



Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective.

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Historically, methods used to settle disputes have ranged from negotiation, to courtroom litigation, and even to physical combat. The legal needs of countries, multinational companies, and ordinary people have changed over the last decade. When faced with a dispute, business people are learning that, whenever possible, it is more advantageous to reach practical and private agreements than to fight for years and spend huge amounts of money in courtroom battles. Due to the vast amounts of time and money involved in the trial process, the American and Italian business communities have increasingly turned to legal alternatives that are more prompt, private and economical than the courtroom. Alternative Dispute Resolution (ADR) refers to the wide spectrum of legal avenues that use means other than trial to settle disputes.

The main ADR alternatives to civil litigation are negotiation, arbitration, conciliation and mediation. Other, more particular ADR processes available are early neutral evaluation, mini-trial, summary jury trial, and the judicial settlement conference. Disputing parties use these ADR methods because they are expeditious, private, and generally much less expensive than a trial. While each of these ADR processes may be effective in various circumstances, mediation in the United States has proven to offer superior advantages for the resolution of disputes that resist resolution.

In comparing the use of ADR processes in the U.S to those available in Italy, it is paramount to recognize the fundamental legal difference between the two nations; the American common law system is very different from Italy's civil law system. Despite that basic difference, both countries have the concept of arbitration firmly entrenched within each of their respective legal systems, as an alternative to the courtroom. While mediation is a concept widely used in U.S., it has yet to truly benefit the legal community in Italy as a viable means to settle disputes. In Italy, mediation is a concept that is often mistakenly confused with conciliation; although the two methods have similar aspects, they are fundamentally different. To appreciate the differences between arbitration, mediation, and conciliation, it is helpful to explain them separately.

Arbitration. Arbitration is an ADR (alternative dispute resolution) method where the disputing parties involved present their disagreement to one arbitrator or a panel of private, independent and qualified third party “arbitrators.” The arbitrator(s) determine the outcome of the case. While it may be less expensive and more accessible than trial, the arbitration process has well-defined disadvantages. Some of disadvantages include the risk losing, formal or semi-formal rules of procedure and evidence, as well as the potential loss of control over the decision after transfer by the parties of decision-making authority to the arbitrator. By employing arbitration, the parties lose their ability to participate directly in the process. In addition, parties in arbitration are confined by traditional legal remedies that do not encompass creative, innovative, or forward-looking solutions to business disputes.

According to the Italian Civil Procedure Code (I.C.P.C.) § 806, parties in conflict may chose neutral arbitrators to decide and settle a dispute between them, as long as those disputes are not already of the type designated to be handled within the court system. In Italy, arbitrators are generally attorneys or law professors, and are chosen by disputing parties in respect to their experience and competence in specific areas of law. When a disputed matter is to be given to a panel of arbitrators, each party selects their own arbitrator, and together, both arbitrators appoint a third one as the president of the panel. If they able to agree on a common choice, the parties may instead appoint and utilize one sole arbitrator to assist with the dispute.

Typically, to use arbitration in Italy, there must be an “arbitration clause” already written into contract that exists between the two parties. I.C.P.C § 808 labels this clause the “compromise clause” (*clausola compromissoria*). The procedures that the arbitrator or the panel must follow during arbitration are inserted along with these contractual arbitration clauses. Without this contractual arbitration clause, parties may agree once a dispute surfaces, to allow arbitrators to hear and resolve their disputes; this in know as a “compromise agreement” (*compromesso*). Although this approach is laid out in I.C.P.C. § 806, this avenue to arbitration is not very common because Italian legal precedent has effectively demonstrated the need for those clauses to be written into contracts before any disputes would surface.

Generally, the procedural rules regarding Italian arbitration are formal but not as strict as the ordinary procedural rules that govern litigation. Technically, the process of arbitration concludes with a decision called an “award” (*lodo arbitrale*) and possibly an



agreement to deposit that amount within 180 days from the date the arbitrator accepted the dispute (I.C.P.C § 820). In reality, however, the conclusion of an arbitrated dispute is a debatable topic, since arbitrators can prolong the process for a long time.

There are two types of arbitration either in U.S. than in Italy. First, in “binding arbitration” (*arbitrato rituale*), the arbitral award (*lodo arbitrale*) is comparable to a litigated judgment and is enforceable in respect to the parties’ damages. Second, in “non-binding arbitration” (*arbitrato non-rituale*) in Italy, the arbitrator renders a final decision similar to that of a contractual agreement; specifically, the parties owe each other an obligation as they would in a contractual arrangement. Under Italian codes, this type of proceeding carries its own scheme of rules and permits parties to obtain substantial justice by asserting a “sentence of equity.” I.C.P.C. § 114 spells out what constitutes a sentence of equity (*pronuncia secondo equità*); a judge will decide how the dispute will be resolved based on principles of equity, as long as these rights are available to the parties and they request that the judge should decide in this manner. Otherwise, the judge will decide on traditional principles of law (*pronuncia secondo diritto*, I.C.P.C. 113). In the United States, non-binding arbitration constitutes an advisory ruling by the arbitrator; the parties are not required to carry out the decision unless they choose to do so.

The processes of appeal also demonstrate the differences between binding and non-binding arbitration. An arbitration decision generally has the force of law behind it, but does not set a legal precedent. A determination arrived at through binding arbitration (*arbitrato rituale*) can be appealed only when a party wishes to seek revocation, and, when appropriate, can be done by a third party objection in front of ordinary judge (I.C.P.C § 827). A third party objection is the usual procedure that extends the length of the overall arbitration proceedings, essentially becoming a double procedure, private at the beginning and then in the enforcement phase. When a determination is made through non-binding arbitration (*arbitrato non-rituale*), the decision can be appealed only in exclusive and limited cases involving sentences that can be enforced by an equity judgment. The appeal must be heard by new arbitrators, who must be chosen with an increasingly selective eye in regards to their experience and competency- a process, of course, which involves more money and time.

Ultimately, the power of an arbitrator or panel of arbitrators is granted directly by the parties. By including contractual arbitration clauses, parties are agreeing to the resolution of their disputes through a process that consists of very simple proceedings, which are similar, but not equal to the traditional route of litigated settlements. The arbitral award



that concludes a dispute has the same value as an ordinary judicial judgment, on the condition that parties will proceed with the next formal step of registering this private decision with the Italian Court of Appeal.

Mediation. Mediation is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. A mediator assists the parties in identifying and articulating their own interests, priorities, needs and wishes to each other. Mediation is a “peaceful” dispute resolution tool that is complementary to the existing court system and the practice of arbitration. Arbitration and mediation both promote the same ideals, such as access to justice, a prompt hearing, fair outcomes and reduced congestion in the courts. Mediation, however, is a voluntary and non-binding process - it is a creative alternative to the court system. Mediation often is successful because it offers parties the rare opportunity to directly express their own interests and anxieties relevant to the dispute. In addition, mediation provides parties with the opportunity to develop a mutually satisfying outcome by creating solutions that are uniquely tailored to meet the needs of the particular parties. A mediator is a neutral and impartial person; mediators do not decide or judge, but instead becomes an *active driver* during the negotiation between the parties. A mediator uses specialized communication techniques and negotiation techniques to assist the parties in reaching optimal solutions.

Mediation is a structured process with a number of procedural stages in which the mediator assists the parties in resolving their disputes. The mediator and the parties follow a specific set of protocols that require everyone involved to be working together. This process permits the mediator and disputants to focus on the real problems and actual difficulties between the parties. Moreover, the parties are free to express their own interests and needs through an open dialogue in a less adversarial setting than a courtroom. The main aim of mediation is to assist people in dedicating more time and attention to the creation of a voluntary, functional and durable agreement. The parties themselves possess the power to control the process- they reserve the right to determine the parameters of the agreement. In mediation, the parties also reserve the right to stop anytime and refer a dispute to the court system or perhaps arbitration.

In addition to economic and legal skills, mediators are professionals who possess specialized technical training in the resolution of disputes. A mediator plays a dual role during the mediation process- as a facilitator of the parties’ positive relationship, and as an evaluator adept at examining the different aspects of the dispute. After analyzing a



dispute, a mediator can help parties to articulate a final agreement and resolve their dispute. The agreement at the end of the mediation process is product of the parties' discussions and decisions. The aim of mediation is to find a mutually satisfactory agreement that all parties believe is beneficial. Their agreement serves as a landmark and reminds parties of their historical, confrontational period, and ultimately helps them anticipate the potential for future disputes.

Generally, an agreement reached through mediation specifies time periods for performance and is customarily specific, measurable, achievable, and realistic. It is advisable for the parties to put their agreement in writing to create tangible evidence that they accomplished something together. The written agreement reminds the parties of their newly achieved common ground and helps to prevent arguments and misunderstandings afterward. Most importantly, a written agreement provides a clear ending point to the mediation process. The agreement binds the parties contractually. In case of disputes concerning compliance with the mediated agreement (e.g., whether a party carries out an agreement) or implementation of a mediated agreement (e.g., disputes concerning the precise terms for carrying out an agreement), the agreement is enforceable as a contract, as it would be in cases of the non-fulfilment of any ordinary contractual provision. Enforceability is necessary for mediation, as an ADR process, to possess any legal strength or to impose any liability on the parties. It should be noted that, in the United States, compliance with mediated settlement agreements is high because the parties, themselves, create the terms of the settlement agreement. Thus, enforcement proceedings are relatively rare because the parties voluntarily carry out their own agreements.

According to § 1965 of the Italian Civil Code (I:C.C.), a mediation agreement is characterized as a transactional contract. A transactional contract is one in which the parties, with concessions to each other, resolve and terminate the present dispute between them. With the same contract, they also resolve the issues that can arise in the future. Disputing parties can initiate mediation anytime, whenever they believe it would be beneficial. Disputes reach mediation in a number of different ways such as through consent of the parties, a mediation clause in a contract, or even a court order. Parties to a contract may be required to submit a dispute to mediation according to insertion mediation clauses in their contracts. Under such a clause, the parties usually retain the right to choose their mediator and to schedule the mediation session on mutually agreeable date.



Mediation clauses, in contrast to arbitration clauses, are not “vexatious clauses” (*clausole vessatorie*) or what is known in the U.S. as “unconscionable”. If the parties do not arrive at any settlement agreement as a result of the mediation process, they are always allowed to go to arbitration or litigation; thus, mediation does not deprive parties of their right to due process. Binding arbitration clauses are qualified as “vexatious”. As laid out in I.C.C § 1341, paragraph 2, and 1469, paragraph 3, nn.18 and 19, a vexatious clause is a provision in an agreement that disadvantages one party, typically the consumer, to the agreement. These types of clauses have to be signed separately by the parties. Such a clause can be vexatious if not signed separately and knowingly by each party because they can ultimately limit options and deprive parties of their due process rights under the traditional judicial system. I.C.P.C. § 808 provides a sort of exception to the constitutional principle of natural jurisdiction, and, therefore has to be regarded as vexatious. Again, a contractual mediation clause is not vexatious, because the parties can always take their dispute through the ordinary judicial channels or utilize arbitration for resolution, without any penalty for doing so.

There are some particular advantages that exist in choosing an alternative method of dispute resolution (ADR) such as mediation or arbitration, as opposed to pursuing ordinary judicial proceedings. The first advantage concerns the all-important consideration of economics and the daunting costs of resolving disputes; arbitration and mediation proceedings are by far cheaper in monetary expense than ordinary judicial proceedings. Mediation fees vary in accordance with the hourly rate of the mediator and the length of the mediation session, and are usually shared equally by the parties participating in the mediation. Another important advantage of alternative dispute resolution proceedings is in the decreased time these proceedings customarily take as opposed to the traditionally litigated dispute.

Mediation is regarded to be more time-efficient than even arbitration, since proceedings have the potential to come to a productive close in under 3 hours. Mediation is not as formal as arbitration, and there are a variety of mediation techniques available and employed depending on the mediator’s personality, the parties’ personalities, and the complexity of the dispute; mediation is an incredibly flexible yet functional process. What substantially sets mediation apart from traditional judicial proceedings and even arbitration is that the parties strive personally to find common ground, and they work to develop mutually agreeable solutions directly with each other and without any exterior imposition of a decision by a judge or arbitrator. The efficiency of the mediation process is evident in



that it aims to avoid further complication of the dispute and animosity between the parties- a mediator actively uses specialized communication and negotiation techniques to guide the parties to the realization of a mutually beneficial agreement. Another advantage of mediation, specifically, is that it seeks to generate an agreement that is realistic, which takes into consideration the financial condition of the parties as well as all other relevant circumstances and factors. Again, mediation is a voluntary process and often it produces such desirable results because it permits parties to express their own interests and anxieties directly, while helping them to create a suitable solution.

Generally, choosing arbitration or mediation is attractive to parties because they get to participate in these proceedings more directly than they would in a courtroom or in a litigated dispute proceeding. However in arbitration, the arbitrator still makes the final determinations of fault and compensation, and the parties must accept those decisions as though they were made by a judge. Also, an arbitration proceeding is governed by formal rules and the role of parties' attorneys is still central to the representation of their interests. With a mediator's help, the parties are increasingly empowered to participate directly in the process and determine the outcome of their own dispute, thus regulating and protecting their own interests.

Another important difference between arbitration and mediation exists in regards to choosing the neutral party. In choosing an arbitrator, the parties seek to select an individual that possesses particular legal skills, knowledge and competence. With the exception of non-binding arbitration in Italy, the arbitrator determines that outcome of the dispute according to traditional legal principles, so the arbitrator must be highly knowledgeable in the relevant area of law. In mediation, the selection of a mediator can be made among individuals with a variety of degrees and particular experience or specialized training in the mediation of disputes. Mediators are often described as experts in the process (of mediation), although it is generally helpful to designate a mediator with some degree of subject matter knowledge as well. Ultimately, mediation is a collaborative effort by all involved, and to arrive at a satisfactory outcome, it includes the willing cooperation and respect of all parties.

The mediation process is both informal and confidential. In contrast to arbitration and its relatively formal rules of evidence and procedure, mediation is flexible in terms of evidence, procedure, and formality. Both procedures are confidential as the parties allow a neutral third- party to discuss or decide the dispute without the exposing the parties' dealings to public scrutiny or judgment. Specifically, the statements of a party during



mediation are confidential and may not be disclosed without written consent. Generally, confidentiality in mediation also extends to documents specifically prepared for mediation, such as mediation briefs. Confidentiality is paramount to the effectiveness of the mediation process--it creates an atmosphere where all parties are increasingly comfortable to discuss their dispute without fear that their words will be used against them at a later date. Confidentiality promotes open communication about the issues involved between the parties.

In regards to the logistics of the confidentiality component of mediation, there are varied rules and customs. Typically, in the U.S., confidentiality of statements made during mediation is provided by law (California Evidence Code Sections 1115-1128). In the alternative, before a mediation begins, the parties may sign a confidentiality agreement, acknowledging that all the statements made during the mediation as well as documents prepared for the mediation are confidential and inadmissible against another party in any subsequent civil proceeding. All participants in mediation are bound by confidentiality, including the parties, the mediator, and non-parties. The scope of confidentiality is broad, usually covering both statements made by parties during mediation and documents prepared for mediation (e.g., mediation briefs). One generally recognized exception to the rule of confidentiality is the mediated settlement agreement itself, which may be used to enforce the terms of the agreement in the event of non-compliance. Nevertheless, in order to promote open communication and disclosure of relevant information, confidentiality in the mediation process is broad.

One unique feature of mediation is that any party, unilaterally, can decide to stop the mediation at anytime if they believe the process is not productive, as opposed to an arbitration proceeding, which needs a common approval to discontinue. To be effective, mediation must be considered by the parties as a tool or instrument that the parties can use to manage directly the resolution of their disputes between one another. The focus is their direct, active participation as opposed to the increasingly detached role the parties play in an arbitration proceeding "run" by an arbitrator.

In Italy, because mediation is new and generally unregulated by legislators, the parties will sign a confidentiality agreement prior to the commencement of a mediation session. The pre-mediation confidentiality agreement will have the force and effect of a contract acknowledging confidentiality as an integral element of the mediation process.

Conciliation. Conciliation is another dispute resolution process that involves building a positive relationship between the parties of dispute, however, it is fundamentally



different than mediation and arbitration in several respects. Conciliation is a method employed in civil law countries, like Italy, and is a more common concept there than is mediation. While conciliation is typically employed in labour and consumer disputes, Italian judges encourage conciliation in every type of dispute¹. The “conciliator” is an impartial person that assists the parties by driving their negotiations and directing them towards a satisfactory agreement. It is unlike arbitration in that conciliation is a much less adversarial proceeding; it seeks to identify a right that has been violated and searches to find the optimal solution.

Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. Although this sounds strikingly similar to mediation, there are important differences between the two methods of dispute resolution. In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure who is responsible for the figuring out the best solution for the parties. The conciliator, not the parties, often develops and proposes the terms of settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators. In this regard, the role of a conciliator is distinct from the role of a mediator. The mediator at all times maintains his or her neutrality and impartiality. A mediator does not focus only on traditional notions of fault and a mediator does not assume sole responsibility for generating solutions. Instead, a mediator works together with the parties as a partner to assist them in finding the best solution to further their interests. A mediator’s priority is to facilitate the parties’ own discussion and representation of their own interests, and guide them to their own suitable solution- a good common solution that is fair, durable, and workable. The parties play an active role in mediation, identifying interests, suggesting possible solutions, and making decisions concerning proposals made by other parties. The parties come to mediator seeking help in finding their own best solution.

Also the role of the attorneys is different in mediation. Attorneys are more active in mediation in generating and developing innovative solutions for settlement. In conciliation, they generally offer advice and guidance to clients about proposals made by conciliators.

Conciliation and mediation both look to maintain an existing business relationship and to rekindle a lost balance of power between two parties. These concepts are sometimes used as synonyms, but they do indeed vary substantially in their procedures.

¹ §§ 183, 184 and 350 c.p.c. An other c.p.c. section, § 410, recognizes the optional attempt to conciliate labor disputes. In labor disputes, conciliation is mandatory before the parties go before a judge.



In mediation, the mediator controls the process through different and specific stages: introduction, joint session, caucus, and agreement, while the parties control the outcome. By contrast, in conciliation the conciliator may not follow a structured process, instead administering the conciliation process as a traditional negotiation, which may take different forms depending on the case.

Conciliation is used almost preventively, as soon as a dispute or misunderstanding surfaces: a conciliator pushes to stop a substantial conflict from developing. Mediation is closer to arbitration in the respect that it "intervenes" in a substantial dispute that has already surfaced that is very difficult to resolve without "professional" assistance. The parties approach mediation as an alternative method to resolve their dispute, due to the fact that they both recognize that the conflict has grown potentially serious enough for litigation. Mediation may be used, however, any time after the emergence of a dispute, including the early stages.

Each of the ADR (alternative dispute resolution) processes addressed herein, arbitration, mediation, and conciliation, provides important benefits to parties and may be seen as complementary to the judicial process. In the United States, mediation has emerged as perhaps the most predominant ADR process because it affords the parties the opportunity to develop settlements that are practical, economical, and durable. For commercial disputes, mediation also offers the opportunity to create innovative solutions to business disputes that further the unique interests of the parties in an analytical framework that is broader than traditional legal rights and remedies. In this sense, the mediation process may be used to secure "business solutions to business disputes," because it encourages the parties to consider all the dimensions of a dispute, including both legal issues and business interests. In all parts of the world, including North and South America, Asia, and India, large and small commercial entities are recognizing the business benefits of mediation.

According to international and European trends, mediation is emerging as an effective and often preferred method for private commercial companies and government agencies to fulfil their organizational objectives by privately and promptly resolving disputes in a manner that saves time, money, and business relationships.

The authors would like to express their gratitude to Prof. Gregg Relyea, for his important contribution to this article.