

Italian Supreme Court: the burden of initiating the mediation procedure following opposition proceedings lies on the creditor

On 18 September 2020, the Italian Supreme Court (Corte di Cassazione) sitting *en banc* issued an awaited decision (no. 19596/2020) concerning mediation, namely the determination of the party bearing the burden of initiating the mediation procedure, in the framework of opposition proceedings to an injunction order.

As for the relevant legal framework, it should be noted that Legislative Decree (LD) no. 28 of 2010, art. 5, paragraph 1-*bis*, provides that who “*intends to take legal action relating to a dispute*” in the matters indicated therein “*is required, assisted by a lawyer, to carry out the mediation procedure in accordance with this decree*”. Furthermore, paragraph 2 provides that the judge may arrange the attempt of mediation in the appeal stage “*after having assessed the nature of the case, the taking of evidence and the parties’ behaviour*”. In such case, the mediation attempt “*is a condition of admissibility of the action also in the appeal stage*”. Finally, art. 5, paragraph 4, lett. a), provides that paragraphs 1-*bis* and 2 shall not be applied “*in injunction proceedings, including opposition, up to the decision on the requests for granting and suspending the provisional enforceability*”.

The ruling concludes a legal matter concerning a debt owed to UBI Banca. In particular, after the opposition to the injunction order brought by the debtors, the Court of Treviso granted the provisional execution to a part of the amount and prescribed the time limit for the request of mediation.

The latter was not carried out and therefore the Court of Treviso ruled that the request had thus become inadmissible, recalling a previous ruling of the Italian Supreme Court¹, according to which in the opposition proceedings to injunction orders, the burden to carry out the mandatory attempt of mediation lies on the opponent.

The Venice Court of Appeal later rejected the appeal brought by the debtors and upheld the first instance decision.

The appellants decided to resort to the Cassazione; the matter was referred to the *en banc* session of the Italian Supreme Court, as it included an especially important question, i.e the party - opponent or opposite – who must promote the mediation procedure in the opposition proceedings to an injunction order.

In the decision *in re*, the Court delivered the following interpretation of the law: «*In disputes subject to mandatory mediation pursuant to Legislative Decree no. 28 of 2010, art. 5, paragraph 1-*bis*, whose proceedings are introduced with an injunction, once the opposition proceedings has been brought and the requests for grant or suspension of the provisional enforcement of the order have been issued, the burden of promoting the mediation procedure is on the opposite party; it follows that, if it is not brought, the decision of inadmissibility referred to in the aforementioned paragraph 1-*bis* shall result in the revocation of the injunction order*”.

¹ Cf. Corte di Cassazione, s. III, 3 December 2015, n. 24629

Following on from that, the Court's *en banc* session stated that the obligation to carry out the mediation procedure is borne by the plaintiff, *i.e.* the opposite creditor in the opposition proceedings to an injunction order, and that is for the following reasons:

- Textual reasons, given that, pursuant to art. 643, third paragraph, Italian Code of Civil Procedure (CCP), *lis pendens* is determined by the serving of the injunction order and, pursuant to art. 5, paragraph 6, L.D n. 28 of 2010, launching mediation interrupts the limitation period of the action. Therefore, it would not be logical that the interruption of the limitation period would be determined by an action taken by the debtor;
- Systematic reasons, given that the plaintiff is actually the opposite party and that the consequences of the failure to initiate the mediation procedure would be more penalizing for the opponent: where the burden were on the latter, its inaction would entail the irrevocability of the injunction order. On the other hand, the burden on the opposite party in case of inaction entails revocation of the injunction order, which however may be re-brought;
- Constitutional reasons, since placing the burden of promoting the mediation procedure on the opponent party means, in the event of his inaction, the irrevocability of the injunction order as a consequence of failure to carry out a procedure that is not judicial².

In light of the above, the Court overturned the decision at issue and revoked the injunction order.

² Cf. Corte Costituzionale, 16 April 2014, n. 98