

## ITALY'S SUPREME COURT ALLOWS THIRD PARTIES TO PARTICIPATE IN MANDATORY MEDIATIONS THROUGH THIRD PARTY REPRESENTATION

In its Judgment No. 8473, published on 27 March 2019, Italy's supreme court, the Court of Cassation, has for the first time dealt with a number of issues regarding mandatory mediation, which article 5 of the Legislative Decree, No. 28/2010, made a precondition to a party's ability to bring a claim in a very wide range of areas of litigation.

More specifically, while the supreme court did underline how the parties were required to appear personally in the mandatory mediation procedure, it nonetheless agreed that "in making the mandatory appearance before the mediator, **a party may also be substituted by a substantial representative**, who may be the lawyer acting for them in the mediation procedure, provided they have a **substantial power of attorney**".

### THE FACTS OF THE CASE AND THE LEGAL ISSUES EXAMINED BY THE COURT

The supreme court's ruling came at the end of a judgment on the substantial issues of the case. The claimant had sought a ruling terminating a property lease the parties had made, on the basis that the tenant, a company, had not paid the deposit. Both at first instance and on appeal, the courts had ruled that the claimant's case had been **inadmissible because of a failure to carry out a mandatory mediation procedure, as required by article 5(1-bis) of Legislative Decree No. 28/2010**.<sup>1</sup>

The lower courts had found that the terms of article 8 of Legislative Decree 28/2010, which required the parties' personal appearance at the first mediation meeting, accompanied by a legal advisor or otherwise, was necessary for that condition to the bringing of a subsequent claim to be said to be satisfied. The courts allowed for the possibility that a party might be substituted by their lawyer, with the grant of a **specific, notarised instrument granting a power of attorney** that made the lawyer the party's substantial representative. A special

#### The legal principles espoused by Italy's Supreme Court

- In a mandatory mediation procedure, **the parties must appear in person before the mediator**;
- **a party may also be represented** at that mandatory appearance by a third party, **provided there is a "substantial" power of attorney**;
- the power of attorney granted to the lawyer cannot be a power of attorney *ad litem*, and the signatures cannot be certified by the same lawyer;
- while it is "not desirable" that a party be substituted by their lawyer in a mediation procedure, "neither does the law exclude it" - and this stance by the Supreme Court is going to influence mediators, who to date have always required the parties to appear personally if the condition to the admissibility of a future claim is to be satisfied.

<sup>1</sup> The Court of Udine at first instance (Judgment No. 1418/2016), and the Court of Appeal in Trieste (Judgment No. 2010/2017) on appeal.

power of attorney granted *ad litem* (pursuant to article 185 of the Code of Civil Procedure) would not go far enough for these purposes.

The claimant appealed the decision by the Trieste court of appeal to Italy's supreme court, the Court of Cassation, on two grounds. In its first ground of appeal, it claimed the appeal court had erred in finding that article 8 of Legislative Decree 28/2010 required the parties to appear personally in the mediation procedure. In its second, that a special power of attorney granted *ad litem* entitled a lawyer to substitute for a party in a mandatory mediation procedure.

The appeal provided the Court of Cassation with a first opportunity to analyse and address a number of issues around mandatory mediation, especially:

- the necessity or otherwise of the parties appearing in person before the mediator, to satisfy the condition for any subsequent claim to be brought;
- whether the parties are entitled to have others substitute for them; and, if so,
- just what form that substitution may take, and on what terms.

## **THE RATIO OF THE SUPREME COURT'S DECISION, AND SOME OBSERVATIONS**

In making its ruling, the supreme court set forth the following legal principles:

- in a mandatory mediation procedure under Legislative Decree 28/2010, as amended, **the parties must appear in person before the mediator**, accompanied by their lawyers, if they wish;
- in that mandatory appearance before the mediator, **a party may also be represented by a "substantial representative"**, who may be the lawyer advising them in the mediation procedure, providing that is pursuant to a substantial power of attorney;
- the condition to bringing any subsequent claim is satisfied at the end of the first meeting before the mediator, where, after receiving appropriate information regarding the mediation, one or both parties indicate they are unwilling to proceed further with the procedure.

The ruling appears to thwart a substantial body of caselaw that had in recent years grown up, arguing that the parties' personal appearance and a prohibition upon their substitution by a lawyer were key features of the mandatory mediation procedure, and that failure to comply with those terms meant that a claim submitted for mandatory mediation could not be pursued through the courts.<sup>2</sup>

The reasoning underlying the rulings may be summarised as article 8 of Legislative Decree 28/2010 seeking to encourage the parties' personal involvement, as only they are at the heart of their interests' assessment, and only in unusual circumstances might they be replaced by a substantial representative.

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<sup>2</sup> See Court of Bologna, 16 October 2014; Court of Pistoia, 25 February 2015; Court of Vasto, 9 March 2015. This strand of judicial thinking holds that mediation procedures are personal in nature, and that a lawyer cannot act both as (i) legal advisor; and (ii) the party's representative with full powers.

This judgment by the Court of Cassation's third civil section found the reverse, that **mediation is not personal, and may be delegated to third parties.**

The court held that the dictum *ubi lex voluit dixit, ubi noluit tacuit* (When the law wills, it speaks; when it does not will, it is silent), and the rule of law generally demanded a ruling that the legislation "neither provides for, nor excludes, the grant of delegated powers to a lawyer. Accordingly, **it must be found that a party ... who by their election or because they are unable to do so does not personally participate in a mediation meeting, may be represented by a person of their choosing, including but not limited to their lawyer.**"

The court found that while a party being replaced by their lawyer "**would not be something that was desirable... it is equally not something that the law prohibits**". In other words, **while it is desirable that the parties make a personal appearance before the mediator**, in order for the parties to be fully in the driving seat and truly informed as to their interests, mediators cannot disregard the fact that the law does not preclude a delegation of powers to third parties in connection with participation in the mediation.<sup>3</sup>

However, the power to be represented by another in a mediation does not derive from the law and may only be granted by the party under a **special power of attorney *ad negotia*** (which is to say, with full powers to transact on the party's behalf).<sup>4</sup>

For this reason, if the party elects to be substituted by their lawyer, the signatures on the special power of attorney granted for the purpose cannot be certified by that same lawyer.

**A plain-vanilla power of attorney granted *ad litem* would not address this**, even where it provided for the lawyer to have powers to resolve issues and settle the dispute. The court expressly mentioned a "substantial power of attorney", which the instructed lawyer would not be able to certify even where that power to certify was the subject of an express grant. Thus, **the instructed lawyer cannot certify the related power of attorney.**

Implicitly, this raises a question of whether, if the lawyer cannot certify the signatures to the substantial power of attorney,<sup>5</sup> that instrument must take the form of a notarised power of attorney. This could be the case according to the principles set forth in the Italian civil procedure law relating to the power of attorney. Conversely, according to the general principles of Italian civil law, the form of the power of attorney follows the one of the instruments that the representative is entitled thereby to execute. Irrespective of whether the mediation results in an agreement or not, the record of the procedure takes the form of an uncertified private instrument. Were there to be a need for the agreement to be reproduced in the form of a public instrument or a private instrument certified as to the signatures (where for example the agreement entails registration of property rights or title), then a private instrument might be required.

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<sup>3</sup> Mediators have always ruled in line with the above caselaw and considered the parties' appearance in person to be necessary for the condition to subsequent litigation to be satisfied.

<sup>4</sup> As the court put it, "In order for a party to validly delegate participation in mediation work to a third party, they must grant them that power of attorney specifically with regard to participation in the mediation and the grant of the power to exercise the substantial powers that it regards ... So the power to be represented in this way by someone else in participation in a mediation may be granted under a special, substantial, power of attorney".

<sup>5</sup> This problem does not occur if the substantial power of attorney is granted to third parties other than lawyers.

It is worth noting that during these days some mediation bodies are taking a preliminary view on the matter: even if they do not require a notarised power of attorney for the lawyers to appear before the mediator, they require a notarised power of attorney for the subscription of the mediation agreement.

A final observation: it would appear from the tone of the judgment that a power of attorney granted to the lawyer merely in order that they appear at the first meeting and refuse to have the dispute mediated is not the kind of decision the court would wish to encourage. Leaving aside considerations of how the court would like litigants to behave, and the consequences that could result from moral suasion being brought to bear, this judgment appears to leave mediators without the kind of legal leverage that can compel unwilling parties to be personally present at mediation procedures.

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