Arbitration - Italy

Mandatory mediation: the Italian experience, two years on

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Italy was one of the first EU member states to implement the EU Mediation Directive (2008/52/EC). The Mediation Law (Legislative Decree 28/2010) provides that a large range of disputes cannot be brought before a civil court unless the plaintiff has attempted mediation beforehand (or as a condition of continuing legal proceedings, if they have already been started).

Background

The declared aim of introducing mandatory mediation was to reduce the enormous backlog of cases pending before the Italian courts. Therefore, some - but not all - of the types of dispute selected for mandatory mediation are among those that arise most frequently. These include disputes relating to:

- real property;
- division of assets;
- inheritance;
- family estates;
- leases of real property and of going concerns;
- gratuitous loans for use;
- medical liability;
- defamation in the press and other media; and
- insurance, banking and certain other financial agreements.

Mediation became mandatory for such disputes in March 2011, one year after the enactment of the law. As of March 2012, the mediation requirement was extended to disputes relating to tenancies in common (eg, in condominiums) and road and shipping accidents. This made it necessary to provide enough mediation bodies to manage thousands of mediations, as well as a sufficient number of mediators to conduct them.

The rise of mediation institutions

At the end of 2008, when the directive was issued, mediation in Italy was performed by a handful of chambers of commerce and, in major cities, by a few institutions established by professional bodies (eg, local bar associations) or private entities. Few institutions taught mediation.

Under the new law, mediation institutions blossomed. The number of mediation bodies in Italy grew from 37 in 2008 to 843 by the end of April 2012, while the number of teaching institutions increased from 35 to 309 in the same period. This raised the problem of quality control. The Ministry of Justice has frequently issued regulations and guidelines to ensure acceptable levels of quality in both the teaching and the performance of mediation. Its monitoring is based mainly, if not exclusively, on the submission of documents, certificates, self-certificates and similar evidence that is appropriate for an accurate but fairly formalistic review by ministerial officers. As such, the onus is on end users to choose their providers well.

The mandatory provisions caused an upsurge in requests for mediation, totalling more than 90,000 between March 2011 and March 2012. However, the obligation to resort to

mediation rests with the prospective plaintiff: the prospective defendant has no duty to appear, and often does not do so. In the 12 months in question, only 35% of respondents appeared before the mediator. Where the respondent was present, 48% of mediations had a positive outcome. However, settlement is often reached before the meeting or after the closure of mediation, but still as a result of it.

Mediation costs are modest. The maximum mediation fees are set by a schedule issued by the ministry and are based on the value of the dispute. If the respondent is absent, only a nominal fee is requested from the applicant in order to obtain certification that a hearing was arranged and the applicant appeared, although the respondent did not.

Evolving responses

Reactions to mandatory mediation have been varied. The response in business circles and from institutions was very favourable, reflecting a view of mediation as a vital means of minimising litigation. On September 30 2011 a joint document, entitled "A Project by Business for Italy", was issued by the Italian Banking Association, the National Insurance Companies Association, *Confindustria* (which represents Italy's manufacturing and services companies) and other business associations. The document calls for greater efficiency in the civil justice system, stating that "it is necessary to continue to rely on civil and commercial mediation as an indispensable instrument to reduce court litigation".

Among lawyers, mandatory mediation prompted heated debate and even open opposition, particularly over the absence of provisions requiring the presence of lawyers in mediation proceedings. It was argued that the absence of a lawyer would result in a lack of protection for the weaker or less informed party. However, statistics for the first year of mandatory mediation show that applicants were assisted by lawyers in 84% of mediations; where respondents attended, 86% of them had legal assistance. These statistics demonstrate that parties are taking no unnecessary risks.

As well as provoking criticism and protests, the law has been challenged on various grounds before both the Italian Constitutional Court and the European Court of Justice. The case before the Constitutional Court will be heard on October 23 2012.

Many mediators have found that the benefit of experiencing mediation tends to change most lawyers' approaches to it. Often lawyers come to mediation without a clear understanding of what it involves. They think (or fear) that the mediator will issue a ruling of some sort, or a quasi-binding proposal, which might imply a criticism of the legal strategy that they have recommended to their clients. A greater understanding of the structure, aims and results of mediation often brings with it a change of attitude.

The opinion of the judiciary remains ambivalent. Before the enactment of the law, some Italian courts had launched pilot projects,(1) which had enjoyed a degree of success. However, many judges still appear to have reservations about mediation, fearing that it will not protect the weaker party and may induce parties to abandon their rights.

The law provides that in cases where mandatory mediation does not apply, judges may nonetheless invite the parties to attempt mediation. The wording of the law stipulates that this invitation should not impose any particular pressure on the parties, which are free to accept or decline it. This may explain the fact that in the 12 months up to March 2012, less than 3% of mediations were initiated in this way. Nonetheless, this small percentage represents an improvement on figures of 1% during the first quarter and 2% in the first nine months, indicating a rise in court-led mediation over the past 12 months and, potentially, a change in attitude among the judiciary.

Comment

The attitude of the courts will be crucial to the future evolution of mediation. The experience of other jurisdictions has shown that in the beginning, lawyers were opposed to mediation and judges were sceptical of it. Attitudes have changed over time, and mediation has become a widespread success, being vigorously promoted by the courts, even to the point of making it all but mandatory in practice.

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Endnotes

(1) Of court-led mediation.

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