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MANDATORY MEDIATION IS BACK IN ITALY WITH NEW PARLIAMENTARY RULES

BY GIUSEPPE DE PALO

If a nation's court system leads its 5.4 million thirsty horses to water, the vast majority will drink.

In this case, the horses are litigation matters.

And the thirst quencher is mediation.

This summer, the Italian Parliament "converted into law" new mediation rules approved by the government in Law Decree 69 of June 21, 2013. The August 9 parliamentary act contains new mediation rules that went into effect last month.

Parliamentary approval of the mediation rules, including the controversial mandatory mediation requirement, resolves the constitutionality issue that had led, in October 2012, to the quashing of 2010 mandatory mediation rules. The court decision that struck the 2010 rules brought mediation in Italy to a virtual halt.

Notorious delays in Italy's civil justice system cost the nation an estimated 1% of its gross domestic product annually, or 16 billion Euros. They have contributed to Italy's dropping rankings in the World Bank's *Doing Business* report.

About 5.4 million civil disputes clog the Italian courts. By implementing mandatory mediation in March 2011, the government hoped to shift more than one million disputes out of the court system within five years.

More than 220,000 mediations were started, close to half of which settled when the defendant accepted mediation—a stunning success, particularly in light of the usual three-year wait for a court decision. (The waits rise to nine years with an appeal.)

Despite this success—unprecedented in a European Union hesitant to impose mandatory mediation—the mandate faced determined opposition from part of the Italian bar.

The mediation explosion came to a sudden end in October 2012, when the 15 judges of the Italian Constitutional Court ruled that the mandatory mediation provisions were unconstitutional. See Giuseppe De Palo and Ashley Oleson, "Lessons on Mediation in Italy: Bring Back Mandatory!" 31 *Alternatives* 54 (April 2013).

Rumors say that it was an 8–7 decision. Regardless, virtually all pending mediations in Italy stopped, even those that had been initiated voluntarily. Other EU states that had been considering mandatory mediation, and monitoring developments in Italy, suspended their plans.

Italy once again confronted the "EU mediation paradox": Despite mediation's effectiveness—and the 2008 adoption of an EU Directive on European law on mediation in civil and commercial matters (see "The Directive Is In: European Union Strongly Backs Cross-Border Mediation," 26 *Alternatives* 119 (June 2008))—disputing parties tend not to use it unless required to do so. The directive can be found at http://bit.ly/16fvF45.

A May 2011 study showed that even with a success rate of only 30%—significantly lower than that achieved in Italy after the mandatory mediation introduction—mediation reduces the time and cost of judicial dispute resolution. [*Editor's note*: The study, co-authored by Giuseppe De Palo, is discussed in the April 2013 *Alternatives* article cited above, and can be found here: http://bit.ly/wExl2W.]

But critics of mandatory mediation continue to raise the old chestnut that "You can lead a horse to water, but you can't make it drink." The retort to this statement is obvious: "You may not be able to make it drink, but it probably will, given the chance."

In the Italian dispute resolution setting, the success of the first mandatory mediation effort already had started to prove this true.

Facing these arguments and the continuing crisis in Italy, Minister of Justice Anna Maria Cancellieri undertook the job of rewriting the mediation rules, again opting for mandatory mediation, with several important modifications.

First, motor vehicle accident disputes are exempt from mandatory mediation.

Second, for a nominal cost, litigants are now allowed to withdraw from the mediation process at the initial stage if they deem settlement unlikely. This opt-out system provides an actual "mediation experience" to litigants and includes a powerful quality assurance device: if the mediator is not good, either party may withdraw.

But "there is no rose without thorns," as an Italian saying goes. The new mediation rules, which were effective as of September 20, also reintroduced a controversial mechanism to ensure that parties think twice before withdrawing from mediation without reaching a settlement.

Upon a party's withdrawal, the mediator may propose a solution to the dispute. If it is rejected and the case goes to trial, the judge may shift onto the rejecting party all mediation and litigation costs subsequent to the media-

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Italy Revisits Compulsory ADR

The question: Will mandatory mediation referrals lighten Italian courts' voluminous caseload?

The status: The nation's legal system has been back and forth on domestic mediation since the 2008 European Union directive mandating cross-border mediation sparked an internal assessment.

The reaction: The author says it worked before it was found unconstitutional. Now refined to lawyers', judges', and the legislature's satisfaction, he says cases will settle and other EU members may follow.

ADR Briefs

tor's proposal if the judgment is consistent with the proposal.

Judges also have the power, at any stage in the dispute, to order the parties to mediation—not just to invite them.

The new law also introduces a four-year trial period that ends September 2017, with a mid-term review to be conducted by the Justice Minister by September 2015. The law also requires that mediation parties be assisted by counsel.

These elements, which were not part of the June 21, 2013 decree, were vigorously advocated for by members of the Italian bar during the process of converting the decree into law. Parliament eventually accepted them.

Based on early official reaction, the Italian bar appears generally satisfied with the new mediation framework. In light of this, commentators predict that Italy is now set to witness an even bigger "mediation explosion" than before—and this time a more stable one.

As a related consequence, some predict that the Italian mediation model might inspire similar moves in a number of other EU countries struggling with court budget cuts, increasing litigation costs, and delays—where, after many years of attempts to promote mediation, the process remains virtually unused.

The regulatory history of Italian mediation is, however, far from finished. For instance, the legal requirement that mediation parties be assisted by counsel may run counter to the recent EU Consumer ADR Directive (No. 2013/11/EU, available at http://bit.ly/10sVUUg).

SECOND CIRCUIT HOLDS CLASS-ACTION WAIVERS ARE ENFORCEABLE IN FLSA CLAIMS

The Second U.S. Circuit Court of Appeals has joined what is now a majority of circuits in upholding the validity of a class-action waiver in an arbitration agreement.

In *Sutherland v. Ernst & Young LLP*, Docket No. 12-304-cv (Aug. 9, 2013)(available at http://1.usa.gov/15Lp5PC), the court relied on—and extended to claims arising under the Fair Labor Standards Act (FSLA)—the U.S. Supreme Court's recent decision in *American Express Co. v Italian Colors Restaurant*, No. 12–133 (June 20, 2013)(available at www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf).

In *Amex*, the Court held that a plaintiff could not invalidate a waiver of class arbitration under the "effective vindication doctrine" by arguing that there was no economic incentive to pursue antitrust claims individually in arbitration.

The opinion reverses a line of Second Circuit decisions involving American Express invalidating class-action waiver provisions in arbitration agreements when plaintiffs could show that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver."

'No Longer Good Law'

The hot topic: Class waivers in arbitration.

The context: The legacy of June's *Amex* U.S. Supreme Court decision, back in the court in which it originated, the Second Circuit.

The new rule: Now, even the Second Circuit extends the validity of class waivers to federal employment law.

The Second Circuit had agreed with plaintiffs' claims that enforcing the arbitration agreement would "deprive them of substantive rights under the federal antitrust statutes."

In *Sutherland*, the plaintiff had sought to initiate a class action for unpaid overtime wages arising from her allegedly improper FSLA classification by Ernst & Young as an "exempt employee."

The federal district court denied E&Y's motion to compel arbitration, relying on the earlier Second Circuit decisions to rule that the underlying class-action waiver provision in the arbitration agreement between the plaintiff and the accounting and consulting firm was unenforceable.

According to the district court, the plaintiff's maximum potential recovery would be too meager to justify the expenses required for the individual prosecution of her claim, thus preventing her from "effectively vindicating" her FSLA and state employment law rights.

The Second Circuit reversed in a per curiam decision by Senior Circuit Judges Ralph K. Winter and Chester J. Straub, and Circuit Judge Jose A. Cabranes. It notes that the Supreme Court's *Amex* ruling "abrogated the District Court's basis for invaliding the class-action waiver provision."

The earlier line of cases relied on by the District Court were "no longer good law," the opinion states. Reiterating the "liberal federal policy favoring arbitration agreements," and extending the Supreme Court's *Amex* analysis to FSLA claims, the Second Circuit found that

1) The FLSA did not contain a "contrary congressional command" barring waivers of class arbitration, and

2) A class-action waiver is not rendered invalid by virtue of the fact that the claim is not economically worth pursuing individually. "The fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy," the opinion states.

Analysts say the case is significant. "The *Sutherland* decision … heralds the Second Circuit's recognition of the [*Amex*] repudiation of class action waivers, as well as the evisceration of the effective-vindication rule, which that court previously championed in several decisions." Linda S. Mullenix, "The Not-So-Effective Vindication Decision," *National Law Journal*, p. 30 (Sept. 9, 2013)(available with a subscription at http://www.law.com/jsp/nlj/index.jsp)(Mullenix is a professor focusing on civil procedure at the University of Texas School of Law in Austin, Texas).

There's more: In the week after deciding *Sutherland*, the Second Circuit, in *Raniere et al v. Citigroup Inc. et al.*, No. 11-5213-cv (2d Cir. Aug. 12, 2013)(available at http://bit.ly/1aZygmy), reversed another district court decision refusing to compel arbitration of an FLSA misclassification claim, in a summary order issued by the same panel that produced the *Sutherland* decision.

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