 64; M.F. GHIRGA, *Strumenti alternativi di risoluzione della lite: fuga dal processo o dal diritto? (riflessioni sulla mediazione in occasione della pubblicazione della direttiva 2008/52/CE)*, in *Rivista di diritto processuale*, 2009, p. 357; L. GRAZIANO, *Contenzioso civile e norme sulla mediazione finalizzata alla conciliazione*, in *Rivista di diritto processuale*, 2011, p. 614; C. PERAGO, *Spunti di riflessione sulla compatibilità costituzionale della mediazione obbligatoria*, in *Responsabilità civile e previdenza*, 2011, p. 1877; P. PIRODDI, *Due anni per ridisegnare la conciliazione stragiudiziale*, in *Guida al diritto*, 6-2009, p. 101; C. PUNZI, *Mediazione e conciliazione*, in *Rivista di diritto processuale*, 2009, p. 845; E. ZUCCONI GALLI FONSECA, *La nuova mediazione nella prospettiva europea: note a prima lettura*, in *Riv. dir. proc. civ.*, 2010, p. 667; C. CONSOLO, *La giustizia civile: quale volto dei nostri processi fra giurisdizione e ADR?*, in *Corriere giur.*, 2014, p. 1263; F. DANOVI, *Mediazione e ADR nelle controversie civili e commerciali: ritorno a una giustizia di prossimità?*, in *Il giusto processo civile*, 2014, p. 1007; L. ANSALDI, *Il crescente ricorso agli strumenti alternativi di risoluzione delle controversie*, in *I contratti*, 2015, p. 203.

⁵ Different provisions of the national rules of civil procedure are still referring to such expression (articles 185, 320, 410 of the Italian code of civil procedure).

Nevertheless, in more recent times, with the acknowledgement of the importance of the techniques for the friendly settlement of disputes, the use of the expression *mediation* became progressively more frequent in the field of civil and commercial matters. A different notion of mediation spreads, now being understood as the activity or the *procedural technique handed over to a neutral and impartial party, who lacks adjudicating powers*, and aimed to the settlement of the dispute.

In the framework of the civil procedure, the principle of encouraging conciliation between the parties of a dispute was strengthened (and, therefore, a general duty upon the judges to try conciliation between the parties of the procedure during the trial was also established) after the reform of the rules of civil procedure of the '90es.

Among the different types of court-annexed conciliation, the first procedure to be mentioned takes place in front of the so called *giudice di pace* (a judge whose jurisdiction is limited to small claims) after the filling of a petition for non-judiciary conciliation. It is a judiciary procedure in nature, since it is administrated by a judge, but is at the same time a non-adjudicating one, since it is not part of a trial and is a voluntary extra-judicial procedure. According to Art. 322 of the Italian code of civil procedure, the *giudice di pace* drafts a record of the procedure which, if the dispute falls under his jurisdiction, becomes a *titre exécutoire*, or, in all the other cases, becomes a private agreement to be recognized in a court of law.

During a proceeding, in the rules of procedure there are different circumstances under which Italian judges are called to encourage the conciliation of the parties both in ordinary proceedings as well as in special proceedings.

In the standard procedure such a duty is envisaged in Art. 320 of the code of civil procedure for *giudice di pace* and in Art. 185 for the ordinary judges. Then, more broadly, the judges are granted discretionary power to order the appearance of the parties at the hearing in order to encourage a friendly resolution of the dispute, at every very stage of the trial, up until the court deliberates on the dispute.

As a matter of principle, it is believed that the parties are also entitled to settle their dispute through conciliation – if previous conciliation meetings failed or if conciliation was at least taken into consideration during the hearings – even at the end of the trial at least till the hearing fixed⁶ by the judge for the submission of the final conclusions the parties would like to be considered in the judgment. In any case, these conciliations are to be considered judiciary in nature, meaning that the party encouraging and organizing the conciliation is the judge in occasion of a judicial dispute.

In addition, some conciliation duties also rest upon the expert witness (Art. 198 and Art. 669*bis* of the code of civil procedure) as additional proof of the favour the Italian civil procedure shows towards mediation.

The greatest limit of judiciary conciliation in the ordinary procedure lies in the mingling of the authoritative and conciliatory functions: the judge is, simultaneously, mediator/conciliator and the authoritative party deciding the dispute: such circumstance can affect party autonomy which is a central element in the conciliation procedure.

In this legal framework, Italy adopted the *decreto legislativo* No. 28/2010, which is the law implementing the Directive No. 2008/52.

The Italian legislator performed a kind of *reductio ad unum* of the previous two concepts of conciliation and mediation. The Decree No. 28/2010 defines “mediation” (*mediazione*) as the activity of a third party to assist the parties in the search of an agreement, while “conciliation” (*conciliazione*) is considered to be the formal and material effect arising out of the activity carried out by the mediator: conciliation is, therefore, the result of mediation⁷.

Today the concept of mediation adopted by the Italian legislator encompasses conciliation, understood as the agreement reached by the parties thanks to the activity of the mediator. With the term *conciliation* specific reference is made to the agreement of the parties, comparable to a contract⁸,

⁶ See Art. 189 rules of the Code of civil procedure.

⁷ C. PUNZI, *Mediazione e conciliazione*, supra [fn. 2](#), p. 845: the Author argues that ‘stating that mediation is aimed to conciliation, means reducing mediation to the intervention of a third party who, by mediating and drafting a proposal of agreement is doing nothing else than conciliating’.

⁸ And, as such, capable to be declared null and void. On this T. GALLETTO, *Il modello italiano di conciliazione stragiudiziale in materia civile*, Milano, 2010, p. 84.

attached to the record of the procedure which is written by the mediator, under his personal liability, at the end of the meetings.

Regarding the judicial conciliation/mediation, the Decree No. 28/2010 does not at all affect mediation procedures in the court of law, except the possibility for the judge to defer the parties – if he thinks it might be useful – to a mediation centre in order to attempt a friendly settlement of the dispute and avoid taking an authoritative decision (the so-called court-annexed mediation).

Apart from the general regulations of judiciary mediation in civil and commercial matters, Italian system also envisages special provisions on mediation in (i) *labour law*⁹; (ii) *family law*¹⁰ and, beyond the field of civil and commercial matters, in the field of (iii) *criminal law*¹¹. Mediation attempts do not extend to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of official authority¹²; nevertheless, Italian administrative judicial authorities are asking, from time to time, the extension of the mediation instrument to the administrative field (it happened last time in the beginning of 2015, when the President of Italian “*Conseil d’État*” asked such an intervention to the Parliament).

• Out-of-court mediation

Beyond the court-annexed conciliation/mediation procedures, different extra-judicial procedures were developed by the Italian legislator as means for alternative dispute resolution.

These procedures are complementary and accessory to the ordinary civil trial: their aim is (i) to reduce, as all ADR systems, the number of trials; (ii) to encourage access to justice by extending the protection of those weak categories who need a specific protection; and (iii) to diversify the methods of dispute settlement by foreseeing different and more functional procedures for the solutions of particular claims that are not finding in the ordinary mechanism of judicial protection a solution fitting enough.

In the absence of a uniform procedure, extra-judicial mediation procedures are developed in a very heterogeneous way according to the claim brought in front of the mediator and to the choice to involve

⁹ Under Article 420 of the Code of civil procedure, where the judge has an obligation to try conciliation of the parties during a hearing where their presence is mandatory; the mandatory regime, which is a burden for the judge and the parties as well, is weakened by the fact that no negative consequences arise from the failure to try conciliation. See A. BRUNO, F. MARASCO, *La mediazione delegata nel diritto del lavoro: prospettive di successo e criticità*, in *Lavoro e previdenza oggi*, 2014, p. 249.

¹⁰ Family mediation, in Italy, generally takes place out-of-the-court, facing cases of conflicts between spouses with children. Anyway, some judiciary mediation possibilities in family matters are similarly provided by Italian law in cases of legal separation and divorce: Article 707 of the Code of civil procedure foresees upon the President of the Court the duty to try the conciliation of the spouses during the first appearance hearing. Even if in the every-day praxis this duty is absolved with the fulfilment of some formalities, some courts stated that it is impossible to give the homologation to the minutes of legal consensual separation if the spouses didn’t attend the hearing by sending their attorneys at law because of the absence of a real possibility to try the conciliation. After all, the failure of conciliation offers an essential proof about the impossibility to save the marital life and indicates the rupture of the marital affection, which is the condition under which legal separation and/or divorce is granted. It is important to point out that, in the above mentioned proceedings, conciliation takes place in an autonomous segment of the trial in front of the President of the Court who is not going to be the judge deciding on the merits of the case. Always in the field of family law, Article 155 *sexies* of the Italian civil code establishes upon the judge the power to postpone the adoption of decisions concerning the children in order to give the spouses a chance to try conciliation with experts that should help them to reach an agreement that takes into account the interests, material and moral, of the children of the couple: the mentioned provision is quite innovative, since the mediation referred to is voluntary and extra-judicial and, at the same time, taking place within the judicial proceeding. Lately, Art. 6 of Law 162/2014 introduced the possibility to use the new instrument of *negoziato assistito* (see above, para. 1) also for spouses’ consensual legal separation. Among the related literature, see D. D’ADAMO, *La mediazione familiare come metodo integrativo di risoluzione delle controversie*, in *Riv. dir. proc.*, 2015, p. 377; M.N. BUGETTI, *Brevi riflessioni sull’arbitrato in materia di separazione e divorzio*, in *Rivista critica del diritto privato*, 2014, p. 273; M. MAZZUCA, *Note sulla mediazione familiare, tra autonomia negoziale e controllo giudiziale*, in *Rassegna di diritto civile*, 2013, p. 711; M.A. LUPOI, *Aspetti processuali della normativa sull’affidamento condiviso*, in *Riv. trim. dir. proc. civ.*, 2006, p. 1063; M. DE STEFANO, *La cultura giuridica europea della mediazione familiare integrata dalla direttiva 2008/52/CE*, in *Rivista della coop. giur. int.*, 2009, p. 189; A. D’ANGELO, *Un contributo per un approccio giuridico allo studio della mediazione familiare*, in *Famiglia*, 2004, p. 533.

¹¹ Criminal mediation is used only in the case of offences prosecuted *upon complaint* and in *juvenile proceedings*. Under the *decreto legislativo* No. 274/00, mediation in this field is conceived as a path to reparation and the acknowledgement between the victim and the alleged offender of their position and interest, thanks to a procedure replacing or taking place side to side to the punitive criminal proceeding. The *giudice di pace* has the power to invite the alleged offender and the victim of the crime, in the criminal proceedings falling under his jurisdiction, to take a mediation procedure into specialized centres for the reparation of the crime and restore peace between the parties. See S. RENZETTI, *La mediazione nel microsistema penale minorile*, in *Rivista di diritto processuale*, 2014, p. 642; G. DARAIO, *Il “principio riparativo” quale paradigma di gestione del conflitto generato dal reato: applicazioni e prospettive*, in *Diritto penale e processo*, 2013, p. 357; L. PULITO, *Lo statuto processuale penale del mediatore*, in *Archivio della nuova procedura penale*, 2012, p. 362.

¹² On the contrary, only those matters that involve the liability of public authorities for non-authoritative acts fall into the category of disputes governed by Legislative Decree No. 28/2010.

a professional mediation organism: that is determining different conditions to access the procedures and different connections with the ordinary civil trial.

For instance, Commercial Chambers were entrusted with the competence to encourage the friendly solutions of disputes of the market (among companies and between companies and consumers) by law No. 580/1993. Such competence has been strengthened over the time, and today it encompasses all consumer-related claims¹³, the claims related to subcontracting contracts¹⁴, the claims related to tourism contracts¹⁵ and the claims related to laundry contracts¹⁶.

Specific mediation duties were also entrusted upon independent authorities working in the field of services of public interest. It is the case of the *Commissione Nazionale per le Società e la Borsa* (CONSOB), with regard to the finance and investment services between investors and financial agents¹⁷, and of the *Comitato Regionale per le Telecomunicazioni* (CoReCom), with regard to the services of telecommunications¹⁸. The same reason of speciality of the subject brought Italian legislator to autonomously rule on the mediation in claims related to farming and agriculture contracts, to be filled in front of a Commission for Farming and Agriculture, and the mediation in the field of copyright, that has to be addressed to a special Commission created within the Permanent Committee for Copyright.

Finally, the Decree No. 28/2010 offered a uniform regulation of extra-judicial mediation in civil and commercial matters, providing for the repeal of all specific mediation/conciliation procedure previously established in other fields of civil and commercial law (basically repealing the discipline of company and commercial mediation), but excluding from its range cases where mediation was mandatory as well as voluntary and joint negotiations (Art. 2.2).

More precisely, a mediation procedure before a private mediator – even if he has the requisite foreseen by the *decreto legislativo* No. 28/2010 – or before mediators not registered in the Minister's registry, is not, in principle, an illegal activity. Though the agreement will not enjoy the benefits established for regular mediation, i.e. first of all such procedure is not considered to fulfil the requirements for the access to the court of law when mediation is a condition to the *vocatio in ius* or to the prosecution of the case and, secondly, even if mediation is successful the parties cannot enjoy tax relief as in the mediation carried out in respect of the provisions of the *decreto legislativo* (Art. 17) and they cannot benefit from the right to ask the enforcement of the agreement (Art. 12).

Similar considerations are valid for mediation procedures conducted in front of joint committees between representatives of consumer and entrepreneur classes, without the activity of an impartial party. Nevertheless, according to article 7.2, lit. c, of the Ministry Decree No. 180/2010, mediation bodies have the right to use the results of the activity done during the procedure in front of joint committees. It is therefore likely that mediation organisms will reach an agreement with these committees to promote the results reached by the latter¹⁹.

2. Mediation organizations in Italy

Public and private mediation providers are accredited by the Ministry of Justice for conducting civil and commercial mediation according to the provisions of *decreto legislativo* No. 28 of 2010 (there are about half a thousand official bodies at the time of writing)²⁰.

As for the public, the 105 Italian Chambers of Commerce / Boards of Trade (*Camere di commercio*) are the more prominent public ADR bodies: each of them has a specific mediation and arbitration

¹³ See Art. 3, Law No. 281/1998, now transposed into Art. 140 of the Italian consumers code (*decreto legislativo* No. 206/2005).

¹⁴ See Art. 10, Law No. 192/1998.

¹⁵ See Art. 4, Law No. 135/2001.

¹⁶ See Art. 3, Law No. 84/2006.

¹⁷ See Law No. 262/2004.

¹⁸ See Law No. 249/1997.

¹⁹ See I. QUEIROLO, L. CARPANETO, S. DOMINELLI, *Italy*, in C. ESPLUGUES, J.L. IGLESIAS, G. PALAO (eds.), *Civil and Commercial Mediation in Europe. I. National Mediation Rules and Procedures*, Cambridge, 2013, p. 251.

²⁰ See the official Register held by the Ministry of Justice at <https://mediazione.giustizia.it/ROM/ALBOORGANISMIMEDIAZIONE.ASPX>.

chamber. Among them, the best-known are the chambers of mediation of the Milan Chamber of Commerce and of the Rome Chamber of Commerce.

As for the private ADR providers, the most prominent are:

(i) *ADR Center*, an organisation of mediators and arbitrators dealing with the resolution of disputes, providing ADR training and consultancy services. It is headquartered in Rome with branch offices in Italy and abroad; it's accredited by the Italian Ministry of Justice for conducting civil and commercial mediations and for mediators' training²¹.

(ii) *Conciliatore Bancario e Finanziario* (Banking and Financial Mediation Provider), born from an initiative led by the first 10 Italian banking groups to give customers a fast and efficient alternative to court proceedings²².

(iii) *The Chamber of Mediation of CONSOB*, which was created to try to settle, through mediation, banking and financial disputes²³.

(iv) *ADR Notariato*, created by the National Council of Notaries with multiple offices in Italy²⁴.

(v) *Concilia*, which provides training and consultancy services in civil and commercial negotiation, mediation, conciliation and arbitration, with headquarters in Rome and secondary offices in Italy and abroad. It is accredited by the Italian Ministry of Justice for conducting civil and commercial mediations and for organising training for professional mediators. It is connected with many ADR providers in Europe and abroad²⁵.

3. Basic terms and definitions

First of all it has to be stressed that, according to EU Directive, mediation in Italy can generally be used in civil and commercial disputes – domestic or cross-border – concerning “disposable rights”.

Here are the most relevant basic terms in mediation matters:

Organismi di mediazione (Mediation provider organisations) → mediation procedures can be handled only by public agencies and private organizations appearing in the Register held by the Ministry of Justice. The requirements and procedures for registration are governed by special ministerial decrees. Members of the Bar Associations, Chambers of Commerce or other professional associations – but these latter are reviewed on the basis of their competence – can form organizations to be entered, upon simple request, in the Register as mediation organizations.

Mediatore (Mediator) → the mediation procedure can only be conducted by mediators who are listed in the Register, and who have attended and passed a special training provided by training institutions that are accredited by the Italian Ministry of Justice.

Mediazione obbligatoria (Mandatory pretrial mediation) → an attempt to mediate that becomes, in certain matters, a compulsory precondition for bringing the case to the court.

Invio in mediazione (Referral to mediation) → the judge, after evaluating the nature of the dispute and the quality of the parties, can refer them to mediation with an accredited provider at any phase of the trial.

Mancata comparizione in mediazione (Non-justified absence) → should one of the parties fail to appear at a mediation session without a valid justification, this failure may be used against the party in the subsequent trial.

Proposta di conciliazione (Proposal of mediation) → when the parties cannot reach an agreement, the Decree gives the mediator discretion to make a written proposal. The parties are free to accept or decline the proposed agreement. Declining the mediator's proposal, however, may produce legal consequences, such as fee shifting in the trial. If requested by both parties, the mediator is bound to make a proposal after warning the parties about the possible legal consequences.

Accordo di conciliazione (Settlement agreement) → if a settlement agreement is reached, the text of the agreement is entered into an official record by the mediator. The settlement agreement becomes

²¹ <http://www.adrcenter.it>.

²² <http://www.conciliatorebancario.it>.

²³ <http://www.camera-consob.it>.

²⁴ <http://www.adrnotariato.org>.

²⁵ <http://www.concilia.it>.

a writ of execution, placing a judicial lien on the party's assets. It is deemed to be enforceable and is recorded on a special form. The agreement is included in the judicial registry of mortgages and claims.

Riservatezza (Confidentiality) → the mediator and anyone else who works within the mediation provider organisation has a duty of confidentiality and may not be called to testify. Statements made or information acquired during the procedure may not be used in court.

4. Initiation of mediation: how mediation process is triggered

The mediation procedure is very informal and the parties do not necessarily have to prepare summaries or keep records or any other document.

The mediation procedure, however, is launched by filing – by the claimant – of a written request for mediation. The request must be transmitted by the ADR provider (mediation provider previously accredited by the Ministry of Justice) to the defendants by any means that can ensure the receipt of the documents: postal services, fax or certified e-mail.

The chosen ADR provider designates an independent mediator (chosen from the mediators accredited by the ADR provider and listed in the specific Register of mediators held by the Ministry²⁶) and arranges the initial meeting between the parties.

The date, the location and the name of the chosen mediator are communicated to other parties by the ADR provider and by the party who requested the mediation, if he/she wants to ensure that other parties have received the communication; the fees to be paid to the accredited mediation bodies and to the mediator are provisionally established.

5. Regulation of mediation process

Once the mediation attempt has been started, two possible scenarios could be faced, depending on the choices of the parties:

(i) if they are able to reach a written agreement, the mediator drafts the minutes of the meeting that must be signed by all the parties and by the mediator him/herself; or

(ii) if no agreement is reached, at the parties' request the mediator must issue a non-binding proposal for the resolution of the dispute, which the parties may choose to accept or refuse. If either party refuses the proposal, the mediation is considered to have failed and any of them may introduce a lawsuit. But if the judicial decision is identical to the previous mediator's proposal, such decision may affect the allocation of judicial expenses: 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.

At any stage of the mediation procedure the parties may jointly ask the mediator to formulate a written proposal and he or she is obliged to issue a non-binding proposal about resolution of the dispute, which the parties may choose to accept or refuse.

If no agreement is reached by the parties, before writing the mediation minutes the mediator may voluntarily issue a nonbinding proposal to try to help the parties reach an agreement.

Italian legislation does not require the presence of consultants in mediation proceedings, but it is always recommended by the ADR providers that parties are accompanied by professional advisers, especially when the dispute is complex and difficult.

The *decreto legislativo* No. 28/2010 sets out special rules applicable to the conduct of the lawyers. When a lawyer has been appointed, he/she must inform the client about the possibility to use the mediation process and about the tax benefits that may come from a mediation procedure governed by the Mediation Decree. The lawyer will also inform the client of the cases occurring which the mediation attempt is a condition of admissibility of the claim. The information must be provided clearly and in written form. In case of breach of information obligations, the contract between the lawyer and the client is voidable.

²⁶ <https://mediazione.giustizia.it/ROM/ALBOMEDIATORI.ASPX>.

The document containing the information about the mediation procedure is signed by the customer and must be attached to the application for any court proceedings. The court, which verifies whether that document is attached to the application, informs the party of the right to request mediation, or sets the first hearing after the expiry of the deadline for the obligatory attempt at mediation (within four months of filing the mediation before an accredited provider)²⁷.

6. Recognition, credentialing and accreditation of mediators

Public-sponsored mediation must be conducted by authorized entities who are obliged to comply with certain requirements in order to be placed in the National Register of Mediation Organizations²⁸.

The National Register contains separate lists for public bodies and for private entities. Mediation organizations must apply with the Ministry of Justice and their application is considered by the Director-General of the Civil Justice Office or his proxy who is the person responsible for the register. The Director-General may be assisted by an advisory committee composed of three experts on ADR.

Professionalism and efficiency are the two main requirements for mediation organizations wishing to appear on the National Register (Art. 4 of Decree 180/2010). They are verified by the Director-General through an evaluation of the following factors:

- the professional qualifications of mediators;
- the guarantees of independence, impartiality and confidentiality that must be assured during the mediation process;
- the conformity of the mediation procedure rules to the law;
- the conformity of fees for mediation services provided by public entities to the fee list established by the Ministry of Justice and the Ministry of Economy and Finance;
- the legal structure of the entity, its autonomy and the compatibility of its activity with its purpose;
- the availability of insurance covering the professional liability of mediators for a minimum of € 500 000;
- the administrative and accounting transparency of the entity and its legal and business relationships with its mediators.

Public-sponsored mediation in corporate and financial disputes may be carried out only by professors, professionals in economics or law, or retired judges. Those who do not belong to at least one of these categories may appear on the Register as mediators only if they can demonstrate that they have undertaken specific training in mediation conducted by accredited bodies. In addition to these professional skills, mediators must possess a good and upstanding reputation (consequently, persons who have been convicted or are subject to precautionary measures may not appear on the Register).

Public or private entities applying for entry to the National Register of Mediators must have their own rules for the mediation process. These rules must be inspired by the basic principles of informality, promptness and confidentiality. They must also provide for the place of the mediation (which can only be modified by agreement of the parties), any possible conflict of interest on the part of the mediator and the declaration of impartiality duly signed by the mediator.

The registration of mediation organizations has a significant effect on their activity. Once registered, neither these entities nor the mediators can refuse to provide mediation services in the absence of a valid justification to do so²⁹.

²⁷ See A. BRUNI, M. SITZIA, *Italy*, in *Mediation in 161 jurisdictions worldwide. 2013*, London, 2012, p. 49, available at http://www.concilia.it/getting_the_deal_mediation_2013_Italy.pdf; ADR CENTER, *Mediation Country Report. Italy*, available at http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Italy.pdf.

²⁸ Under Ministry of Justice Decree No. 180/2010, as augmented by Ministry of Justice Decree No. 145/2011. On this point see A. FEASLEY, *Regulating Mediator Qualifications in the 2008 EU Mediation Directive: The Need for a Supranational Standard*, in *Journal of Dispute Resolution*, 2011(2), p. 341.

²⁹ See G. DE PALO, L. COMINELLI, *Mediation in Italy: Waiting for the Big Bang?*, in N. ALEXANDER (ed.), *Global Trends in Mediation*, Alphen aan den Rijn, 2nd ed., 2006, p. 266.

The list of agencies authorised to provide training courses provided for by Art. 4 para. 3 of Decree No. 180/2010 can be accessed on the Ministry of Justice's website³⁰, as well as the official list of the authorised "mediation educators" (*formatori*)³¹.

Among the requirements that must be fulfilled by conciliation bodies to be included in the register, the legislation places a strong emphasis on the personal qualifications of the mediators. Moreover, the Decree states that each organization must have at least seven available individuals, provided that each such individual can only participate in no more than three proceedings at a time.

These individuals must meet certain requirements, dealing in particular with their past conduct (with particular reference to having a clean criminal record).

The required training is based on standards developed by the Italian ADR community and then formally endorsed, on July 24, 2006, by a Decree of the Ministry of Justice. This Decree allows the existing organizations to adapt their training standards and the new training entities can structure their training programs in accordance with certain minimum standards, which are:

1) at least 32 hours of training, including no less than 16 hours of practice and 4 hours for assessment, with the following minimum topics to be covered: alternative dispute resolution tools; principles, nature and function of reconciliation; international experience and Community; principles, tasks, responsibilities and characteristics of the conciliator and mediator relationships between the parties and mediation techniques; relationship between ADR and litigation;

2) at least 8 hours of training on certain substantive law issues.

In addition, an organization seeking to carry out mediation training must have premises available for holding the training courses as well as a minimum of three trainers who are committed to completing at least 90 hours of mediation training annually and who have obtained the necessary mediator accreditation and at least three years of teaching courses in law or economics.

7. Confidentiality and admissibility of mediation evidence

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 *decreto legislativo* No. 28/2010 provides that mediators may not be called as witnesses and the parties may not rely on any communications made or any information collected during mediation in the subsequent judicial proceedings.

In particular, Art. 9 ('Duty of confidentiality'), states that anyone who works in a mediation provider accredited by the Ministry of Justice is bound by an obligation of confidentiality with respect to statements made and the information acquired during the mediation process. The same Article states that the mediator shall be held to confidentiality in relation to all other parties, with regard to the statements made and to the information acquired during the caucuses (separate sessions), except with the consent of the registrant, or the consent of the party from whom the information originated.

The following Art. 10 ('Usability and professional-secrecy') sets forth that the statements made or the information acquired in the course of a mediation process cannot be used in a trial having the same object, even in part, that has begun, been summarised, or continued after the failure of mediation, except with the consent of the registrant or the party from whom the information originated. Furthermore, the evidence of witnesses is not allowed on the content of those statements and information.

The mediator may not be required to testify about the content of the statements made and the information gathered during the mediation process before the court or other authorities.

³⁰ <https://mediazione.giustizia.it/ROM/AlboEntiFormazione.aspx>.

³¹ <https://mediazione.giustizia.it/ROM/AlboFormatori.aspx>.

Finally, in accordance with Art. 22 of the *decreto legislativo* No. 28/2010, the mediator must report suspected money laundering or terrorist financing to the competent authority. The disclosure of confidential information by the mediator or the parties is permitted or compelled in the cases provided by Article 7 of EC Directive No. 2008/52.

8. Mediated outcomes and enforceability

The parties are free to conclude a mediation agreement at their discretion.

Nevertheless, they may themselves undertake a mediation attempt in advance, through the provision of a specific contractual mediation clause in their mediation agreement.

As already said, during mediation the parties may only oblige the mediator to issue a non-binding written proposal. Decree No. 28/2010 has introduced a form of multistep procedure: while *mediation* is the process in which a professional mediator helps the counterparties to resolve their dispute, *conciliation* is the positive result of the mediation process (the settlement).

The new law establishes that if an amicable settlement among the parties is reached, the mediator compiles the mediation minutes to which the text of the mediation agreement is attached.

The request of enforceability is possible only for the mediation minutes (a document that the mediator draws up and that is signed by all the participants to the mediation procedure), not for the mediation agreement, which has the nature of a private contract (and is composed and signed by the parties, not by the mediator).

A party may request enforceability of the mediation before the President of the Tribunal of the place in which the mediation provider has its headquarters. The request must be made by depositing the mediation minutes and the attached mediation agreement.

Before granting enforceability, the judge will verify that the content is not contrary to public policy or mandatory rules, and checks for compliance with the requested formalities.

Following a grant of enforceability, the mediation minutes will be enforceable for (i) compulsory expropriation; (ii) specific performance; and (iii) recognition of judicial mortgage.

In cross-border disputes, the mediation minutes are approved by the chief judge of the district in which they are to be executed³².

9. Duties and obligations during mediation

Before the first meeting of the mediation procedure, the appointed mediator must make a written declaration certifying his or her independence and impartiality with explicit reference to the *European Code of Conduct for Mediators*³³.

In exceptional cases, the mediation provider may substitute the chosen mediator with another mediator from the list with the same qualifications before the start of the mediation session.

After the Mediation proceedings have begun, if the mediator communicates that he or she has encountered an issue which limits his or her impartiality or independence, or another impediment arises, the provider will inform the parties of the issue and provide a substitution.

The parties have the exclusive responsibility for (i) any liability arising from the mediation procedure, including any exclusions, foreclosures, limitations, or delays that were not expressly stated by the parties in the mediation request; (ii) indicating the subject matter of the claim and the issues in the request for mediation; (iii) identifying the individuals that must participate in the mediation, with particular reference to necessary joinder of parties, in disputes where the parties are pursuing judicial action in matters for which mediation is mandatory; (iv) indicating the addresses of the persons who must receive communication regarding the mediation procedure; (v) determination of the value of the

³² With reference to the cross-border issues of mediation, see *inter alia* I. QUEIROLO, C. GAMBINO, *Italy*, in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe. II. Cross-Border Mediation*, Cambridge, 2014, p. 221. For the cross-border family mediation, see <http://www.crossbordermediator.eu/>.

³³ http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

dispute; (vi) form and content of any powers delegated to their representatives; (vii) filing official declarations regarding legal aid under the *decreto del Presidente della Repubblica* of 30 May 2002, No. 115, Art. 76; (viii) assuring that there are no other issues relating to the same controversy or any other declarations filed with the organization or given to the mediator between filing the request to mediate and the conclusion of the mediation procedure.

Unless otherwise agreed between the parties, the mediator cannot act as an arbitrator in arbitration proceedings connected with a dispute that was the subject of the mediation.

According to the *European Code of Conduct for Mediators*, formulated by a group of experts with the assistance of the European Commission and presented in Brussels on July 2, 2004, mediators must be competent and knowledgeable in the process of mediation: relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

Mediators must confer with the parties regarding suitable dates on which the mediation may take place; they also have to verify that they have the appropriate background and competence to conduct mediation in a given case before accepting the appointment. Upon request, they must disclose information concerning their background and experience to the parties.

Where not already provided, mediators must always supply the parties with complete information as to the mode of remuneration which they intend to apply. They must not agree to act in a mediation before the principles of their remuneration have been accepted by all parties concerned.

Mediators may promote their practice provided that they do so in a professional, truthful and dignified way (*European Code*, Art. 1).

Moreover, if there are any circumstances that may (or may be seen to) affect a mediator's independence or give rise to a conflict of interests, the mediator must disclose those circumstances to the parties before acting or continuing to act.

Such circumstances include:

- any personal or business relationship with one or more of the parties;
- any financial or other interest, direct or indirect, in the outcome of the mediation;
- the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties.

In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and the parties explicitly consent. The duty to disclose is a continuing obligation throughout the process of mediation. So mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

The mediator must also ensure that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it. In particular, he/she has to ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including any applicable provisions relating to obligations of confidentiality on the mediator and on the parties. The mediation agreement may, upon request of the parties, be drawn up in writing. The mediator must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express the rule of law and the need for a prompt settlement of the dispute. The parties may agree with the mediator on the manner in which the mediation is to be conducted, by reference to a set of rules or otherwise. The mediator may hear the parties separately, if he deems it useful.

10. Expected developments in mediation regulation

Future perspective of development for the mediation instrument in Italy seems to be strictly connected with possible extension of mediation's scope of application: as already mentioned under para. 2, Italian administrative judicial authorities are asking, time by time, the extension of the mediation to the *administrative field*, where it could give some positive outcomes since one of the parties is represented

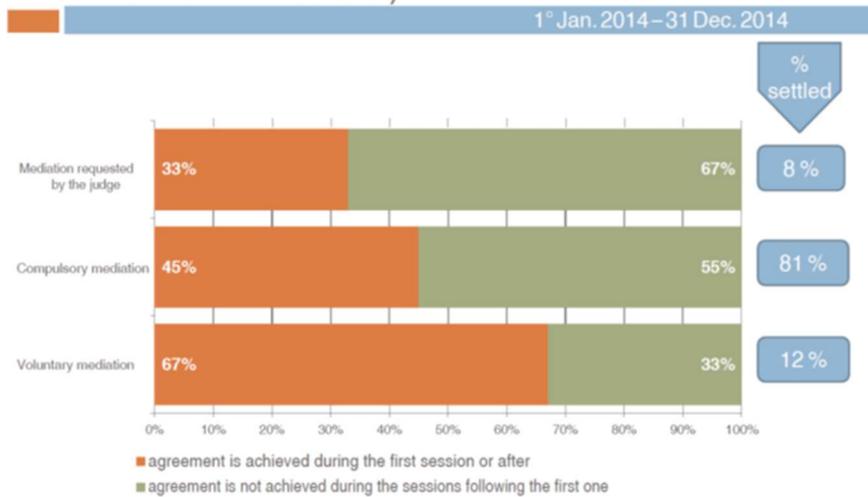
by a public body and, consequently, in that field we do not find the same ‘litigiousness’ which is typical of the disputes between individuals.

Concerning the future of Mediation Directive in the frame of EU legislation, it could be useful to refer to the recent study *‘Rebooting’ the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, published by the European Parliament³⁴.

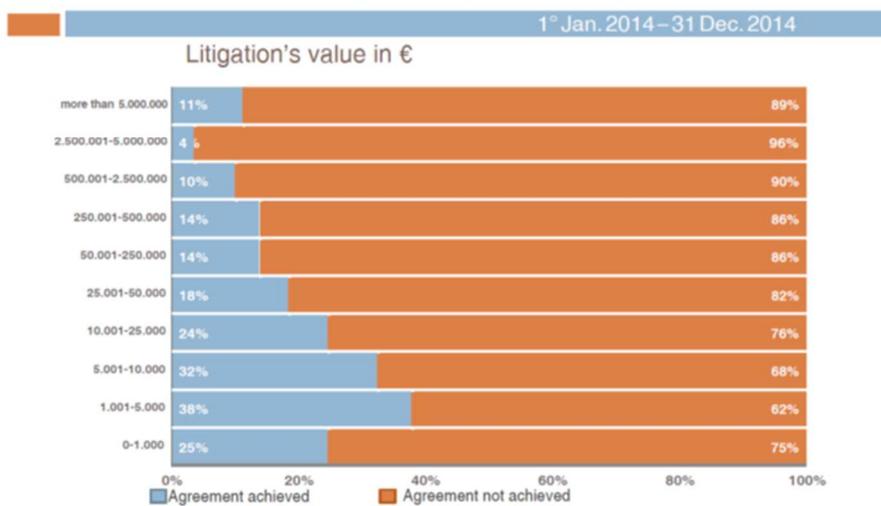
11. Available statistics on mediation

CIVIL MEDIATION UNDER DECREE 28/2010 - YEAR 2014

Mediation outcomes (in case both the parties appears in front of the mediator)



Mediation results depending on the litigation’s value



³⁴ http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET%282014%29493042_EN.pdf.

Duration of the proceedings

1° Jan. 2014 – 30 June 2014

Comparison to the ordinary justice

TRIBUNAL



MEDIATION

63^{dd} Agreement NOT achieved

83^{dd} Agreement achieved

