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STRENGTHENING COMMERCIAL LONG TERM RELATIONSHIP WITH THE HELP OF THE ADR

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Abstract:

The companies tend to pursue the goal of maximizing efficiency. They are ready to implement alternative models of problem solving where these prove more efficient than traditional ones. The international trade agreements are by nature prepared for such dispute settlement type: alternative, voluntary, amicable. However, it seems that this still happens sporadically or at least not fully detectable in reality. One might well wonder which is the reason why a management tool of the commercial crisis evidently characterized by a strong bond with the relationship in crisis, in terms of adaptability, creative potential, satisfaction of expectations, is not publicly perceived as the standard management litigation in the long term commercial agreements. The paper faces arbitration and mediation from the business growth point of view and privileges for this purpose the client's interest oriented.

Keywords: Arbitration; Mediation; Business Relationship; Long Term Commercial Contracts.

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Summary: **1.** *The crisis of the business relationship: the ambivalence of the arbitration method.* - **2.** *Long term commercial contracts and mediation.* - **3.** *Beyond the solution: the practice of mediation as a lever for the expansion of economic relationships through the responsible and productive behavior.* - **4.** *Arbitration or mediation? A client's interest oriented answer.*

1. The crisis of the business relationship: the ambivalence of the arbitration method.

It is rare to read an international agreement in which there is no arbitration clause that involve any future dispute between the parties. It's mainly a question of being able to choose the judges: the arbitrators are appointed, in fact, by the parties; the companies choose the arbitration because of the speed of the procedure, compared to the time of the courts¹, the resolution of the problem of the *sprachrisiko* and of the mandatory rules.

However, there are doubts about the real efficacy of the arbitration process. First of all, the certainty of the judges does not mean legal certainty: even in case of an applicable law clause, in fact, any gap or profile that is not covered, will attract the application of private international law or, more easily and understandably, the *lex mercatoria*. Moreover, speed is not guaranteed: there are procedures that are complex enough to take a long time, sometimes not less than two years; the cost of the procedures is very high; contesting the arbitration award or execution requires qualified professional competence.

Given these plausible arguments, especially in the U.S. experience, somebody is talking about the "flight of U.S. firms by arbitration in favor of ADR".

While there is no doubt about the good fortune of the arbitration procedures in commercial and international trade, one cannot forget that companies always pursue the goal of utility maximization. Every company is therefore ready to implement alternative models of conflict resolution where these are more efficient than traditional ones.

The arbitration procedures are, for the reasons described above, a good alternative to the ordinary jurisdiction, and - at the same time - a weak response to the need of speed, punctuality, efficiency. Compared to a trial in front of a court arbitration is usually to be preferred, but this is not always the case: the same reasons that make it more attractive, direct companies toward other method of dispute resolution where those are better able to comply with economic interest and are more efficient².

¹ In Italy, see M. BIANCO, S. GIACOMELLI, G. GIORGIANTONIO, G. PALUMBO, B. SZEGO, *La durata (eccessiva) dei procedimenti civili in Italia: offerta, domanda o rito?*, in *Rivista di politica economica*, IX-X, 2007.

² We must not forget, M. CAPPELLETTI e B. GARTH, *Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report*, in M. CAPPELLETTI (ed.), *Access to Justice*, 1978, vol. I, p. 3.

The amicable management of the disputes, that does not contemplate the delegation of power to decide to the arbitrators, is particularly desirable in international trade, as the business relationship is, given the nature of the involved interests, congenial to alternative voluntary conciliation.

International companies face issues related to the language, the distance, the choice of applicable law, the guarantees for performance, the highly specific investments. The business relationship relies on a common language, a mostly electronic communication, a content of the contract to be drawn up in detail and according to the enterprises' actual needs (tailor made), the usages, customs, general principles, standard terms, guarantee payment instruments whose common discipline is recalled by the contract (see the Uniform Customs and Practice for Documentary Credits and Standby Letters of Credit).

The relation relies, as it is natural and appropriate, in an experience in which the construction of an agreement is tailored to the interests of companies. Mutual trust (confidence), openness and courage, dynamism, are very intensive needs. In particular, what drives the companies towards internationalization is the interest in the business, but also the ability to overcome the legal dimension as well as the local economy in which and from which the companies feel safe.

We can immediately realize that these same elements are also the elective profiles in the mediation experience. It's not a mere coincidence, in fact, that a tailor-made agreement matches the ability to face negotiations without delegation to the law, while the attitude of trust and collaboration show the ability to dialogue, to manage the long term relationship and changing circumstances together with adding flexibility.

All these are qualities that show a sensitivity toward solutions which are not derived from the protection of the right by the law, but from the relation itself and from the awareness about the reasons of the conflict and that rely less on legal logic and more on the economic one³.

Unlike litigation, where typical remedies are used in all the diverse areas of conflict, the mediation process solutions are as broad and atypical as it is the extension of the will of the people involved. So wide is the area of possible remedies to the crisis of the relation, as wide is the fantasy in negotiation and entrepreneurial creativity.

If the ADR models are certainly compatible with the international dimension of the relationship, they are even more suitable for the interests of the parties. The practice of mediation is surely influenced by the nature of the relationship at the origin of the conflict, since the process is in continuity with it and aims at using tools and answers that are able to satisfy the interests involved in the relationship.

³ We already know that justice and economy are considered to much far on a high ground of problems, see M. BIANCO-S. ROSSI, *Giustizia ed economia: due mondi separati*, in S. Rossi, *Controtempo. L'Italia nella crisi mondiale*, Laterza, 2009.

However, it seems that the use of mediation, which is to say the technique of direct management of the conflict, is still sporadic, or at least not fully detectable in reality. One might well wonder what is the reason why it is not publicly received as a standard model of litigation management in long term commercial agreements, even if it is clearly characterized by a strong bond with the relationship in crisis, in terms of adaptability, creative potentials, satisfaction of expectations. Maybe because lawyers are still used in designing dispute resolution as a judicial and administered procedure, maybe because other tools still conquer priority in practice, the habit to choose a neutral third party model does not seem to exploit all its potentials.

2. Long term commercial contracts and mediation.

Adaptation and flexibility in the relationship over time becomes an essential responsibility and ability of the parties. Due to the changes in market conditions, the inadequacy of the performance as agreed, the replacement of the persons involved in the contractual relationship, the opportunistic behavior, it is common that the contract enters into a phase of a more or less serious crisis.

The tradition of civil law systems conceived the contract as an instrument of control and governance of the relationship as it presents itself at the time of the closing. Recently, a more conscious openness towards the clauses of renegotiation and adaptation of the original agreement presents a new approach to the problem, a more appropriate culture of the crisis management, based on the ability to understand the causes of the conflict, the way to transform, where possible and desired, the business relationship⁴.

Companies and, more specifically, their consultants and lawyers, will need to become aware that trade agreements create relationships exposed to changes, and that the landscape of tools available to them for making flexible contracts - and the relation ready to change - is broader and more varied: if the traditional work on the contract concerns the renegotiation clauses, i.e. the provision of mechanisms for balance, control and contract management, the new frontier becomes that of assisted negotiation or mediation. A plan of business continuity that contemplate a relationship that evolve as time passes⁵.

After the emergence of the conflict, in fact, conciliation and other sophisticated tools, not only alternative, but functionally and ontologically far away from court trial, are efficient tools in both situations: in case of a particular interest in the conservation of the contractual relationship, looking for a new balance that will allow the continuation of the relationship where it is really wanted; in case of a solution to close the relation that can be less wasteful.

⁴ F. MACARIO, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Jovene, 1996; F. MACARIO, *I diritti oltre la legge. Principi e regole nel nuovo diritto dei contratti*, in *Dem. dir.*, 1997, 1, p. 149; V. ROPPO, *From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?*, in *Eur. Rev. Contract Law*, 2009, p. 304.

⁵ These issues are treated in a forthcoming book, P. LUCARELLI-L. RISTORI, *Il governo del cambiamento nei contratti commerciali di durata. Crisi di cooperazione e metodi negoziali di soluzione*.

In both cases the amicable approach has an intrinsic value that comes out as follows: a reflection that does not end in the evaluation of the legal case, which gives no guarantee to the economic interests, but tries to aim at the needs of the enterprise. The area of possible solutions in the field of amicable remedies to contractual crisis, is as vast as the ability to invent the solution and not at all limited to the typical judicial remedies⁶.

3. Beyond the solution: the practice of mediation as a lever for the expansion of economic relationships through the responsible and productive behavior.

The parties, instead of delegating to others the solution of the problem, maintain in mediation an active role; either in case they decide to destroy the relationship, or to rebuilt it with a new agreement. The solution really belongs to the parties, they shape it themselves in order to satisfy their needs; if found, it is therefore a solution that is much more likely to be respected by them.

It seems important, however, to emphasize an aspect regardless of the outcome of mediation. Even if they do not settle the dispute, the parties derive benefits from a serious and deep confrontation, aware about the problems of the relationship. A mediation of high quality, in fact, allows the parties to acquire the skills, even if the conflict proves to be not apt to amicable settlement.

The first result that can be achieved with the help of the mediator is the ability to analyze the conflict and the role of the parties in it. By sitting at the mediation table, in fact, parties are obliged to face their dispute having explored the reasons, evaluated the relationship, identified the terms of a continuation or of a closure. Such an obviously reflective approach is clearly distant from a passive attitude pending the decision of heteronomous court. The practice of mediation then moves the business practices and behaviors toward conscious decisions which are thought out in relation to the causes and effects of the crisis. At the same time, and this, for the reasons mentioned above, is of particular interests in the context of international trade relationships, this method, is giving companies the instruments for overcoming conflicts, especially in long-term relationships, and reduces the problems that arises with the application of the contractual clause of applicable law to the business agreements: as a matter of fact, law becomes the last resort, the residual rule in case the path of negotiation turns out to be sterile and inadequate.

The second skill that can be enhanced with the help of mediation is the opportunity for rethinking about procedures, internal organization, management of litigation. Facilitating a mature and conscious management of the conflict both within and outside the company, can only promote a process of gradual empowerment within the organization: a constructive dialogue about the responsibilities within the company, the practice of anticipation and prevention of possible causes of the crisis.

⁶ F.P. LUISO, *La conciliazione nel quadro della tutela dei diritti*, in *Riv. trim. dir. proc. civ.*, 2004, p. 1203.

It seems adequate to define the ability as a *relational intelligence*: manage the autonomy, the differences of views, needs and interests in relation to partners and stakeholders. Mature and ready entrepreneurs thus become able to take initiatives not relying only to the state as a sort of legal guardian and protector⁷. Relational intelligence means the ability to manage the business relationship, but also the possible crisis of the same, leading the company in international relations and in its own growth.

4. Arbitration or mediation? A client's interest oriented answer.

Though the practice of mediation enhances the business management, as a leverage and growth of firms, the providers of alternative dispute resolution run a very low number of disputes arising from international trade (except for special cases, see the contracts on e-bay), even if they are providers which handle a large number of domestic conciliation (see U.S. agencies).

We try to read that practice from a different point of view, companies are not very interested in administered mediation procedures: companies know and practice ADR, but they usually do not settle cross-border disputes with the help of ADR. We could suggest the following reasons: the number of international disputes is very low; the majority of trade disputes aren't solved by public or private providers through mediation services; international disputes are handled mainly by arbitration and national courts; disputes not handled by national courts and arbitration panels are solved privately or by *ad hoc* procedures. The first explanation is improbable, the second and the third are obvious, the fourth is plausible.

Private negotiation - with the help of a neutral - is one of the two ADR procedures that was the object of a new regulation by the International Chamber of Commerce: the new *Arbitration and ADR Rules*. The ICC is now linking its arbitration and mediation practices, described in the introduction as "two discrete but complementary dispute resolution procedures"⁸. The Appendix XIV of the Rules (Case Management Techniques) expresses very clearly that complementarity:

"The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

- a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.
- b) Identifying issues can be resolved by agreement between the parties or their experts.

(...)

⁷ See, V. G. COSI, *Invece di giudicare. Scritti sulla mediazione*, Milano, 2007, p. 2.

⁸ See also "Principles of Transnational Civil Procedure", *American Law Institute and Unidroit* (2006).

h) Settlement of Disputes:

(i) Informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC ADR Rules;

(ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the disputes, provided that every effort is made to ensure that any subsequent award is enforceable at law”.

The text of the Rules clearly indicates the intent to encourage companies to choose mediation, assigning to the arbitration panel the task to move the parties toward an informed choice. The benefits that companies can draw from independent and friendly accommodation of the dispute are, thus, *inside* the procedure of arbitration, the one that is traditionally recognized as the most appropriate remedy to cross-border trade disputes. Arbitrators who wonder about the preservation of their role and give the companies the option for a different type of settlement, mediation, can only contribute to the development of relational intelligence, that brings to the growth of enterprises.

This assumes, however, that arbitrators must be ready to have a different approach to their role as conflict professionals, and to enlarge their expertise with knowledge about different methods of dispute resolution to adequately inform and assist the parties. A behavior which is first of all oriented to the enterprises’ interest, the development of their autonomy and relational intelligence.

An uphill climb, perhaps, to a new culture of conflict management, but it’s about time⁹.

⁹ Using the same words, in a very interesting blog, Michael McIlwrath, General Electric Company, *Anti-Arbitration: It's Not Hard to Mediate During Arbitral Proceedings*, at the page <http://kluwerarbitrationblog.com/blog/2011/09/13/anti-arbitration-it%E2%80%99s-not-hard-to-mediate-during-arbitral-proceedings/>