



ADR

NEWS

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IMPORTANT NEWS

Listed or Certified Mediator?

As a reminder, please be aware that Formal Ethics Opinion 98-F-142, issued by the Board of Professional Responsibility, states that the proper identification of your listing is the phrase **“Rule 31 Listed (General Civil and/or Family) Mediator.”** The ADR Commission recommends that you use this phrase for advertising, letterhead, business cards, etc. To see Formal Ethics Opinion 98-F-142, go to:

<http://www.tncourts.gov/programs/mediation/resources-mediators/opinions>.

If you were initially listed in an *even year*, your CME/CLE hours are due by the end of 2012. If you are unsure of the year you were initially listed, you can check the mediator database on our website at:

<http://www.tncourts.gov/programs/mediation/find-mediator>.

The Tenth Annual ADRC Workshop will be held October 19, 2012 at Lipscomb University in Nashville. Please note that the Workshop will *always* satisfy the CME requirements for *BOTH* general civil and family listed mediators. Registration materials will be emailed soon. We look forward to seeing you there!

Mandatory Mediation: the Italian experience, two years on

Contributed by Dr. Giovanni De Berti, De Berti Jacchia Franchini Forlani Studio Legale

June 7, 2012

Background

The rise of mediation institutions

Evolving responses

Comment

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 already have 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, totaling 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 favorable, 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 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.

¹ Of court-led mediation

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.

For further information on this topic please contact Dr. Giovanni de Berti at De Berti Jacchia Franchini Forlani by telephone (+39 02 72 55 41), fax (+39 02 72 55 47 00) or email (g.deberti@dejalex.com).

This article and the biography below were reprinted with permission by the author, Dr. Giovanni De Berti. This article was originally printed on the ILO (www.internationallawoffice.com) website.

About the Author:

Dr. Giovanni De Berti, Founding Partner, De Berti Jacchia Franchini Forlani Studio Legale-Milan, Italy. Admitted to the Italian Bar of Gray's Inn, Barrister MCI Arb, FCI Arb (Mediation).

Dr. Giovanni De Berti graduated in law, maxima cum laude, at the Milan State University in 1962.

He has been practicing law since 1963. After qualifying in Italy he studied at the Council of Legal Education in London and was called to the Bar of England and Wales at Gray's Inn in 1970. Back to Italy, he was associate and partner of Graziadei, then the leading international law firm in Italy. He is a founding partner of the Firm. Giovanni De Berti has been active in professional associations (President of the Milan Young Lawyers Association, of the Association Internationale des Jeunes Avocats, of the Milan Law School Alumni Association; officer of the Union Internationale des Avocats), has held appointments with the Italian Bar (Delegate to the Italian Lawyers' Pension Fund and to Italian National Bar Congresses, President of the Milan Bar Commission for International Relations) and is Regional Secretary for Asia of the Union Internationale des Avocats.

His professional practice has been devoted to commercial and corporate matters, contract drafting, mergers and acquisitions, stock purchase agreements, joint ventures, leasing, purchasing and selling of goods, supply of services (namely logistics), agency and distribution (namely of medical products), construction, media and entertainment, product liability, as well as litigation in these and other subjects.

He has been acting as an attorney, party appointed arbitrator, sole arbitrator and president of arbitration tribunals in proceedings of the Chamber of National and International Arbitration of Milan, the European Court of Arbitration, the International Centre for Dispute Resolution (ICDR), the International Court of Arbitration of the International Chamber of Commerce, the Italian Arbitration Association, the Italian Chamber of Arbitration of Public Works and in ad hoc domestic and international arbitration proceedings. He is on the arbitrators list of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber, the Italo-Swedish Chamber of Commerce-Assosvezia, the Swiss Chamber of Commerce in Italy, the International Centre for Dispute Resolution (ICDR) and is a Member of the Chartered Institute of Arbitrators (member of the Practice & Standards Committee and of the European Branch Committee).

He has also been acting as mediator and attorney in institutional and ad hoc mediation proceedings and is an accredited mediator of the Chamber of National and International Arbitration of Milan, the Centre for Effective Dispute Resolution (CEDR), the Italy-China International Business Mediation Centre, the International Centre for Dispute Resolution (ICDR), the Milan Bar Mediation Institution, the International Mediation Institute and is a Fellow (Mediation) and chairman of the Mediation Sub-Committee of the Chartered Institute of Arbitrators.

He is author of legal works and papers, frequent speaker at legal conferences and lecturer at seminars.

Foreign Languages-English, French, notions of German.

~ Roll Call ~ **Congratulations to the following Newly Listed Rule 31 Mediators!**
These mediators were approved for listing at the ADRC Quarterly Meeting on July 24, 2012.

Ms. Edubina Arce, Family
Mr. Jack B. Bellar, General Civil
Ms. Melissa C. Berry, Family
Mr. J. Frank Bryant, Jr., General Civil
Mr. Donald N. Capparella, General Civil
Mrs. Sandie L. Carroll, Family
Mr. Bradley M. Carter, Family
Ms. Margaret M. Chesney, Family
Mr. Kurtis A. (Kurt) Cornett, General Civil
Ms. Amelia G. Crotwell, Family
Ms. Melissa R. Deskins, Family
Ms. Stephanie J. Edmondson, Family
Mrs. Kasey A. Frank, Family
Dr. Richard M. Gadzekpo, General Civil
Ms. Susan M. Gillpatrick, General Civil
Mr. Barry A. Glenn, General Civil
Mr. Gary M. Gossett, General Civil/Family
Mr. Daniel K. Habenicht, Family
Mr. David A. Hart, General Civil
Mr. Donald S. Hart, Jr., General Civil
Mr. John W. Heacock, General Civil
Ms. Elizabeth J. Johnson, General Civil
Mr. Arthur F. Knight, III, General Civil
Ms. Wendy L. Longmire, General Civil
Ms. Sharon L. Lusk, General Civil
Dr. Michael E. Mailahn, Family

Ms. Patricia A. McDade, Family
Ms. Alice I. Meade, Family
Mr. Clyde E. Miller, Family
Ms. Jessica R. Miller, Family
Mrs. Paula M. Murray, General Civil
Ms. Jennifer F. Noe, Family
Mr. Michael R. O'Connell, General Civil
Dr. Ann G. Parker, Family
Ms. Renee M. Pembroke, Family
Mr. William H. Poland, General Civil
Ms. Vicky L. Powell, General Civil
Mr. James R. Pryor, General Civil/Family
Ms. Elizabeth D. Rankin, Family
Mr. Clyde W. Richert, III, General Civil
Ms. Rhonda Saylor, Family
Mr. Timothy R. Simonds, General Civil
Mr. Michael P. Stewart, General Civil
Mr. Jerry D. Taylor, General Civil
Mr. David M. Tilson, General Civil
Ms. Jane B. Warren, General Civil
Ms. Cynthia Wells-Leatherwood, Family
Ms. Saadia L. Williams, General Civil
Ms. Davis A. Williamson, Family
Mr. Brandon C. Wojcik, General Civil
Ms. Mildred L. Worley, Family

Important ADRC Dates

September 4, 2012.....Rule 31 Mediator Application Deadline for ADRC review on October 23, 2012
October 19, 2012.....Annual ADR Workshop, Lipscomb University, Nashville
October 23, 2012.....ADR Commission Meeting, Administrative Office of the Courts, Nashville
December 31, 2012.....Rule 31 Mediator Renewal Application Deadline for 2013

We Would Like to Hear From You!

In an effort to encourage education and communication between and for Rule 31 listed mediators, the ADRC accepts proposed article submissions from Rule 31 listed mediators and others for publication in the *ADR News*. All submissions may or may not be published and are subject to editing according to the Program Manager's discretion. If you are interested in submitting an article for publication in the *ADR News*, please contact Claudia Lewis, AOC Programs Manager, at Claudia.Lewis@tncourts.gov.