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Litigation Management

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successful resolution.

Sometimes, in the case of multiparty or class action litigation, we would try one or more cases to establish a benchmark so that we could then settle other cases more reasonably. Sometimes we

elected to pursue simultaneous two-track processes using both settlement counsel and trial counsel. But in every instance, we sought to use early case assessment and the LAB to determine which path and which strategies would maximize our opportunity to address the company's particular needs and interests and achieve a successful result.

Today, as a former litigator, I have come to appreciate the value of the many tools in the ADR toolkit. And as a mediator, arbitrator and senior consultant to *Alternatives'* publisher, the CPR Institute, I use them every day. 

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SUPREME COURT BACKS 'LOOK THROUGH' JURISDICTION, THEN REVERSES AN ARBITRATION ORDER

BY RUSS BLEEMER AND JASON FRANK

The first decision in the group of three arbitration cases argued in the 2008-2009 U.S. Supreme Court term arrived last month, with the Court reversing a Fourth U.S. Circuit Court arbitration order. The decision sent a credit card provider back to a state trial court to prove its case.

But Associate Justice Ruth Bader Ginsburg's opinion in *Vaden v. Discover Bank, et al.*, No. 07-773 (March 9, 2009) (available at www.supremecourtus.gov/opinions/08pdf/07-773.pdf), doesn't necessarily mean that Discover Bank will have to fight its case in the Maryland court where it filed a debt collection action against original defendant Betty Vaden.

The reversal, Ginsburg points out, leaves Discover Bank with the option of trying to enforce the arbitration agreement in state court.

The opinion focuses on jurisdiction over arbitration, holding that federal courts may "look through" to pleadings for jurisdiction over Federal Arbitration Act Section 4 cases requesting orders to compel arbitration that originally were brought in state courts.

On that point, the Court agreed with the Fourth Circuit. But the na-

tion's top court reversed the Richmond, Va.-based appellate court, holding that federal courts can't assert FAA Sec. 4 jurisdiction "based on the contents of a counterclaim when the whole controver-

**An arbitration
jurisdiction rule is
set, but 'manifest
disregard' is a big
question mark.**

sy between the parties does not qualify for federal-court adjudication."

Vaden had counterclaimed that Discover Bank's finance charges, interest, and late fees violated state law. Vaden later conceded, and the Fourth Circuit reasserted after an analysis, that the counterclaims were preempted by federal law, the Federal Deposit Insurance Act. In response, Discover Bank filed a federal court motion to compel arbitration.

The case won't upend U.S. arbitration practice—it's probably more notable for the fact that four justices declined to join the majority's decision to reverse the order to compel arbitration, instead signing on to Chief Justice John G. Roberts Jr. concurrence in part, and dissent in part.

But it's also possible that the case could

be a reason to shift, or at least examine, litigation strategies. Plaintiffs might not want to delay arbitration if they think they'll use it later, or at least go straight to federal court, despite the fact that the decision backs federal courts' ability to look through to the "well-pleaded complaint" in order to assess jurisdiction and, for example, issue an order to compel arbitration.

"Conceivably," notes Newark, N.J.-based Gibbons PC director Christopher Walsh, "to ensure a federal forum over a petition to compel, some litigants might anticipate an arbitrable counterclaim and make a pre-litigation demand for arbitration before filing suit on a non-arbitrable affirmative claim."

But he adds that litigants generally won't have to "choose this route" because "most states have arbitration statutes that allow state courts to grant Section 4-type relief," like the Maryland state court review noted in the Ginsburg opinion.

"Instead," says Walsh, "in most cases, they will continue to file suit on the non-arbitrable claim and deal with any counterclaims if and when they are asserted." [Walsh analyzed the *Stolt-Nielsen* case on class action arbitration and the "manifest disregard" standard for challenging awards in the February *Alternatives*. That case will be appealed to the U.S. Supreme Court this month. See below.]

In the majority *Vaden* opinion written by Justice Ginsburg, the Court found that federal courts may "look through" an FAA Sec. 4 petition to enforce an arbitration agreement to determine "whether it is predicated on a controversy that 'arises

Bleemer is *Alternatives* editor. Frank is a CPR intern. This article is updated and expanded from a version that appeared on www.cpradr.org on March 9.

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under' federal law."

Ginsburg writes that FAA Sec. 4 "instructs district courts asked to compel arbitration to inquire whether the court would have jurisdiction, 'save for [the arbitration] agreement,' over 'a suit arising out of the controversy between the parties.'"

The language of FAA Sec. 4 states that petitions to compel arbitration may be brought before "any United States district court which, save for such agreement, would have jurisdiction under title 28 [on general federal procedures] . . . of the subject matter of a suit arising out of the controversy between the parties."

But the Court found that the Fourth Circuit went too far in accepting jurisdiction in the case. In reversing the Fourth Circuit, Ginsburg wrote

[F]ederal jurisdiction cannot be invoked on the basis of a defense or counterclaim. Parties may not circumvent those rules by asking a federal court to order

arbitration of the portion of a controversy that implicates federal law when the court would not have federal-question jurisdiction over the controversy as a whole. It does not suffice to show that a federal question lurks somewhere inside the parties' controversy, or that a defense or counterclaim would arise under federal law. Because the controversy between Discover and Vaden, properly perceived, is not one qualifying for federal-court adjudication, §4 of the FAA does not empower a federal court to order arbitration of that controversy, in whole or in part.

Associate Justices Antonin Scalia, Anthony M. Kennedy, David H. Souter, and Clarence Thomas joined the Ginsburg opinion.

Chief Justice Roberts filed an opinion that concurred in part and dissented in part. He was joined by Associate Justices John Paul Stevens, Stephen G. Breyer, and

Samuel A. Alito Jr.

Roberts agreed with the Ginsburg majority opinion on the "look through" jurisdiction point, but wrote that the Court's view on FAA Sec. 4 jurisdiction was too broad: "Instead of looking to the controversy the §4 petitioner seeks to arbitrate, the majority focuses on the controversy underlying that complaint, and asks whether 'the *whole* controversy,' as reflected in the parties' state-court filings, arises under federal law." (Emphasis is in the opinion.)

The chief justice states that focusing on the sequence of the state court claims' origination is mistaken. Writes Roberts,

The far more concrete and administrable approach would be to apply the same rule in all instances: Look to the controversy the §4 petitioner seeks to arbitrate—as set forth in the §4 petition—and assess whether a federal court would have jurisdiction over the subject matter of a suit arising out of that controversy.

Roberts appeared to be referring to the fact that Discover Bank sought only to arbitrate the fraud allegations, not the debt's existence. The dissent indicates that the jurisdictional standard should be that the assessment is based on the same controversy used to petition the court to compel arbitration, not the whole controversy.

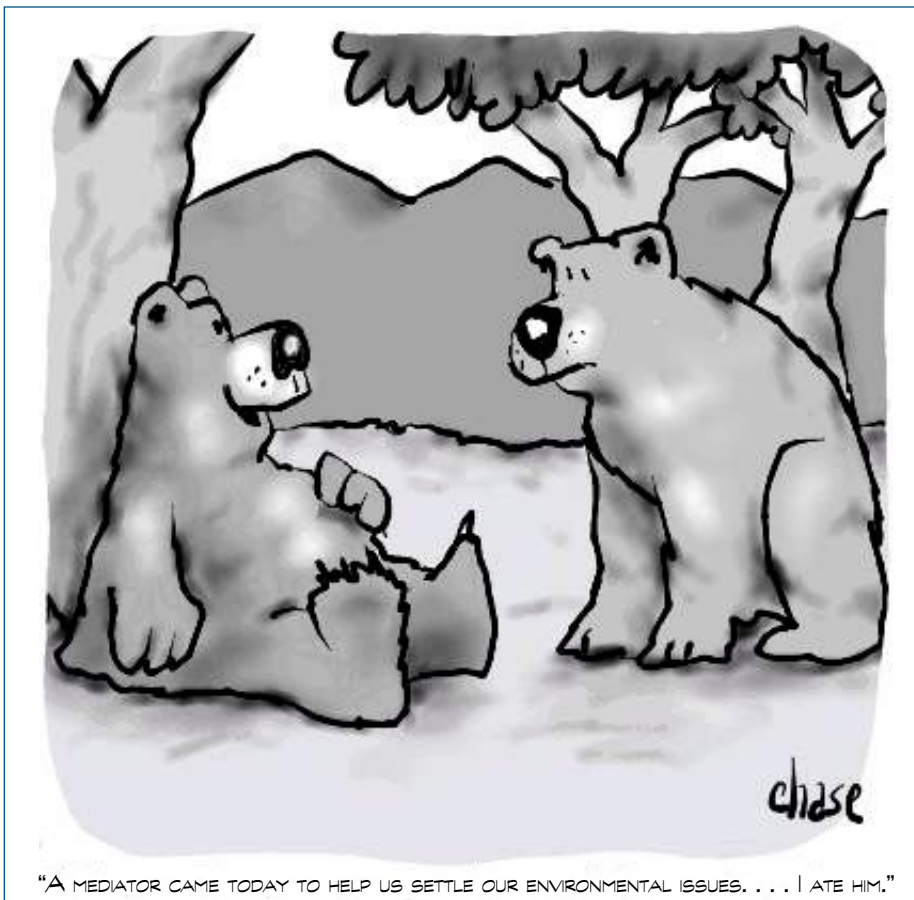
In her majority opinion, Justice Ginsburg countered that

The dissent would have us treat a §4 petitioner's statement of the issues to be arbitrated as the relevant controversy even when that statement does not convey the full flavor of the parties' entire dispute. Artful dodges by a §4 petitioner should not divert us from recognizing the actual dimensions of that controversy.

The majority opinion continues:

As the dissent would have it, parties could commandeer a federal court to slice off responsive pleadings for
(continued on next page)

Cartoon by John Chase



"A MEDIATOR CAME TODAY TO HELP US SETTLE OUR ENVIRONMENTAL ISSUES. . . . I ATE HIM."

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arbitration while leaving the remainder of the parties' controversy pending in state court. That seems a bizarre way to proceed. In this case, Vaden's counterclaims would be sent to arbitration while the complaint to which they are addressed—Discover's state-law-grounded debt-collection action—would remain pending in a Maryland court. When the controversy between the parties is not one over which a federal court would have jurisdiction, it makes scant sense to allow one of the parties to enlist a federal court to disturb the state-court proceedings by carving out issues for separate resolution.

In its first opinion on the issues, the Fourth Circuit had held that the federal question does not need to appear on the face of the motion to compel arbitration but may arise from the underlying substantive dispute.

The Fourth Circuit remanded for determination of whether on a "look through" analysis there was a federal question in the underlying dispute of this case.

On remand, the district court determined that all of Vaden's state claims were preempted, and thus were sufficient to provide subject matter jurisdiction to compel arbitration.

On a second appeal, the Fourth Circuit affirmed that the arbitration was properly compelled. *Discover Bank v. Vaden*, 489 F.3d 594 (2007)

In her petition for certiorari and subsequent brief, Vaden had argued that the Fourth Circuit upset Congress's Federal Arbitration Act intent to place arbitration agreements on equal footing with other contracts. Vaden's attorney is John A. Mattingly Jr. of Leonardtown, but much of the preparation was by students under the direction of University of Virginia School of Law Prof. Daniel R. Ortiz, who is co-director of the school's Supreme Court Litigation Clinic, and who argued *Vaden* at the Supreme Court last fall.

Two other arbitration cases have been argued in the current Supreme Court term, with decisions expected before the term ends in June.

In December, the Court heard arguments in *14 Penn Plaza LLC, et al. v. Pyett*, No. 07-581, which questions whether a union can negotiate away in a collective bargaining agreement with an employer a court option for its members' discrimination claims, in favor of arbitration.

Arthur Andersen LLP v. Carlisle, No. 08-146, which was argued last month, deals with whether a nonsignatory party can successfully file an interlocutory appeal to stay a litigation matter for an arbitration.

Meantime, there is no let up in the hot arbitration issues that the Supreme Court is being asked to consider.

Attorneys at New York-based White & Case, which represents Stolt-Nielsen SA, an international maritime services provider, confirmed that the client would ask the Court this month to hear a case it lost late last year, *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir 2008).

In the Second Circuit case, Stolt-Nielsen asked the appellate court to uphold a lower-court decision overturning an arbitration award that permitted a customer to engage in class arbitration, even though the contract was silent on the subject.

The case has a second big potential sticking point in addition to the class arbitration issue: The U.S. District Court had overturned the award because of manifest disregard of the law, a nonstatutory ground that has been called into question by the U.S. Supreme Court's decision in *Hall Street Associates LLC v. Mattel Inc.*, 128 S.Ct. 1396 (2008).

Last November's Second Circuit decision overturned the lower court, and reinstated the award against Stolt-Nielsen, based on *Hall Street Associates*. The decision said that the award permitting class arbitration was not in manifest disregard of the law by the tribunal.

The result is that the class arbitration may proceed against Stolt-Nielsen.

The case could be an opportunity

for the Supreme Court to revisit *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which sent class arbitrability questions to arbitrators, not a court. *Bazzle*, and the Second Circuit *Stolt-Nielsen* opinion, both dealt extensively with the contracts' silence on class arbitration.

The petition on behalf of Stolt-Nielsen had not been written at press time. But even if it focuses on class arbitration and doesn't tackle the manifest disregard issue, another recent federal circuit court decision tees up the latter issue, and it could be the subject of a cert petition.

In *Citigroup Global Markets Inc. v. Debra M. Bacon*, No. 07-20670 (5th Cir. March 5, 2009)(available at the Opinions page at www.ca5.uscourts.gov; direct URL: www.ca5.uscourts.gov/opinions%5Cpub%5C07/07-20670-CV0.wpd.pdf), a unanimous Fifth Circuit panel declared the manifest disregard standard for overturning arbitration awards dead in the circuit in light of *Hall Street Associates*.


Fifth Circuit Judge E. Grady Jolly wrote:

Hall Street unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a nonstatutory ground for vacatur. [Citation omitted.]. Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.

Moreover, Jolly criticized the circuit court cases that held or suggest that manifest disregard survived *Hall Street Associates*, including *Stolt-Nielsen*, illuminating a new variation of an old circuit split. The analysis points out that the existence of the vitality of manifest disregard, like in the Second Circuit case, comes from reasoning that equates the manifest disregard standard as shorthand for the FAA Sec. 10 statutory grounds for overturning an award.

Citigroup Global was decided as this issue went to press, and no request had yet

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been made to the Fifth Circuit for a circuit panel rehearing or a rehearing en banc. 

NEW BOOK'S GOAL IS TO CHANGE HOW NEGOTIATION IS TAUGHT

A new negotiation teaching effort will roll out this month that aims to change the way the field is taught.

The initiative will debut with two print features—a book and a special issue of a journal—and a live seminar.

The main component is a book, “Rethinking Negotiation Teaching: Innovations for Context and Culture,” which will be the debut publication in a new conflict resolution imprint established by Hamline University School of Law in St. Paul, Minn.

It will contain 22 articles—scholarly, but grounded in practice experience—from about 50 professors and practitioners across disciplines that focus on negotiation. Hamline also will maintain a web page to house the materials—eventually, the entire book will be available for free to aid worldwide distribution and encourage continued dialogue.

The project includes significant analysis on improving international business communications.

In addition to the book, another eight articles from the initiative are in the new spring issue of *Negotiation Journal*, published by the Program on Negotiation at Harvard Law School, also scheduled to be released in April.

There will be a session introducing the efforts to academics at the American Bar Association’s Section of Dispute Resolution meeting in New York on April 18.

There’s more after this month, too. Two more editions of the book are expected, shortly following two more conferences. One conference is scheduled for this fall in Istanbul; the initiative’s concluding event will be in the Far East. The principals behind the initiative are targeting New Delhi or Beijing.

The book and accompanying projects

have their origins in long-running efforts by the book’s editors to improve negotiation. But this book and the *Negotiation Journal* project came together in less than a year, the products of an intense negotiation seminar last May in Rome.

Moreover, the editors expect the new materials to be only a step in what they say will be a massive worldwide push to teach negotiation better and produce individuals more effective in interactions in law, business, community, and governmental settings.

Time for an Update

The issue: It’s time to bring the latest scholarship to negotiation practice.

Is there a problem? The discipline has grown voluminously for two decades, but the people who teach it seem to agree that instruction needed an upgrade.

All this theory. Ugh. But no! The new writings will be translated into practices that, almost immediately, will be used by students—worldwide, at all levels—who want to negotiate better in their businesses, in their communities, and in their lives.

The initiative, the editors state, will cover three years, three countries, more than 50 international scholars, and dozens of students.

“We have targeted the top teachers of the field,” says book editor Chris Honeyman, a Madison, Wis., consultant. “We expect their writings and the new exercises they develop will become models for other teachers. We are hoping for relatively rapid adoption across the better-informed end of the teaching industry.”

Improving negotiation scholarship has

been Honeyman’s target for most of the decade. The new book has roots in Honeyman’s previous effort, a 768-page volume, “The Negotiator’s Fieldbook,” which he co-edited with Marquette University Law School Prof. Andrea Schneider, and which the ABA published two years ago. For excerpts, see “Metaphors, Hostage-Takers, and Dealing with ‘Influential Outsiders’ Highlight Excerpts from a ‘Canon’ on Deal-Making,” 24 *Alternatives* 131 (2006); background on the efforts leading up to the Fieldbook can be found at “How the Canon Was Built,” 24 *Alternatives* 134 (2006).

Honeyman’s co-editors, James Coben and Guiseppe De Palo, have been involved in “a three-year, four-country, six-university project to develop transnational alternate [sic] dispute resolution” curricula, according to the editors’ *Negotiation Journal* articles introduction.

The combined work resulted in a plan starting with the Rome conference, hosted by De Palo’s ADR Center, an Italy-based ADR provider and research organization. The two-day training course in basic negotiation was conventional, the editors note, but it was observed by an overflow group of about 50 academics, who met afterward for two more days to analyze the teaching.

The professors were encouraged to form interdisciplinary and international teams to write the articles that now constitute “Rethinking Negotiation Teaching.”

“[I]t became apparent,” the editors note in *Negotiation Journal*, “that the field might be ripe for a comprehensive attempt to rethink what is taught and how it is taught in basic negotiation courses.”

Honeyman says that the current work builds upon its recent past. Now, he says, it’s easier to engage negotiation professionals in cross-discipline collaboration than it was when work began, nearly a decade ago, on the projects which led to “The Negotiator’s Fieldbook.”

Coben is a professor at Hamline University School of Law, where he is overseeing the book publishing and the new conflict (continued on next page)

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resolution imprint, as well as the project's website at http://law.hamline.edu/dispute_resolution/Second_Generation_Negotiation.html. In addition to Amazon.com sales and free website distribution, Coben and Honeyman intend for the book to be translated into as many languages as the program can support.

"From the very beginning," says Coben, "this initiative has been a collaboration between business and law schools, and others . . . who inform the contemporary science of negotiation." He adds, "If you're a lawyer thinking about assisting clients

in business, then it makes sense that we shouldn't be in separate worlds."

The next step will be a conference in Turkey later this year, to be followed by an event in the Far East about a year later. The purpose, the editors say, is to try out "Negotiation Teaching 2.0" in other cultures. They anticipate issuing revised editions of "Rethinking Negotiation Teaching" speedily, as more articles are filed by the academic observers.

In addition, the Istanbul conference this fall will require the contributors to construct short exercises based on the principles they have written about. Chris Hon-

eyman says he expects a significant focus on issues surrounding negotiation communications across cultures where translators are needed to help get deals done and matters settled.

The book is supported by a grant from the JAMS Foundation, the charitable arm of the Irvine, Calif.-based ADR provider.

Several of the articles cover themes that will resonate with executives confronting cross-cultural business challenges. For example, Phyllis E. Bernard, a professor at Oklahoma City University School of Law, in Oklahoma City, Okla., calls for a shift in training for international com-

BACK TO VETERANS AFFAIRS: WE NEED TO RECONSIDER ADR FOR APPEALS BOARD MATTERS

BY RICHARD M. ROSENBLEETH

In September 2007, I wrote an *Alternatives* article suggesting alternative dispute resolution processes as a way to reduce the tremendous backlog of veteran's disability claims. See "Why Not ADR? Burdened by Backlogs, the System that Deals with Veterans' Disability Claims Needs Help," 25 *Alternatives* 131 (September 2007).

It's time to renew the call to change the system.

The essence of the 2007 proposal was that volunteer lawyers applying ADR practices should be used to resolve veteran's disability claims, because there was an unacceptable delay in decisions—that is, until appeals were decided by the Board of Veterans Appeals. The delay then was, on average, longer than two years.

The situation has not gotten any better despite the efforts of the U.S. De-

partment of Veterans Affairs, and the Washington, D.C.-based appeals board. There are just too many claims. The claims of Iraq and Afghanistan veterans will make the load even more crushing in future years.

Veterans for Common Sense, a seven-year-old nonprofit veterans advocacy and assistance group in Washington, D.C., has filed suit against the VA in California's Northern District federal court on a number of counts to obtain better care and due process for veterans.

The suit asserts that veterans are being denied due process because of delay in claims resolution. The court has entered judgment for the VA. The case is now on appeal to the Ninth U.S. Circuit Court of Appeals. The lower court's judgment was on jurisdictional grounds, not on substantive grounds.

And the district court's findings of fact make clear that veterans are being denied due process because of backlog and delays. It found that resolution, including appeals to the board, takes an average of 4.4 years.

A website devoted to the case can be found at www.veteransptsdclassaction.org.

The 2007 *Alternatives* proposal was that volunteer lawyers could help in resolving claims by acting as "judges pro tem" by deciding and settling claims. An

example is a Philadelphia court system program that has been highly successful in using voluntary lawyers as acting judges. The program has reduced a backlog of cases to 12 months, from six or seven years.

The American College of Trial Lawyers, a national association based in Irvine, Calif., stepped forward and offered to the VA to have its fellows act as the judges pro tem to help deal with the disability claims backlog.

But the offer was not accepted. The VA and the major veterans service organizations, which represent veterans in claims processing, take the position that the claims system was set up to be non-adversarial.

This is correct to a point, but not after a claim is rejected and an appeal is taken.

In view of the bleak prospect of a continuing high volume of claims, it is time to again consider creative ways to provide veterans with due process. So once again, this author renews the call for ADR action. The Obama administration has a mandate for change, and more timely veterans disability claims resolution is urgent.

So once again: Why not ADR? 

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mercial negotiation, which she suggests produces a narrow, homogenized view of interactions and cultural differences. She makes a case for moving away from the standard Western linear, rational, fact-oriented style in international transactions, toward training that makes room for what she terms “soul.”

Bernard’s idea combines several concepts that integrate learning on human cognition, cultural intelligence, and effectiveness in international management. “Soul” has three components: emotion and subjectivity; deep narratives rooted in faith and ethnic traditions; and cultural intelligence.

When the project concludes with the writings following the Far East conference next year, “we hope the theory material will be accompanied by very practical teaching tools,” says Jim Coben. “We hold that the goal of the project . . . is eminently practical and will get into the lexicon of the business world quickly.”

FOLLOW-UP: ADR ‘CHAMBER’ IS HELD BACK AS ITALY DELAYS ITS CLASS ACTION LAW

The Italian government has blinked, and as a result, an unusual court-based dispute resolution facility may never see the light of day.

Italy’s comprehensive “ADR Chamber of Conciliation,” a post-trial facility that would reconcile defendants’ and plaintiffs’ views on award distributions, fell victim to elections a year ago.

The new government changed a sixth-month enactment period to one year, moving the effectiveness date to Jan. 1. But two days before the official enactment, the Italian Legislature, via budget legislation, moved the date to July 1.

Now, according to Riccardo Buizza, a partner in Piergrossi Bianchini Eversheds, in Milan, Italy, proposals to amend the law probably means that the institutionalized conciliation facility won’t be opening its doors this summer, and may never do so.

Ironically, the problem doesn’t appear to be the far-reaching conflict resolution processes, but the context in which the legislation would establish them. The facility provides ADR in class action matters, which are still rare in Europe, and politically divisive.

While the U.S. has moved in recent years to restrict class actions, European nations have moved—sometimes haltingly—to open their courts to class claims.

Italy, in the wake of an accounting scandal at Parmalat Finanziaria SpA, liberalized its class action laws and set up the ADR program after a long legislative debate in late 2007. England, Sweden and the Netherlands all allow forms of class actions.

Alternatives examined the Italian legislative moves last year. See “Italy May Allow Class Actions, But With an ADR Twist,” 26 *Alternatives* 11 (January 2008), and “Follow-up: After Beefing up ADR, Italy Allows Class Actions,” 26 *Alternatives* 20 (February 2008).

Buizza reports that Law No. 207, on Dec. 20, postponed the legislation’s effectiveness date for a second time late last year, until this summer. The postponements, he writes in an E-mail, have been justified by government statements that the original scheme needs improvement.

Class action proposals originally had been introduced in Italy about five years ago. The bill that passed in 2007 provided that Italian class actions were far more limited than U.S. suits. Punitive damages would not be allowed. Only national consumer associations could bring the actions, not individuals. Consumers would need to register with the associations to participate, though they wouldn’t be barred from their own legal actions if they failed to join.

The individual plaintiff provision may be the first thing to be reformed in the new proposal before it takes effect. Buizza notes that legislators are considering broadening the legislation, and allowing individual consumers to file class actions.

In addition, the law as passed allows class action suits only against private entities—a direct response to Parmalat, where accounting fraud over the extent of the

company’s debt sent the stock price plummeting and the dairy and food giant into bankruptcy. A new proposal that would change the class action law would add actions against the government. A provision that made the legislation retroactive to existing actions also could be stripped from the legislation.

At press time last month, no action had yet been taken on amending legislation.

There’s more current Italian budget legislation that may appease ADR advocates—if it goes into effect. While the class action ADR facility is in trouble for the current June 30 effectiveness date, the same budget bill brings with it the first systemwide introduction of mediation and conciliation into the judiciary’s operations.

The budget, explains Buizza, who is co-leader of his firm’s dispute resolution group, “sets out a very, very general discipline” that requires the government to issue regulations that make ADR a part of all civil and commercial cases—including class actions, in whatever form they eventually may be permitted.

The need for enabling regulations, to follow the budgetary enactments, “renders such introduction simply theoretical for the time being,” notes Buizza. Still, the nascent requirement is, at minimum, an interesting symbolic governmental endorsement of voluntary conflict resolution processes.

In the meantime, business interests are watching class action developments in Italy and across Europe. A recent report by Lloyd’s in London and the RAND Institute for Civil Justice Europe says that European governments’ moves have “raised anxieties” about class actions. Lloyds, not surprisingly, is advising companies to beef up their vigilance of European litigation reforms as part of corporate risk management strategy. See “Are Class Actions Coming to Europe?” (Feb. 18, 2009) (available using the search function at www.lloyds.com).

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