The New Era: How Mediation Will Be Vital For Successful Italian Businesses.

by Alessandra Sgubini

For years, successful American companies have used mediation as a method for resolving commercial disputes. The considerable time, money, and risk associated with arbitration and trial have prompted American companies to explore the unique benefits of mediation. It is now common practice for managers and business executives in the United States to turn to mediation because it is significantly more efficient, private, and economical than the courtroom. Companies have incorporated mediation as a keystone in their conflict resolution procedures. Mediation has proven to be effective in resolving both external disputes involving other companies and internal disputes involving employees.

While arbitration and trial are both effective methods for resolving disputes where the parties cannot otherwise reach a negotiated solution, only mediation offers several distinct advantages to companies embroiled in a business dispute. In mediation, the parties retain control over the outcome of a negotiation. Because mediation looks beyond purely traditional legal remedies, it offers the parties an opportunity to develop business solutions for business problems. Mediation also offers the parties an unparalleled level of direct involvement in resolving their own disputes, including both the obvious legal issues but also their business interests and goals.

Mediation has yet to gain wide acceptance in Italy, despite its widespread usage in the United States and, increasingly, in international disputes. In many instances, mediation still is unknown to Italian lawyers and merchants. In other instances, mediation may be mistakenly confused with conciliation, which is a statutorily recognized process of dispute resolution in specified types of disputes. Although conciliation and mediation have similar aspects and are many times, they are indeed different.

Over the last few years, the Italian business community has joined other Europeans in searching for an effective alternative to trial and arbitration. Small, medium-sized, and large Italian companies are beginning to turn their attention to mediation as their first choice when confronted with a dispute. Indeed, it appears that the concept of mediation has set in motion a new era in business for Italians, as well as other European common law countries and civil law countries, where commercial enterprise responds to legislative reform in corporate law.

New Laws Encourage Mediation. It is a new day for Italian business people. The Italian legislature recently approved the use of mediation and conciliation in commercial disputes. In the new law, the legislature authorized the use of mediation by public and private corporate entities. Two new bills (n.222 and 223/2004) prescribe standards for companies that wish to register as providers of mediation or conciliation services. Mediation services will be included in the public registry with the Ministry of Justice. Still other legislative bills recognize the role of a mediator as a profession and set forth the fees that can be charged for mediation services.

This new legislative activity reflects the increasingly prominent role mediation will play in resolving commercial disputes in Italy. In the United States, mediation has emerged as perhaps the most prominent alternative dispute resolution process because it affords the parties the opportunity to develop settlements that are practical, economical and durable. It is only a matter of time before the efficacy of the mediation process becomes clear to the Italian business community.

The decree § 223/2004 has settled that the payment for the use of the conciliation service. Public or private bodies can provide this service; which must be registered in the official registry book established by the § 38 of decree § 5/2003.
The minimum and maximum payment amounts of the conciliation services have been established; they are determinate by specific rules of calculation.
The explanation for the calculation here below:
The total expenses of the conciliation service cover the beginning and the continuing of the proceeding
Each part involved in the dispute, has to pay an amount of 30€ which have to be paid before the conciliation takes place. This amount has not to be paid if there is a joined demand of the conciliation service.
When the value the dispute is concerned is not defined a priori, the conciliation body itself would determine it and would communicate it to the parts involved.
The expenses for the conciliation service have to be paid by the parts for at least half of the total amount before the proceeding takes place, on the contrary, the body can suspend it.
The total expenses amount includes also the conciliator fee for the entire conciliation proceeding, this independently on the number of conciliators.
The conciliation fee has to be paid jointly from every part involved in the conciliation proceeding.

The decree § 222/2004 has regulated the institutions at the Ministry of Justice of the registry book of the public and private established bodies found by § 38 of decree § 5/2003. This decree has also defined some standards and rules for the entrance in the registry book of the resolution.
Conciliation bodies constituted by the chambers of commerce are registered on the basis of informal application. The private entities, which are not chambers of commerce, have to have the following aspects:
- Legal foundation of the body, autonomy and compatibility of the social object;
- It is necessary to produce the evidence of an insurance coverage not smaller than 500.000 € for the possible economical consequences;
- Honorability requirements of the members and the managers;
- Administrative and accountable transparency;
- Independency, impartiality, confidentiality during the service;
- Number of conciliators not inferior to 7 who have declared the availability to attend the services of the conciliation exclusively for the clients.
- Location of the entities;
- Requirements of the professional qualification of the conciliators, for whom it must be proved the satisfaction of a specific education acquired through the attendance professional training courses.
- Information regarding the conciliation proceeding must be considered as strictly confidential by anyone involved or performing on it

The term alternative dispute resolution (ADR) refers collectively to a variety of procedures that are used to resolve conflicts “outside” the courtroom. The most well known ADR procedures are arbitration and mediation. Disputing parties use these ADR methods because they are expeditious, private, and generally much less expensive than trial. While each of these ADR processes

may be effective in various circumstances, mediation in the United States has proven to offer several advantages. Mediation invites the parties to develop solutions that are tailored to the particular facts of a specific dispute and the unique interests of the parties. Mediation produces agreements that are stable, where compliance is the norm because the parties helped create a solution that furthers their interests and is within their ability to implement.

Mediation is a structured negotiation process where a neutral third party mediator, selected by the parties, facilitates dialogue in a multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. The mediation process is both informal and confidential. The mediator does not make decisions for the parties.
Mediation has the following features:
1. The parties select a mediator who conducts the mediation session;
2. During the mediation, each party is given the opportunity to identify the issues and explore possible methods of resolving the disputes;
3. When both parties mutually agree upon specific settlement terms, a settlement is reduced to writing and signed by both parties. This settlement agreement has the legal force of a contract.

Arbitration is an adjudicative process where the disputing parties present their disagreement to one or a panel of private, independent and qualified third party "arbitrators." The arbitrators control both the arbitration process and they determine the outcome of the case.
Basic steps in an arbitral proceeding are:
1. The parties select the arbitrator(s) to hear the case;
2. The arbitrator(s) conducts an adjudicative hearing where written and/or evidence is presented;
3. The arbitrator issues and arbitral award which resolves the disputes.

Conciliation is another dispute resolution process that involves building a positive relationship between the parties. Conciliation is a more familiar concept in civil law countries and it has been applied in various specified circumstances, including family disputes. The conciliator is an impartial person that assists the parties by driving their negotiation and directing them towards a satisfactory agreement.

Advantages of Mediation. The use of mediation in the international marketplace presents advantages for businesses because they can avoid time-consuming and destructive courtroom battles, especially when many disputing businesses would prefer to continue their existing business relationship. The agreement at the end of the mediation process is product of the parties' discussions and decisions. Generally, an agreement reached through mediation specifies time periods for performance and is customarily specific, measurable, achievable, and realistic. The aim of mediation is to find a mutually satisfactory agreement that all parties believe is beneficial. The agreement binds the parties contractually.

Mediation can be used effectively by businesses because the parties want:

- to negotiate and have the control of the outcome of the disputes;
- prompt resolution;
- to maintain their business relationships;
- the opportunity to develop creative, non-traditional remedies.

According to international and European trends, mediation is emerging as an effective and often preferred method for private commercial companies and government agencies. This trend is beginning to surface in Italy too, as business people work to fulfill their organizational objectives by privately and promptly resolving disputes in a manner that promotes their interest in saving time, saving money, and preserving business relationships. Growing worldwide interest in ADR and mediation, in particular, has prodded private and public companies to research these alternatives to trial. People who are familiar with the mediation process have taken great strides in educating the international business community to its uses.

Bridge Mediation Surveys Italian Companies. Bridge Mediation, LLC is a consulting company that offers alternative dispute resolution services. Bridge Mediation focuses especially providing mediation services tailored to international and domestic business communities. Bridge Mediation has worked to introduce mediation to many national and international Italian and American businesses as an alternative to the traditional judicial system through seminars for businesses and mediation training for mediators.

One of the early goals of Bridge Mediation was to research and examine the attitudes toward mediation and experiences with mediation of many small and medium-sized Italian companies. A survey was developed to inquire about their use of non-judicial methods of dispute resolution. In addition to this survey, Bridge interviewed several general counsel and chief executive officers of larger Italian companies to develop data on the typical costs of litigation for their companies, the time they lost to commercial disputes, and their knowledge of ADR.

Bridge Mediation received more than one hundred responses to the general survey that reached international businesses in Milan, Italy, and San Diego, California. The results of this survey confirmed the need for an effective alternative to trial and arbitration. A large majority of the companies surveyed agreed that ADR is not well enough known among individuals and companies involved in international adjudicative proceedings. The survey found that the interest in new methods of dispute resolution is strong; mediation was especially intriguing to many companies since arbitration has been, in some instances, equally frustrating as a formal trial. According to the survey, many of the companies are not satisfied with the arbitration process because it simply a lesser of two evils--still costing vast amounts of time, money and company resources. Importantly, arbitration presents significant risk of losing to the parties and, in many cases, the outcome is largely unpredictable. Many companies want to know more about the various ways to use mediation clauses in connection with external disputes and in-house issues.

Bridge Mediation interviews included one meeting with a CEO of the national Italian gas company and he shared that his company spends one million Euros in

overall legal costs per year. Of this amount, 500,000 Euros are spent in civil litigation.

The results from the Bridge Mediation survey with Italian companies included:

- 90% of Italian companies used traditional judicial system to resolve civil and commercial disputes.
- 9% used arbitration
- 1% used conciliation
- 95% were not satisfied with the result from the judicial system
- 5% knew about mediation but they don't use it
- 100% willing to know more about mediation
- 95% didn't know about mediation clauses
- 95% wanted to know more about mediation clauses.

The results from the interviews and research in San Diego, California showed that the business community is aware of the benefits of mediation, especially insurance companies that regularly use mediation to settle claims and cases. Many small and medium-sized companies are familiar with the concept of mediation and are starting to introduce mediation clauses in their agreements to prevent disputes from escalating. Mediation clauses also are being used as a risk-management strategy that assures mediation is the first response to a dispute. For the international community, this translates into an effective way to save money and time from mounting legal costs and minimizes the uncertainty involved in allowing a foreign judge or arbitrator to decide the case.

For those businesses looking to take their first step towards implementing mediation into their practices, Bridge Mediation recommends that contractual mediation clauses be included in their agreements. Mediation clauses may be included in contracts with external vendors, suppliers and service providers. Likewise, mediation clauses can be used internally in contracts of employment. Often, mediation clauses are used as the first level of response to a complaint or claim. For maximum effectiveness, mediation clauses frequently require parties to attempt to mediate their disputes before turning to other processes of dispute resolution, such as arbitration or trial. By participating in mediation, the parties do not waive any legal rights they may assert if the mediation does not result in a global resolution of all issues.

A "New Tradition." Even though attorneys and business people are open to the idea of mediation, many of them resist its use perhaps because it is not a traditional method for resolving disputes. This resistance does not serve the interests of the companies they represent, which want to use their resources to develop business and generate revenue. One possible approach to this resistance is to view mediation as a "new tradition" for resolving disputes. It is interesting to note that most countries, including Italy, have an ancient history of using informal consensual methods of dispute resolution long before the existence of legislatures and courts. Viewing mediation as a new tradition will

allow lawyers and corporate representatives to secure optimal solutions to commercial disputes within a framework of newly adopted laws and procedures.

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