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TO THE HIGH COST OF LITIGATION



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Kathleen A. Bryan
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Susan E. Lewis
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Editor:

Russ Bleemer

Jossey-Bass Editor:

David Famiano

Production Editor:

Ross Horowitz

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Editorial correspondence should be addressed to Alternatives, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022; E-mail: alternatives@cpradr.org.

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According to the 2006 mediation law, court-system mediation is administered by a number of Magistrate Court and First Instance Court judges who are nominated by the chairman of the First Instance Court.

The head of the Judicial Council may nominate private mediators consisting of retired judges, lawyers, and professionals of long experience who are known for their impartiality and integrity. The law, however, does not mention training in mediation as a prerequisite to perform as a mediator.

The legislative framework in Jordan encourages disputants to turn to mediation. If the mediator is successful in reaching a complete or a partial settlement, the mediator presents a report to the case management judge or the magistrate judge enclosing the settlement signed by the disputants. The judge then must endorse the settlement for it to be considered a

final judgment. The mediation proceedings are deemed confidential.

Despite the existence of a legislative framework for mediation in Jordan, the law of mediation falls far below expectations. Problems with the institutionalization of mediation and its incorporation into the Jordanian judicial system arrangements underline the need for a well-defined regulatory framework. Such a framework would specify the nature and objectives of mediation, its relationship to other modes of intervention—notably the courts, the mediator's provenance and responsibilities, and the conditions under which mediation should be undertaken.

There is minimal awareness of other ADR mechanisms. A decent number of Jordanian business people are unaware of mediation as an ADR method, let alone other mechanisms. A new law bill is expected to reach the legisla-

tive body soon, which is the Law of Deewan al-Mathalem, a notion similar to the ombudsman concept. This law is expected to empower an independent and nonpartisan official appointed by the government to receive and examine complaints made by citizens against the administration.

One may have many questions in mind about ADR mechanisms. But what is most likely to happen in the future is that adjudication as a means of settling disputes will remain a part of dispute resolution systems in Jordan, with the alternatives to court mechanisms continually transforming, perhaps to become more formal.

* * *

Coming next month: *Algeria.*

(For bulk reprints of this article, please call (201) 748-8789.)

International ADR

Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes, Annually

BY GIUSEPPE DE PALO AND LEONARDO D'URSO

The long-awaited legislative decree addressing "mediation aimed at conciliation of civil and commercial disputes" was finally approved by the Italian Council of Ministers on Feb. 19, and went into effect last month, on March 20.



The government revised the text after receiving a number of written opinions from the Justice Committees in the Chamber of Deputies, and in the Senate. Officials in producing the final decree also evaluated a significant debate that took place in the Italian legal and ADR community after the first legislative draft was circulated at the end of last year.

The machinations leading up to the bill have long been the subject of articles in these pages, most recently Riccardo Buizza's "Follow-Up: Amended Italy Class Action Law, and a New ADR Law, Finally (Appear Ready)," 27 *Alternatives* 187 (December 2009). (See also "Follow-up: ADR 'Chamber' Is Held Back as Italy Delays its Class Action Law," 27 *Alternatives* 72 (April 2009); "Follow-up:

After Beefing up ADR, Italy Allows Class Actions," 26 *Alternatives* 19 (February 2008), and "Italy May Allow Class Actions, but with an ADR Twist," 26 *Alternatives* 9 (January 2008).)

The goal is to create a mediation explosion to combat congested courts. The driving force behind the law's approval was the aim to reduce the incredible backlog of civil cases currently pending in Italy, which has reached 5.4 million cases. The idea is to shorten the average eight-year civil-case time frame. At a minimum, ADR supporters hope and expect that the new legislative encouragement leads to the fulfillment of the promise of better—and quicker—resolutions.

Within several new legislative regulations that have been recently approved in the procedural code, the Italian government is strongly

(continued on next page)

De Palo, whose *Worldly Perspectives Alternatives* column this month examines ADR in Jordan on page 91, is co-founder and president of JAMS International ADR Center, based in Rome. D'Urso is also a co-founder of the ADR Center, and is its CEO. D'Urso focuses on creating conflict management systems, managing business negotiations, and mediating complex commercial disputes. He has lectured on negotiation techniques and ADR at a number of universities and multinational corporations for more than a decade, and has mediated significant commercial cases. This article was prepared with the assistance of Paola Guttadauro, who works in the JAMS International ADR Center Projects Unit, and Doe Zilyte, who is an intern at the unit.

International ADR *continued*

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relying on mediation to eliminate at least one million disputes per year.

The new law—which can be found at www.mondoadr.it/cms/?p=2244—encompasses two main objectives: “forcing” parties to attend a mediation session and ensuring a quality mediation procedure.

To address the first objective, the new legislation, in many types of disputes, requires parties to engage in mediation as a precondition to accessing the courts. In addition, judges are granted authority to refer parties to mediation and enforce financial consequences—costs and fees—on those who refuse to do so.

The new legislation’s second objective, to ensure process quality, coincides with the requirement outlined in Article 4 of the European Union Directive on Mediation. The quality of process is to be controlled by allowing only providers who are accredited and monitored by the Ministry of Justice to administer mediations.

In addition, mediations may only be conducted by mediators who have successfully completed a 40-hour mediation training course. These measures will be implemented, partly, in an attempt to raise the mediation success rate, despite the proceedings’ mandatory nature.

* * *

Here is a summary of the legislation’s main features:

Scope of application—Mediation organizations referred to in the decree are to handle all civil and commercial disputes concerning “disposable rights,” including cross-border disputes, in accordance with the EU Directive.

Mandatory pretrial mediation—12 months after the law’s publication, an attempt to mediate before accredited providers becomes a condition precedent to bringing a suit in court in the following subject matters: neighbor disputes (“*condominio*”); property rights; division of goods (“*divisione*” in the Italian Civil Code); trusts and estates; family-owned business; landlord/tenant disputes; loans; leasing of companies (“*affitto di aziende*,” which also corresponds to an Italian Civil Code section); disputes arising out of car and boat

accidents (which are covered by a statutory framework of mandatory insurance); medical malpractice; libel; insurance, banking and financial contracts.

The one-year delay on implementation is required to allow the providers in Italy sufficient time to get organized and train new mediators.

Referral to mediation—The judge, after evaluating the nature of the dispute, status of

ADR Encouragement—By Law

The move: Italy sends nearly every-third to mediation.

The motivation: Eight years to try a civil case? Italian courts and legislature agree that there has to be a better way.

The result: Mediation is now a prerequisite to accessing the courts in many cases.

the case and the willingness of the parties, can refer them to mediation with an accredited provider at any phase of the trial.

Duty to inform—When powers of attorney are signed, the lawyers are required to inform their clients, in writing, about the mediation option and the financial incentives. Should the lawyer fail to do so, the power of attorney may be voided.

Starting the process—The parties first select a mediation provider, unless it has been preselected in a contract. The process starts by submitting a request to the provider for mediation. The mediation provider then appoints a mediator and arranges a meeting with the parties within 15 days of the request.

Duration of the mediation and first session—The mediation proceeding must be completed within four months of the submission of the request.

No-show at mediation—Should one of the parties, without a valid justification, fail to appear at a mediation session, this failure

may be used against the party in the subsequent trial.

The mediator’s proposal—When the parties cannot reach an agreement, the legislative 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 of the possible legal consequences.

Contract clauses—If a contract between the parties includes a mediation clause, or if mediation is required by statute and an attempt to mediate has not been made before filing a case in court, a judge or an arbitrator may set a 15-day deadline for the parties to submit a request for mediation to an accredited mediation provider.

Regulations of organizations—The regulations of the selected mediation provider will apply to the procedure. The selected mediation provider must ensure confidentiality of the procedure, and the appointed mediator’s impartiality and fitness to appropriately conduct the mediation.

Tax incentives—All mediation acts, documents and agreements are exempt from stamp taxes and any charges of any kind and nature. The verbal agreement is exempt from registration up to a maximum value of 51,646 Euros.

Tax credit—The parties who pay the appropriate compensation are granted a tax credit of up to 500 Euros. In case of failure of mediation, the tax credit is reduced by half.

Fees—The fees and calculation criteria are determined by ministerial decrees.

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 a writ of execution, placing a judicial lean 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 registrar of mortgages and claims.

Recovery of costs—If the parties request the mediator to make a proposal, and if this proposal completely corresponds with a subsequent judicial sentence, the judge excludes the recovery of costs incurred by the winning party that declined the proposal. When the judicial sentence does not completely cor-

respond with the proposal, in serious and extraordinary circumstances, the judge also can exclude the recovery of costs incurred by the winning party.

Confidentiality—The mediator and anyone else who works within the mediation provider organization 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.

Mediation provider organization registration in the Register—Mediation procedures can be handled only by public agencies and private organizations registered with the Ministry of Justice. The requirements and procedures for registration are governed by special ministerial decrees. Members of the bar association, the chambers of commerce or other professional associations—the latter are reviewed based on competence—can form organizations to be

entered, upon simple request, in the Register as mediation organizations.

Mediators—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. ■

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ADR Tools *continued*

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the probability of achieving favorable or unfavorable results in filing motions to compel or for summary judgment; and (4) the sequence of the uncertain events. Even assuming the use of competent information in the analysis, the quantified probabilities calculated in the analytical process must be qualified by the uncertainty of the underlying estimates.

DECISION TREE ANALYSIS

In its simplest form, DTA graphically illustrates branches or paths of sequential uncertain events leading to possible outcomes for chosen options. Estimating probabilities for the possible outcomes at each of the intervening uncertain events—represented in the figures on the next four pages as nodes with alternative outcomes in the sequential paths—enables calculation of the cumulative probability for each possible ultimate outcome. Typically, a decision tree graphic depicts numerous probable outcomes for two or more alternative options.

In a patent infringement case, for example, a prospective plaintiff may be faced with the options of accepting a settlement offer (e.g., back damages or a license) or litigating in the hopes of obtaining a much larger damage award. As shown in Figure 1, an example of the litigation option in a patent case may have the following four sequential stages, each involving critical uncertain events:

- discovery;
- claim construction;

- summary judgment of infringement; and,
- trial/post-trial events (such as post-trial motions, appeal, remand).

As illustrated in Figure 1 on page 96, the critical uncertain events at each stage, except the last, trial/post trial, are viewed as

Beyond the Trees

The ADR tools: Decision trees, which lay out possibilities that help predict the future of your litigation.

What's new: The authors' 'Augmented Option Analysis' integrates more factors into the tree, particularly regarding time and costs.

The benefit: The process itself provides better negotiations in addition to better decisions.

having two possible outcomes—favorable or unfavorable. For purposes of this example, the trial/post trial outcome stage, which could be viewed as two or more sequential stages, has three possible outcomes, favorable, unfavorable, and intermediate. The small “p” indicates the probability of the path as determined and projected by the contributors to the DTA (e.g., outside counsel, in-house counsel, a mediator or an early neutral evaluator).

The column headed “Dollar Outcome” in Figure 1 represents dollar value estimates for each of the possible ultimate outcomes.

The Figure 1 column headed “Ultimate Probability” represents the ultimate probabilities for each of those outcomes, based on the estimated probabilities of sequential events leading to that outcome.

The overall probability for each ultimate outcome consists of the product of all of the probabilities of the outcomes of the intermediate uncertain events leading to that ultimate outcome. In this case, the DTA illustrates 24 possible ultimate outcomes with dollar values ranging from -\$3 million—the negative representing an adverse award of attorneys’ fees—to +\$47 million (see the “Dollar Outcome” column), and overall probabilities for those outcomes, ranging from 0% to 19.6% (see the “Ultimate Probability” column). After eliminating the outcomes with a 0% ultimate probability, the result is 19 possible outcomes with the same dollar range (i.e. -\$3 million to \$47 million) and with ultimate probabilities ranging from 0% to .5%, and up to 19.6%.

This litigation option may then be compared to the license/settlement option shown on the first line in Figure 1 and labeled “License/Settlement?” The license/settlement option has a presumed present value of \$10 million, that presumably is 100% certain.

AUGMENTED OPTION ANALYSIS

Although conventional DTA has proven useful for assessing the probabilities of possible litigation outcomes in the litigation/settlement environment, it commonly presents decision makers with information such as (1) a multitude of possible results, and (2) the individual probabilities of each, as shown in Figure 1.

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