The content of the relevant provisions in Dispute Resolution Clauses with regard to the Arbitration Clauses*

Il contenuto delle disposizioni rilevanti nelle clausole di risoluzione delle controversie con riferimento alle clausole arbitrali

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Abstract

Lo scritto approfondisce il contenuto delle disposizioni di maggior rilievo nelle clausole dedicate alla risoluzione delle controversie, soffermandosi, in particolare, sulle clausole arbitrali.

The paper deals with relevant provisions in Dispute Resolution Clauses, focusing on Arbitration Clauses.

1. A Basic Premise

Arbitration for many years has generally been regarded as an effective method for solving major disputes, especially if related to complex and long-lasting contracts.

However, a recent survey conducted in the International Arbitrations field by Queen Mary University of London and White & Case in 2018 shows that nearly most of the interviewees reported that their preferred approach to dispute resolution is no longer the mode of arbitration alone, but rather a combi-

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nation of other alternative dispute resolution methods and arbitration, intended as mere adversarial and adjudicative proceedings.

The results of the previous similar survey conducted in 2015 were different. In that occasion, only the 34% of the respondents preferred hybrid solutions [1].

This means that nowadays practitioners are increasingly interested in finding various forms of dispute resolution modes in the hope that a swifter and more cost-effective resolution can be found to dispute, before having the conflicts resolved by an arbitration award.

The widespread feeling is the following: it helps dealing with disagreements at an early stage before the parties become entrenched and deep-rooted in their respective positions.

Above all, if parties have a long-term relationship, they prefer to consider in advance the physiological arise of conflicts and they wish to see that relationship continue [2].

In addition, the incorporation since the beginning of a tailored dispute resolution clause in a contract couldn't be interpreted as a sign of weakness, or a lack of confidence by either side.

More simply, similar clauses – named multi-tiered, escalation or multi-step dispute resolution clauses [3] – become an instrument that provide guidance on how parties should proceed in the event of a claim, or of a different conflict.

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[1] See GU, *Mapping and Assessing the Rise of Multi-tiered Approaches to the Resolution of International Disputes across the Globe. An Introduction*, in REYES-GU, *Multi-Tier Approaches to the Resolution of International Disputes. A Global and Comparative Study*, 2021, p. 3, footnotes 1-3 and STIPANOWICH, *Multi-Tier Commercial Dispute Resolution Processes in the United States*, in REYES-GU, *op. cit*., p. 275, footnote 30, who recalls that nowadays multi-tiered resolution clauses are often found in various kind of commercial contracts.

[2] For instance, in many construction projects the dispute resolution clauses adopted by the parties frequently make use of dispute boards (boards of one or more independent professionals who review the facts and either make recommandations or binding decisions) and it has been said that in the early 2000s around 97% of disputes referred to dispute boards were finally resolved by these boards, without recourse to litigation. See KANTOR-PARROT, "'Gaps' Can End in Tears" (Herbert Smith Frehills), in *https://hsfnotes.com/wp-content/uploads/sites/4/2016/08/GapsCanEndInTears.pdf.*

[3] The literature in this field has been quite impressive since many years: PRYLES, *Multi-Tiered Dispute Resolution Clauses*, in *Journal of International Arbitration,* 2001, vol. 18, issue 2, p. 159; KAYALI, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, in *Journal of International Arbitration*, 2010 (vol. 27), p. 55; BORN, *International Commercial Arbitration*, Den Haag, 2014, p. 278 ss. As far as multi-tiered resolution clauses are concerned, the International Chamber of Commerce has put in place four different samples of them under the ICC

In reality, it could be hard for the parties to agree on a dispute resolution process when a dispute has already arisen. The reactions when the relation breaks down are not easily predictable.

An old paper about the enforcement of clauses for dispute resolution before arbitration was meaningfully entitled "Peace Talks before War" [4]. And another more recent set of instructions and warning was also significantly entitled "'Gaps' Can End in Tears" [5].

In this perspective – as said – arbitration is nowadays more often considered costly and time-consuming and for these reasons it is frequently thought of as a last resort to be employed when all other measures or remedies failed. This is the actual scenario.

Therefore, it has been discussed as to whether it is possible to transpose and implement a more flexible approach.

An approach which combines non-adjudicative with adjudicative methods: one adversarial, the other non-adversarial, or at least less so, in genuine and primarily enforceable dispute resolution clauses, like arbitration agreements can manage.

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mediation rules. They are the following: *1)* The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules; *2)* In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules; *3.1)* In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below; *3.2)* All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules; *4)* In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration. See ICC Mediation clauses, in www.iccwbo.org and D. Jiménez Figueres, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, in ICC International Court of Arbitration Bulletin, Vol. 14/No. 1 – Spring 2003.

[4] See LEONARD-DHARMANANDA, *Peace Talks before War: The Enforcement of Clauses for Dispute ResolutionsBefore Arbitration*, in 23 *Journal of International Arbitration* (2006), pp. 301-315.

[5] See KANTOR-PARROTT, *op. cit.*

Or there is something different to be observed.

As it often happens, a direct answer under a strictly legal point of view is far to be given. For sure, arbitration is not only a stand-alone option [6].

2. The Relevance of Drafting

Having that said and underlined, some basic directions can be defined.

Before drafting any kind of dispute resolution clause, parties and their counsels should pay great attention.

Planning in advance is crucial and there are several options to be considered. Indeed, there are a number of drawbacks and inconvenients that may occur especially in the unwary side of the contractual relation.

In fact, not only there is more than one phase to be conceived, better just as mandatory conditions precedent [7], aimed at facilitating efficient solutions and reducing externalities of time and of cost associated with traditional court-based litigations, but also it is worth to establish from the very beginning which will be the consequences of a premature litigation, by filing a claim in adjudicative seat.

In this framework: two could be the alternative scenarios.

On the one hand, the dispute resolution clause and the fulfilment of every single step could be regarded as a "jurisdictional condition". It means, in clearer words, that the arbitration tribunal may consider that it lacks jurisdiction to hear the case until the agreed procedures are complied with. By consequence, the acceptance of the above-mentioned "jurisdiction theory" extends the scope of judicial supervision of arbitration, also to matters concerned with monitoring compliance with pre-arbitral phases [8].

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[6] See REYES, *Making Multi-tier Dispute Resolution Work*, in REYES-GU, *op. cit*., p. 417 ss.

[7] See STIPANOWICH, *op. cit*., p. 286 ss. and CHAISSE, *Praised, but Not Practised – The EU's Paradoxes of Hybrid Dispute Resolution*, in REYES-GU, *op. cit*., p. 375.

[8] To be precise, it must be added that "the jurisdiction theory" occurs in two variants: the full or the qualified one. In the first case, there is a double effect: the arbitral tribunal cannot hear the case (exclusion of positive effects) and, at the same time, the normal authority of the courts is retained (exclusion of negative effects). In the second case, there is not a total alignment. The positive effect of the arbitration clause is excluded, but negative effect remains unaffected. Therefore, in this view, the court must refuse to hear the case, if the parties concluded a valid and enforceable arbitration clause, notwithstanding that arbitration can only be commenced after the fulfillment of the various commitments agreed in the contract. See KAJKOWSKA, *Typology of Multi-tiered Dispute Resolution Clauses*, in *Enforceability of Multi-Tiered*

On the other hand, the respect of the negotiated procedures can be considered an "admissibility condition", which means that the arbitral tribunal, which anyhow holds jurisdiction to hear the case, may declare the instant claim inadmissible.

To put it plainly: this result occurs if the respondent can object to the admissibility of the arbitration request on the grounds that the requirement to find a settlement passing through differently agreed amicable means had been disregarded or not adequately fulfilled.

3. Drafting and Enforceability

The importance to design a self-tailored process in order to afford dispute resolution problems from the start of negotiations has been already highlighted. This mindset should serve the intent and the goals of the parties and it fosters long-term relations. But it is also self-evident that the responsibility of the effectiveness and of the enforceability of the agreed dispute resolution mechanisms largely lies on the parties.

For their benefit, the parties should ask some key questions.

In particular: who should be at the table and for how long? Might there be multiple levels of negotiations? Should there be mediation or other third-party intervention at some point? How does one moves on from one step to another? If we speak of "good faith" participation, what do we mean [9]?

A clear and cohesive platform should be offered to parties for dispute resolutions.

"Flaw drafting" is, consequently, the main enemy to face, and it is worth recalling that the dispute resolution agreements are often called – indeed, not without reasons – "midnight clauses" because of their late, uncareful, or any-

Dispute Resolution Clauses, Oxford, Hart Publishing, 2017, p. 203 ss.; CHAISSE, *op. cit*., p. 364 and T. Stipanowich, op. cit., p. 288, who suggests to incorporate, in the dispute resolution agreements, rules that grant to the Arbitral Tribunal the power to adjudicate on its own jurisdiction. Recently, the Hong Kong Court of Appeal confirmed that the issue of whether a party has complied with a contractual escalation clause before commencing arbitration proceedings should generally be resolved by the arbitral tribunal, rather than the courts. On this topic see the Judgment of the Court of First Instance of the High Court of Hong Kong [2021] HKCFI 1474-24 mai 2021; *Escalation clauses in Hong Kong-seated arbitrations*, in *https://www.ashurst.com/en/news-and-insights/insights/escalation-clauses-in-hong-kong-seated-arbitrations/* and *Notizie: competenze o ammissibilità: Corte di Hong Kong si pronuncia sulla natura della Escalation Clause*, in *Riv. dir. comm. int*., 2021, p. 855 ss.

[9] See STIPANOWICH, *op. cit*., p. 290.

way soft discussion. Moreover, these clauses are frequently incorporated in the agreement as mechanical and unexamined "boiler plate". This is a bad habit to leave. A deep change in the traditional attitude to negotiate dispute resolution provisions should be strongly recommended.

In this respect, many are the considerations to keep in mind.

The English case law even in recent times [10] has indicated a number of quite strict criteria to be followed. The main obstacle to avoid the risk of uncertainty, being conscious that "agreements to agree" or "agreements to negotiate in good faith, without more" are unlike to be enforceable [11].

These are some important recommendations to consider when drafting, on a professional basis, a dispute resolution clause with the aim to obtain recognition and enforcement not only for the agreed phases themself, but also for the ensuing award.

Hence, extreme care and careful considerations should be taken on how the clause has been finally worded [12].

To this end it is crucial to avoid, or at least mitigate, any interpretation issues (which are magnified by drawing up late-night clauses, as already mentioned).

i) Use mandatory language and assertive words (like "must" or "shall"), not permissive vocabulary (like "may").

ii) Insert detailed concepts and set out the particular procedure to respect with sufficient certainty without the need for further agreements at any stage before matters can proceed (specifying if it requires co-operation in the appointment of a neutral, submission of documents to her or him, or attendance at the planned meeting, anyway making reference to a recognized mediation institution and its regulation could help), refrain from using vague or overly complicated terms and definitions (like "amicable negotiations", "best undertakings", "good faith" [13]), clarify if there are different paths to follow depending on the type of the possible disputes ("catch all" provisions are anyway recommended).

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[10] See Ohpen Operation UK vs Invesco Fund Managers Ltd, 2019, EWHC 2246 (TCC), 2020, 1 All ER (Comm), p. 786 and Wah vs Grant Thornton International Ltd, 2012, EWHC 3198 (Ch), 2013, 1 All ER (Comm), p. 1226. These cases have been quoted by LEIN, *Multi-tiered Dispute Resolution Clauses. An English Perspective*, in REYES-GU, *op. cit*., p. 298.

[11] See REYES, *op. cit*., p. 425 footnote 15.

[12] See CHAISSE, *op. cit*., p. 375.

[13] For instance in the case Petromec inc. vs. Petroleo Brasileiro Sa, in vlex.co.uk, the concept of bringing a negotiations to an end in bad faith has been considered "somewhat elusive".

iii) Define precisely the time frame of each step, qualifying them as "condition precedent" to be satisfied. This allows each party to know how long the process will take and offers clarity and transparency on potential limitation or time bar issues (better make it clear whether counts a precise time limit or it is consistent the duration of the discussion [14]).

iv) Define precisely every step in full detail. Clearly set out how each step is commenced and how it must be conducted, and the compulsory nature of all or of only some of them. Do not leave matters to be agreed and the commitment in the conciliation process must not be expressed "generally and equivocally".

v) Describe the effects of the different outcomes and specify the applicable law to the dispute resolution clause, as a whole.

vi) Improve the success of enforceability of the tailored clause by specifying the consequence of the failure to comply with any of the negotiated phase, especially in those cases in which the claimant, allegedly, has submitted the request for arbitration prematurely. Precise in details if the non-compliance with the provisions of the dispute resolution clause may affect the jurisdiction of the arbitral tribunal and if yes, to which extent, (I have already explained the two possible variants of the jurisdiction theory) or precise whether it simply causes a non-admissibility issue. Specify the availability of interim measures and disclose, if any, the waivers of limitation plea or reason for the appeal.

vii) Consider the type of disputes likely to arise and ensure that the dispute resolution clause addresses the specific need of the parties.

viii) In conclusion, do not leave any room to interpretation as to the mandatory character of the provisions agreed in the clause, as to the procedure to follow with the mandatory intervention of true third, disinterested parties, and as to the set time frame and content for every stage [15]. The mission to accomplish is to avoid procedural arguments and consequently the risk of procedural discussions.

4. Forum selection clauses and the wider spectrum of dispute resolution clauses

A first crossroad, to start from the beginning of the analysis of the dispute resolution provisions, consists in choosing between simple forum selection

[14] See LEIN, *op. cit.*, p. 298 and CHAISSE, *op. cit.*, p. 376.

[15] See LEIN, *op. cit.*, p. 298 ss.

clauses and the wider spectrum of dispute resolution clauses which, as already anticipated, could be integrated, and still have a clear hybrid nature [16].

In the first scenario, the main question to pose is the following: which law should be chosen? Developed, stable, or business oriented?

Or is it better to consider the familiarity and the ease of access of the selected law.

Or again, is it better to choose the most favourable one, having in mind the contractual position of either party and the respective conducts that parties could take in the future, after signing, closing and execution?

It has been already noted that many commercial relations are obviously structured to deal with not predictable scenarios or even with further conflict of interests. Moreover, it must be added that the commercial parties are becoming much more creative in designing dispute resolution clauses.

Even the best national judicial systems have trial judges or lay juries that international businesses would prefer to avoid [17].

Therefore, could it be convenient to look at the interaction of the selected law with eventual dispute resolution provisions or pre-litigation processes?

5. Hybrid resolutions and the variable geometry of arbitration agreements

Moving the focus on the alternative methods that can be used in dispute resolution field, arbitration agreements are not the only one perspective to look through on a traditional basis.

First of all, arbitration proceedings cannot be seen any more as a fixed and strictly adversial and lawyer-driven dispute resolution model, in which motivations, feeling of hurts and disappointments are usually considered immaterial.

In reality, the process very often is characterized by a strong pro-mediation spirit.

Not by chance, the main arbitration institutions propose specimen of clauses to provide for more than one method of setting disputes.

More precisely, arbitration proceedings not only can be regarded as a crisp judicial decision, but also can lead to the well-known Solomonic awards. Especially in some domestic arbitration contexts the arbitrators are

[16] See BORN, I*nternational Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 5th Edition, Den Haag, 2016, p. 4 ss.

[17] See BORN, *op. ult. cit*., p. 7.

prone to act in this way. Coming to an arrangement is something that the parties expect in agreeing to arbitrate. In addition, for sure, three persons arbitration tribunals frequently seek to produce unanimous decisions which can result in some degree of compromise. And this approach can realise outcomes that may be somewhat less crisp and principled than those of a rigorous national court.

Furthermore, the proceedings can be conducted as an amiable composition or *ex aequo et bono*.

It means that the members of the arbitration panel are expressly authorized to decide and reach verdicts without being bound by strict rules of law.

It should be also mentioned the experience of high-low and baseball arbitrations.

In the first hypothesis the arbitration clause states a range of the possible monetary award and provides that the arbitrators may only grant a decision within that range. A range defined by a minimum and a maximum amount of money.

In the second hypothesis, each party shall submit to the arbitration panel its "last best offer" and the arbitration panel must simply select the "last best offer" of one party or the other. In different words the arbitration tribunal has no power to grant any award of damages, above or below the "last best offer". It means that the arbitrators shall be limited to choose only one or the other of the proposed figures submitted by the parties. Clearly the intention behind these models is to provide a financial incentive for compromise a dispute [18].

And even for these reasons, it is also important to clearly establish the applicable law to the arbitration agreement and to the arbitration proceedings. The International Institute for Conflict Prevention and Resolution (CPR) convened recently a group of experienced lawyers and arbitrators in order to write a book of guidelines on binding arbitration in business disputes [19]. The intention was advising parties not only that most gaps and claims are best resolved privately and by agreement and that the principals should be engaged in efforts to informally negotiate dispute first directly and, afterwords, if necessary, with the help of a mediator or a evaluator, but also that, even then, the door of a possible settlement should remain open.

The arbitrators, in particular, must encourage the parties to discuss a compromise and, if appropriate, to open or re-open a mediation [20].

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[18] See BORN, *op. ult. cit*., p. 99.

[19] See CPR, Guidelines on Early Disposition of Issues in Arbitration, in *info@cpradr.org*.

[20] See CPR, *op. loc. ult. cit.*

Also, in these circumstances principals may remain fully engaged in the process, retaining control over the final outcome and maintaining expectations of privacy and confidentiality.

Secondly, the more flexible frameworks of the arbitration agreements can fall into real integrated and stepped dispute resolution clauses. Clauses which have hybrid shape and include, one after the other, in sequence: friendly conversations, forced discussions, negotiations, mediations, conciliations with the intervention of third parties, early neutral evaluation, expert determination, dispute review boards, mini trial. Sometimes – another bad habit to leave – such options are embraced without much forethought regarding their operation and enforcement. But a poor drafting can add an extra layer of bureaucracy and leave parties without proper recourse to the arbitration tribunal or to courts.

And this kind of issues could also be used tactically to delay matters in an opportunistic way [21].

However, since now it must be precised the main differences between consensual and quasi-adjudicative remedies.

The effects of the outcome achieved during the process in the different context are not at all the same.

Every time a neutral is involved there is a matter in question about the binding, or not binding, nature of his or her determination.

Generally, the determination of the neutral is binding unless and until it is finally reviewed in arbitration or before a court. For business parties, mandatory arbitration proceedings are preferable to litigation before an ordinary court, but what ever one may say about the ability of arbitrators to fashion remedies appropriate to the circumstances, the practical reality is that arbitrators tend to adhere to the safe ground of recognized judicial remedies, rather than exercise creativity. This attitude exposes to the risk of a more extended judicial review and possible annulment or invalidation of the proceedings.

[21] See STIPANOWICH, *op. cit.,* p. 279, who highlights the possible several concerns about pre-dispute multi-step provisions and KANTON-PARROT, *op. loc. cit*., who describe the common pitfalls associated with the use of multi-tiered dispute resolution clauses.

6. The different roles of Neutrals: Negotiators, Mediators, Experts, Members of dispute boards, Arbitrators

A second crossroad consists in understanding and furthermore structuring the role of the different neutrals and the variable outcome of their different activity. Having in mind the still open issue if the same neutral may or may not serve distinct functions in the same dispute [22].

It is possible to appoint a person or an institution as a neutral not only if there are not conflict of interest, even at a potential level with the subjects largely involved in the dispute, but also if there is no correlation and social ties with the latters. Furthermore, specific professional skills and advanced experience in the fields interested by the claim could be requested and fully disclosed.

There are different techniques. There are in practice several permutations of hybrid resolutions. Negotiator, mediator, expert, evaluator, dispute reviewers and arbitrator can act properly and wisely in a plenty of ways [23].

[22] See ARAGAKI, *A Snapshot of National Legislation on Same Neutral Med-arb and Arb-med around the Globe*, in REYES-GU, *op. cit*., p. 25 ss.; REYES, *op. cit*., p. 417 ss. and STIPANOWICH, *op. cit*., p. 292 ss.

[23] See the explanation made by CAPPS-SNEDDON, *Tiered dispute resolution clauses*, in *https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---tiered-dispute-resolution-clauses/*, 28 Jun 2021, about structured negotiation, mediation, early neutral evaluation, expert determination, adjudication, med-arb, mini trial, dispute review board.

TYPE	EXPLANATION
Structured negotiation	This is negotiation at different levels within a corporation and often features in tiered clauses. So, for example, where a dispute arises the issues in dispute will first be negotiated by managers. If that proves unsuccessful the next stage is to move to negotiation between the senior managers and then up the chain until it ends with negotiation between the CEOs.
Mediation	This is the most common form of ADR and is a process which involves a neutral person (the mediator) actively assisting parties in working towards a negotiated agreement of a dispute. The mediator essentially facilitates settlement by bridging gaps between the relevant parties. Mediation does not result in a binding decision – it is not the role of the mediator to rule on the merits of the dispute - rather, the purpose of the mediation is to encourage the parties to reach a mutually beneficial settlement. However, if requested, the mediator may provide a mutual and confidential evaluation of each party's case which may assist in the negotiation process. For further information on the mediation process itself see our Quickguide on Commercial Mediation.
Early neutral evaluation	This is a process whereby the court provides a without prejudice, non-binding, early neutral evaluation at the request of the parties. This involves a particular judge in a matter or dispute providing a preliminary view on a question of law or a particular issue in dispute. It is usually more appropriate in disputes which revolve around questions of law rather than complicated issues of fact or quantum.
Expert determination	A process in which an independent third party, acting as an expert rather than a judge or arbitrator, is appointed by the parties to decide the dispute. The basis of an expert determination lies purely in contract, the parties having made a binding agreement to accept the expert's decision. If done properly it can be a very quick and cost-effective way of achieving resolution of a dispute. There are very limited rights of appeal which gives the parties finality and expert determinations tend to be used in disputes of a technical nature. For more information see our Quickguide on Expert Determination.
Adjudication	Adjudication is similar to expert determination in that it is a process in which a third-party neutral, the adjudicator, makes a binding decision on a contractual dispute. The right to refer the dispute to the adjudicator can be provided by contract or statute and is usually used in construction matters. In England adjudication applies to all construction contracts entered into after 1 May 1998.
Med-Arb	This is a hybrid between mediation and arbitration and can be used where mediated negotiations do not lead to a settlement. In those circumstances the parties can agree that the mediator becomes an arbitrator and issues a final and binding award on the outstanding matters. The process has been supported by various countries and institutions, including Singapore, Japan and China, but has not been greatly used in Europe. It has at least theoretical advantages but among its downsides is the risk that an aggrieved party could seize on the arbitrator's involvement as mediator to allege apparent bias or loss of neutrality. This could lead to the removal of the arbitrator or, conceivably, invalidation of an arbitral award. In addition the prospect of a mediator becoming an arbitrator can be perceived as inhibiting full and frank discussions in the mediation.
Mini Trial	A process in which a representative of each party makes a formal presentation of their best case to a panel of senior executives from each party, usually with a mediator or expert as neutral chairperson. Following the presentations, the panel meets and the usual format is for the chairperson to act as a mediator between the senior executives. Unless requested by the parties the chairperson does not make a binding determination. The process is confidential and without prejudice.
Dispute Review Board	A panel (usually three neutral individuals) is appointed at the start of a project and adjudicates disputes as they arise. The decisions are binding but can be challenged via court or arbitration. They tend to be used in large-scale construction projects.

Looking at mediation, for example, the following modes can be mentioned, even if – as well outlined – the reality shows the flexibility, the fluidity of their application and the frequent overlap of some of them. Expert advisory mediation; settlement mediation; facilitative mediation; wise counsel mediation; tradition-based mediation and, last but not least, transformative mediation [24].

But, of course, the most relevant factor to make mediation a success story is its quality.

Not by chance, in order to increase the role of the mediation inside the EU, in 2019 the European Parliament adopted a resolution – which is a measure not binding: it is a simple political desire – indicating a strong encouragement of voluntary codes of conduct, initial and further training of professional mediators and large provisions of information about the advantages of mediation to the general public [25].

As already highlighted, the determination or the evaluation of the nominated neutral could have, in one more than one hypothesis, binding effect [26]. But it must be recalled that if the neutral is operating or has conducted the activity not in an adjudicative context, the final control of the outcome still remains in the hands of the principals. They can accept the proposed solution, or they can challenge it and start a more formal, adversarial, lawyer-driven, extended in duration and may not be confidential procedure.

However, in this circumstance they cede and leave the control over the decision, that is likely to be final, to the arbitration tribunal or to an ordinary court.

Although, there are some more remarks to add.

There is no doubt that the chances of the parties to ventilate the real concerns take wider place outside adjudicative seats and certainly the inherent flexibility of all the other possible not-adjudicative remedies should be considered an advantage.

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[24] See Nadja Alexander, The mediation meta-model; The realities of mediation practice (2011), 12 (6), ADR Bulletin: The monthly newsletter on dispute resolution, p. 126.

[25] See CHAISSE, *op. cit*., pp. 377, 379 and 382 and GU, *op. cit.,* p. 19 ss., who stressed the fact that mediation can effectively reduce courts' caseload.

[26] However, even if parties voluntary agree to settle their dispute and enter into an agreement to that effect and if there is an high likelihood of compliance, it must be said that the problems of enforcing mediated settlement agreements exists under a strict legal point of view. In many countries a mediated settlement agreement can be enforced only by suing the defaulting party for breach of the relevant agreement. See, on the topic of the enforcing of Med-arb's outputs, REYES, *op. cit*., p. 437 ss.

At this respect, it must be recorded that the United Nations Sustainable Development Goals encourage every means of bringing constituency to the international framework of mediation [27].

But a settlement not always can be reached at an advanced stage.

Sometimes the parties want to have the capacity to make the more precise judgement about the strength and the weakness of their case, before they decide to resolve amicably or not the dispute. Occasionally they also want to know the composition of the arbitration panel and to have the opportunity to meet the arbitrators in person, at least one time [28].

7. In particular: Med-arb, Arb-med and Arb-med-arb models. Could the same neutral serve different roles in the identical case?

By the way, the practice has put in place experiences named Med-arb, Arb-med, Arb-med-arb (in fact, when mediation fails to produce a settlement in an advanced stage it is surely possible to regulate an Arb-med in a Arb-med-arb way [29]) and in all these circumstances the open and much more delicate question is, again, the following.

May or may not the same neutral serve the role of mediator and arbitrator or vice versa, in the identical case?

The answer given to this articulated phenomenon by regulators is an open book, far to be finished.

All the feasible solutions have been indicated.

Sometimes the option is prohibited, sometimes is permitted with or even without the prior consent of the parties involved, sometimes provisions don't exist, they are agnostic or seem unclear [30].

There are, of course, advantages and disadvantages.

On the one hand, familiarity with the facts, the matters and the nuances of

[27] See, in particular, the context of SDG 16, which aims to promote peaceful and inclusive societies and to provide access to justice for all and to build effective, accountable and inclusive institutions at all levels.

[28] Not by chance, it has been said that "Provisions to negotiate or to mediate prior to adjudication are a double-edged sword". See, CHAISSE, *op. cit.*, p. 364, footnote 8. Indeed, multiple tiers may create multiple risks.

[29] See REYES, *op. cit.*, p. 419 ss.

[30] See ARAGKI, *op. cit.*, p. 38 ss. In particular, the author remarks the circumstance that emphasis on same neutral has been posed on Med-arb more than Arb-med, see *ivi*, p. 61.

dispute can be considered a pros. But all information collected even in one-to-one meeting must be immediately disclosed, at least just before the adjudicative phase starts [31].

On the other hand, the appointment of the same neutrals in both the contexts can cause a problem of lack of confidentiality and can origin apparent or actual bias [32].

The mediation stage should be conducted carefully to prevent every kind of risk. Too much informality represents a consistent obstacle and particularly confidential meeting with single party should be avoided in principle.

On a psychological level – as anticipated – many bias cannot be under evaluated, but, at the end, the resolution process will depend on the persons engaged as mediator and as decision maker, and their appointment depend on a decision that parties can determine and monitor along the way.

For sure, these aspects could consent a possible attack versus the final award also on the ground that some material information obtained during the Med phase was not disclosed by arbitrators when Med shifted to Arb.

8. Some practical Indications and a Conclusion

In the end, the promotion of consensus and conciliation are in public interest and serve a commercial purpose [33].

There is a clear difference between an Arb-med or an Arb-med-arb and an arbitration proceeding *ex aequo et bono* [34]. In both the first cases, the parties maintain a total control on the possible decision, which is anyhow influenced by criteria not strictly legal oriented, and both of them still have the chance to obtain a final virdict of that nature, requesting the beginning of an adjudicative proceedings.

In the latter case – as already mentioned – the arbitrators must resolve the parties'dispute without being bound by strict rules of law. It means that this is the mandatory path to be walked by the arbitration panel.

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[31] See REYES, *op. cit*., p. 430 ss., who remarks the possible attack versus the outcome of the decision on the grant that material information was not properly disclosed by the arbitrator.

[32] See REYES, *op. ult. cit*., p. 436 ss.

[33] It must be recalled that the Covid-19 global crisis called for a "breathing space" in contractual relations and encouraged non adversarial forms of dispute all over the world: see LEIN, *op. cit*., p. 295 ss.

[34] See. REYES, *op. cit*., p. 435.

All this being said, the parties should have the option to follow alternative ways, much more flexible for their hybrid character and more useful for the same reason.

Indeed, the inherent flexibility should be considered a key advantage.

By the way, for practical and pragmatic reasons, innovative methods should be designed and promoted without compromising "due process" fundamental principles.

In this respect, the recalled drawbacks must be taken into account and faced in advance, thinking that the effective devolution, recognition and enforceability on the agreed clauses and consequent steps to be respected depend on several factors: the jurisdictional legal system chosen by parties, its traditions, and its multilateral cultural aspects.

Last but not least, the expertise, the negotiation skills either in process intervention or in problem orientations, the status, the standing in the community, the persuasive presence, the authority and the wisdom of the neutrals appointed from time to time should be carefully taken into account.

In every single case, it could be convenient to involve advisors, professionals selected on the bases of their expertise in the subject matter of the dispute, senior lawyers, mediators trained to refrain from advising the parties on the merits of the case and wise counsels sought out for their position and life experience rather than technical or legal knowledge.

In the light of above, much more emphasis should be put on these aspects even to try to mitigate opportunistic forum shopping practices that do not help at all.