Different types of Alternative Dispute Resolutions (in taxation field) between Contracting States within the European context, with the Italian domestic system as a starting point

Camilla Mazzucato

SNR 2087789

ANR 170397

PROGRAM International Business Tax Law & Globalization Tilburg University

SUPERVISOR Professor Diheng Xu

ACADEMIC YEAR 2021-2022

Alla mia famiglia

Table of Contents

Chapter 1 Introduction

1.1 General Introduction

This thesis is due to the fascination of the writer in the law of the European Union. Specialising in this field gives a sense of searching for a target that is constantly moving, it is especially true in the external relations field. European activity on the International scene is expanding rapidly, with a corresponding development of the legal concepts, principles, and rules. External relations law is bound to be affected by all that has been going on in the domestic system within the Member States. The research would continue focusing on the ADR system which can be defined as a unitary dispute resolution system consisting of the systematic and progressive recourse by litigants to primary, hybrid, or multiphase negotiation, mediation, or arbitration procedures in order to prevent and resolve disputes as efficiently as possible.
There are aspects of external relations law that remain deeply controversial, both technically and in terms of underlying political values. The aim of the writer is giving a clearer perspective as far as possible, or at least, humbly, trying to solve some of the most controversial points.

1.2 Research question and sub-research questions

The main research question this paper aims to reflect on is if there could be an advancement in the dispute resolution system, moving forward from the classic court litigation into a new system, the ADR, that nowadays hasn't really involved a real engagement in States disputes probably because of its novelty, but the writer profoundly thinks it has an authentic potential. The sub-questions linked to the main one are needed to have an expanded panorama decisive to reach a conclusion on the study, the sub-points would focus on the current difficulties and incorrect application of the methods analyzed and on an achievable solution to fix them.
The investigation would consist on the contemporary legislation within the European Union and, secondly, in the Italian context. Firstly the writer has to analyse the EU's external action, understanding its functioning and importance within the Union, secondly, it is crucial to evaluate the Treaties and legislation in force, trying to figure out the problematics inside them, thirdly the main research question would be on the ADR system, its pros and cons, the potentials and the unconvincing elements present nowadays. Lastly, the sub-research questions would occupy the advancements that can be made in the litigation framework in the next future.

1.3 Motivation of study

The motivation underlying the research is an interest in an area of international law of considerable institutional relevance and at the same time of great concrete importance. This paper is due to the growing importance of alternative dispute resolution systems in the global context. International and European Taxation and International Business Law are expanding fields that will continue to amplify in the contemporary era, so there is the necessity to analyse the subject and implement its provisions. Nowadays this field of interest has the focus of many studies due to the fact that there is the necessity to amplify the

resolution methods beyond the general option of court litigation, but contemplating original approaches could lead to a process easier, quicker, and, maybe in some cases, cheaper too.
It is a simple procedure that allows for a rapid and effective resolution of conflicts, thereby contributing to the easing of the judicial burden and the proper functioning of the internal market. The characteristics of the procedure, in fact, encourage the party to proceed without resorting to a judge and not to renounce the defence of their rights because of procedural delays and the, unluckily frequent, exorbitant costs of the process.
The acronym ADR refers to the alternative methods of resolving disputes that are increasingly gaining ground all over the world and that are considered by many to be a panacea to overcome the limitations and hindrances of ordinary justice. The use of this type of procedure is constantly growing, especially in recent years. For these reasons, the writer thinks that it is a topic noteworthy to be analyzed.

1.4 Methodology

The methodology used in writing this paper primarily focuses on cross analysing different sources and perspectives on the subject. The main idea behind this master thesis is the possibility to read different sources in several languages, in this way, there would be a more ample view, not centralised only on one approach in force in a Member State, but the final *cogitatio* would be forged by the comparison between assorted attitudes present all over the European context. The aim of this research is to focus mainly on the case law and the legislation inside the Community. The main goal is to give a concrete view on the topic, grounding the research on current legislation, especially in the EU. In fact, the benchmark of this work is to reach an answer to the main research question stated above, thus, are ADRs the new future for tax disputes?

1.5 Delimitations

This work will be conducted by scientific analysis to ensure the accuracy of the sources used. An examination of the directives, treaties, and laws, both at the European and national levels, has already been done in preparation for the writing. The conclusions reached would represent a crossing between the rules exposed in the discussed legislation, the case law, and the author's personal opinion.

1.6 Layout

The first chapter of this paper exposes the research's background, motivation, and methodology. In the second chapter, the EU external action will be explained to give a complete view on the matter and the ability to understand the further chapters. The third chapter instead will focus on the current legislation on the topic. The fourth would start to get more substantial with the exploration of the different types of ADR and concentrate on the issue in practice. The fifth would try to give a spotlight on the system in the next future, the possibility to implement the current ADR with advanced systems of online dispute resolutions and a uniform legal approach at the European level. Lastly, the explanation of conclusion reached will be carried out.

Chapter 2 EU External Action

2.1 Principles, values and institutions of EU external action

After the Treaty of Lisbon[1], significant changes had been made, the most significant is the unification of the matter within a single set of rules, called 'external action', the main articles on the topic are article 21[2] Treaty on European Union (TEU) and article 205[3] Treaty on the Functions of the European Union (TFEU). On the international scene, the European Union appears as an organization with a legal personality, equipped with external representation, founding principles, and goals to pursue.

The principles that define the EU's external action are multiple, such as principles of equality and solidarity, democracy, the rule of law, universality, and indivisibility of human rights and fundamental freedoms, and the respect for international law and the Charter of the United Nations.
The EU's external action is developed in many areas such as common commercial policy, development cooperation, economic, financial, and technical cooperation with third countries, humanitarian aid, associations with third countries or international organizations, relations with international organizations; Common Foreign and Security Policy (CFSP).

Concerning these areas, the performance of the various functions and operating methods must comply with an important principle, that is the so-called consistency, to explain briefly the concept, the EU must ensure harmony between the various sectors of external action and between these and other policies. The guarantors of this consistency are the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy[4].

However, the concept must be analyzed in detail to ensure the ability to understand it and the legal regime behind it. It is one of the most influential principles within the European Union, even if its importance is not in discussion, its definition has been the object of many juridical debates[5].
The starting point is in the word itself and in its translation into different languages present in the European area. The terminology variates from consistency to coherence, it is due to the fact that in other languages such as Italian or French the expressions used are *coerenza* or *cohérence,* because the literal translation in English would be coherence and not consistency. But in the English vocabulary, the two terms have a different meanings, the wrongful use could lead to a much different interpretation of the whole principle.

---

[1] Treaty amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306.

[2] General Provision on the Union's external action. Article 21 of Consolidated Version of the Treaty on European Union [2012] OJ C 326.

[3] General Provisions on the Union's External Action. Article 205 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[4] Paul Craig and Gràinne De Bùrca, *The Evolution of EU Law* (Oxford University Press 2021) pages 431-479.

[5] Marise Cremona, *Development in EU External Relations Law* (Oxford University Press 2008) pages 10-36.

The denomination of coherence would lead to the concept of "coherence of norms" that is a matter of their making sense by being rationally related as a set, instrumentally or intrinsically, either to the realisation of some common values or to the fulfillment of some common principles[6]. While the word consistency has a restricted meaning that can be approached by two different paths: the legislation of TEU[7] and TFEU[8] and the case law.

Regarding the treaties, consistency appears in relation to actions and policies of EU institutions, mostly in the field of external relations stated in article 21[9] of TEU.
Whereas in the case law it could be seen, thanks to the legal practice developed in the years, in the EU internal market litigation, where there must be internal consistency of national policies used by Member States to reinforce the allegation against the public exceptions provided by the treaties and the judgments of the Court of Justice of the EU (CJEU). To deep the reasoning there must be consistency at the basis, so in the effective transposition of European law into the domestic law of every Member State.

The objectives that the EU intends to achieve, within the areas supra mentioned, must respect the principles previously referred to. The EU, through its external action, aims to safeguard the values of the EU, its fundamental interests, its security, its independence, and its integrity, to consolidate and support democracy, the rule of law, human rights, and the principles of international law, to preserve peace, prevent conflict and strengthen international security.

Article 21[10] of TEU sets out the guiding principles and objectives of the Union's external action together with the principle of consistency in paragraph 3. Consistency is no longer limited to external action, it is meant as consistency between various sectors of external action and between these and other policies. The provisions of general application are completed by article 22[11] which gives the European Council the power to make decisions regarding the strategic interests and objectives of external action.
These decisions, which reproduce and develop the current common strategies, concern the CFSP and other areas of competence, in this manner the European Council has conferred a much wider power of directing on external action. The prominence attributed by the systematic collocation between the general clauses and the express provision that they refer to all sectors greatly strengthens their position, making them an act intended to oversee the major foreign policy choices of the Union.

---

[6] Neil MacCormick, *Coherence in Legal Justification* in Theory of Legal Studies Volume 176 (Dordrecht Springer 1984) pages 235-251.

[7] Consolidated Version of the Treaty on European Union [2012] OJ C 326.

[8] Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[9] General Provision on the Union's external action. Article 21 of Consolidated Version of the Treaty on European Union [2012] OJ C 326.

[10] Ibidem.

[11] General Provision on the Union's external action. Article 22 of Consolidated Version of the Treaty on European Union [2012] OJ C 326.

It is necessary to give an overview referring to the exclusive and concurrent competencies of the EU[12], especially in the field of economic and financial cooperation with third countries, in addition to all other areas that have external relevance. In these cases, the EU has shared competence with the Member States. An important principle that underlies the action of the Union in the case of shared competencies with the Member States should be noted, namely the principle of subsidiarity. The EU intervenes in the sectors that are not its exclusive competence only if, the objectives of the envisaged action cannot be sufficiently achieved by the Member States, at a central, regional, or local level, but that can be best realised at the Union level.

While on the one hand, this grants more freedom to States in the realisation of specific objectives, it can create certain tardiness in organisational and decision-making processes, copious uncertainties, and often a great number of shortcomings, in the context of foreign policy, as the EU does not present itself as a unitary and homogeneous subject.

The concepts analyzed, such as the principle of consistency, the principle of subsidiarity, the terms of exclusive or concurrent competencies, and the structure of the external action, are all needed to understand the ADRs between Contracting States, that is because the nations of the European Union do not operate only as States but, they are also, and especially, Member States.

This is their fundamental characteristic that leads to the obligation to follow the European dogmas and to try to act in the most uniform way possible. This matter is a cornerstone in the European area and in the way of acting of the countries within it. In other areas of the contemporary world the territories are sovereigns in their jurisdictions and can operate without any control, except the domestic one, for their internal decisions[13], also regarding the *modus operandi* in case of disputes regarding the tax matter, while European States have to comply with directives and regulations, that are dictated by the role that the external action has. EU is a recognized organization with legal personality, as it will be analyzed in the following subparagraph, so it could establish agreements with different nations, while MSs have to adhere to what is enacted, transposing the decisions taken into their domestic system in the way that the main goal that is wanted has to be reached by each European State. The impact of EU law regarding external actions, and thus the Alternative Dispute Resolution mechanisms (ADR), leads to two views, on one side the topics are left to the discretion of each Member State; on the other, EU law shall apply in a uniform and consistent manner throughout the entire territory. This dualism is the focus of this second chapter, it is essential to really comprehend that States within the EU can act in an autonomous manner, but they have to follow the intentions of the Union as a whole. Moreover, the EU is considered an independent body, but still is an agglomerate of different States, thus it has to act autonomously while also bringing back its decisions to the States' wills.

---

[12] Chris J. Bickerton, *European Integration: From Nation-States to Member States* (Oxford: Oxford University Press 2012) pages 150- 156.

[13] Of course they are bounded to international law, but the same can be said for Member States, for this reason international law is not taken into account. It operates in the same manner all over the world, so its analysis is excluded because it would not make significant change.

2.2 Essential characteristics of EU external action

Article 47[14] of TEU gave a new sphere of competences to the European Union, the most important recognition was the acknowledgment of the EU's legal personality[15]. The endorsement of the article clear the picture from the opaqueness that the previous treaties made on the ambiguity surrounding the concept of legal personality itself[16], there was a complication of retaining a separate international legal personality for the European Community and the pillar structure introduced in the Treaty of Maastricht[17]; moreover, it led to the concept of the EU as an independent entity in its own rights, it confers many abilities, such as, to conclude and negotiate international agreements, to become a member of international organizations and to join international conventions. The Union obtained a role of an organization itself, and not a simple *summa* of the Member States present within it.
The only limit to the legal personality of the EU is stated in the Declaration number 24[18] concerning the legal personality of the European Union, where it is explained that the Union is authorised to use its legal capacity to legislate or act within the competences conferred by the MS, it is not possible to exceed the conferral given by the Member States in the treaties.

The EU's external action is based on the supra-mentioned article, thanks to the legal capacity the Union has the ability to contract as an international organization, exercising the external action towards the other States. The main characteristics of EU's external action can be analyzed from this starting point. Firstly, it has the recognition by the international community, this concept is strictly connected to the second one because thanks to the recognition the EU has the ability to act and contract. This capability is limited by the funding treaties and the constitutional framework, they granted it only within the scope of the competences accorded to the Union. This means that the EU can act solely to reach a purpose stated by the treaties, any action has to be connected to the mission that leads to the conception inherent within the Union.
Following the reasoning, the next consideration must be the theory of unity, the challenge of the external action is to preserve unity between the Community and its members, and the action must be and appear as the cohesion of intentions from MS to European institutions; this seems, and is, a really hard task, the Union has to meet all the necessities and thoughts of the MS's executives, but it is an effort that has to be made to have a stronger strategy and policy.

---

[14] Final Provisions. Article 47 of Consolidated version of the Treaty on European Union [2012] OJ C 326.

[15] Alan Dashwood and Marc Maresceau, *Law and Practice of EU External Relations. Salient features of a changing landscape* (Cambridge university Press 2008) pages 70-103.

[16] Eileen Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press 2002) pages 36-55.

[17] Treaty of the European Union [1992] OJ C 191.

[18] Consolidated Version of the Treaty on the Functioning of the European Union. Declaration concerning provisions of the Treaties. 24 Declaration concerning the legal personality of the European Union [2016] OJ C 202.

These characteristics lead to the enumeration of four key principles of the EU's external action[19]. They are the principle of general powers, in other words, the ability to conclude agreements with third countries in relation to the objectives attributed to the Community by the treaties; the principle of implicit powers, or the circumstance that the power to conclude international agreements can also be derived from other provisions of the treaties; the principle of exclusivity, namely the fact that the Community is the only one to hold this power under the conditions indicated; finally, the principle of parallelism[20] which basically means that external actions must reflect the measures adopted internally, there has to be a match between the internal and external intentions.

At this point in writing, it is worth drawing some general conclusions regarding the EU's external action. The *datum* that mainly emerges is constituted by the wideness of the powers of external action that the EU has at its disposal. This result is the consequence of various factors which have, over time, extended the material scope of the European Union's external powers. The case of external action is configured in an atypical way in the panorama of the competences of the EU, it is the only sector for which a strengthening of powers has always been hoped for, rather than a diminution. It is certainly the field in which the Union's competences have enjoyed greater dynamic strength by the revision of the treaties during times.
In the present day, the effort that has to be made is to regulate the exercise, in order to preserve the spheres of MS's action. In this perspective, it becomes essential to enhance the principles of proportionality and subsidiarity, which allow limiting the impact of Community intervention.

2.3 Conclusion of agreements (art 216 TFEU) and the direct competence of CJEU (art 273 TFEU) in relation to the ADR system

A fundamentally important issue is the definition of the treaty-making power, there are two provisions that govern the competence to stipulate the agreements.
Article 216[21] TFEU clarifies in which circumstances the Union can conclude agreements with third States: "The Union may conclude an agreement with one or more third countries or international organizations where the treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the treaties, or is provided for in a legally binding Union act or is likely to affect common rules[22] or alter their scope"[23].

---

[19] Francesca Ippolito and Maria Eugenia Bartoloni, *The EU and the proliferation of integration principles under the Lisbon Treaty* (Routledge 2018) pages 195-204.

[20] Principle stated in Opinion 1/76 on the ERTA case C 22-70 Commission of the European Communities v Council of the European Communities.

[21] International Agreements. Article 216 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[22] The Court stated in the judgement on ERTA case that the Community has the power to conclude agreements whenever such a conclusion is necessary to achieve one of the objectives of the Treaty in the context of common policies.

[23] International Agreements. Article 216 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

It is notable that this provision contains a codification of the principles developed over time, especially by the Court of Justice on the subject of the jurisdiction of stipulation[24]. The aforementioned provision must be read in conjunction with article 3[25] of TFEU according to which the Union has exclusive competence to conclude international agreements only when provided by a legislative act, or when it is necessary to allow the exercise of its competences at the internal level, or when it may affect common rules grounding the EU itself.

Two personal considerations must be made immediately regarding what has just been written, one of a positive nature, the other of a negative aspect. Positively speaking, the introduction in the treaty of a provision that expressly extends the power of the Union to conclude agreements in all sectors is admirable. This codification, even if it was not able to avoid eventual disputes on the subject (since the text lends itself to be interpreted in relation to individual concrete cases) could certainly provide a solid basis for the interpretative work of the Court. On the other hand, it is impossible not to notice the difficulties of regulating a long, complex, and, at times, incoherent jurisprudence. The wide margin of interpretation in the assessment of the areas of competence falling within the EU could lead to different opinions on the same matter and a consequent lack of legal certainty.

The single procedure for concluding agreements is contained in articles 207[26], 218[27] , and 219[28] of TFEU. A central role in the conclusion of the agreements is attributed to the Council, which authorises the start of negotiations, defines the trading directives, and is entitled to the signature and the conclusion of the agreements[29]. The negotiator, or the head of the negotiating team, is appointed by the Council according to the subject matter of the envisaged agreement. On the negotiator's proposal, the Council adopts a decision authorising the signature of the agreement. The decision must be taken after obtaining the consent of the European Parliament, except when it concerns only the common foreign and security policy. The agreements can be adopted by majority or unanimity based on the sector affected and therefore the *quorum* required.

---

[24] Enzo Cannizzaro, The European Union as an Actor in International Relations (Kluwer Law International 2002) pages 51-77, 150-175.

[25] Common Provisions. Article 3 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[26] Common Commercial Policy. Article 207 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[27] International Agreements. Article 218 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[28] International Agreements. Article 219 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[29] Marise Cremona, *Development in EU External Relations Law* (Oxford University Press 2008) pages 38-95.

In this regard, the Court of Justice of the European Union possesses a strong influence and role. Under articles 272[30] and 273[31] of TFEU it is stated that the CJEU has the jurisdiction to give its judgment pursuant to any arbitration clause contained in a contract concluded by the Union, moreover the Court shall have the jurisdiction in any dispute between MS if it relates to the subject matter of the treaties also when the dispute is submitted to special agreements between the parties.

It has to be mentioned that article 272[32] of TFEU is an open provision, which makes the recourse to the CJEU available by virtue of optional clauses agreed in relation to contracts of public or private law, but there are no further specifications about its meaning. In light of this, and not as in the context of the institutional law of the European Union, it is not possible to predict *a priori* which form of a request for judicial protection can be proposed before the CJEU. The only clear thing is that considering the Court's jurisdiction to rule under any arbitration clause, CJEU must guarantee the parties full and effective legal protection. If in a given case, there is a question of a request for a declaration, the judges of the Union must also be required to rule on that demand, and they cannot, under article 272[33] TFEU, declare their lack of jurisdiction, taking refuge behind the fact that actions for a declaratory judgment have no basis in positive law or the fact that such actions are not available in other areas of EU law.

The importance of article 273[34] TFEU is denoted in inter state litigations. Disputes can arise by agreements, which can be of a bilateral or multilateral nature, and are in need of adjudication. This is when article 273[35] TFEU comes into play, involving inter-state disputes that touch upon EU law, but it is confined to cases where one Member State believes another MS has not fulfilled its obligations flowing from EU law.
The article is in line with general international law, in fact, to bring the case upon CJEU there has to be the consent of both Contracting States, the main benefit that can be made of it is that the parties can determine what the subject matter will be before the Court. Furthermore, there could be the claim's party to submit that the judgment has to be declaratory or has to ensure the performance of an international agreement.

However, it is critical to the understanding of article 273[36] TFEU that just because two parties consent to have an inter-state dispute before the CJEU, it is by no means guaranteed that the Court will accept the jurisdiction. In fact, the CJEU, when asked to adjudicate an inter-state dispute would find it beneficial to examine whether the given dispute is fully compliant with the admissibility criteria set out in the treaties.

---

[30] Institutional Provisions. Article 272 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[31] Institutional Provisions. Article 273 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[32] Ivi footnote 30.

[33] Ibidem.

[34] Ivi footnote 31.

[35] Ibidem.

[36] Ibidem.

Article 273[37] TFEU is an exception to the general rule, this concept is stated immediately in article 274[38] of TFEU, disputes in which the Union is a party, are not, for this reason, removed from typical procedures, except in cases where the dispute is attributed to the exclusive jurisdiction of the Court of Justice.

Consequently, Alternative Dispute Resolution options can be used for the types of litigation where there is not the exclusive competence of the Court of Justice of the European Union. Therefore, it is not excluded that appeals may be risen against the EU, its institutions, bodies, and agencies, whenever, in matters not reserved to the jurisdiction of the Court of Justice, there is a dispute on the interpretation, application, or validity of a contract stipulated with the Union or its organs, and the contract does not include a jurisdiction clause in favour of the CJEU[39]. A limit of the ADR options can be founded in article 6[40] of ECHR, the European Court of Human Rights (ECtHR) has held that an extrajudicial body can be considered to be a court if it clearly exercises judicial functions and offers the procedural guarantees provided for in the article such as impartiality and independence. Otherwise, the extrajudicial body must be subject to the control of a judicial body that has full jurisdiction and complies with the requirements needed.

Now that we have described the strength of EU's external action and the limits of ADR, it is the moment to analyse some legislation regarding Alternative Dispute Resolution systems.

Chapter 3 Legislation on the matter

3.1 General considerations

Under article 33[41] of the Charter of the United Nations, the States which are involved in some kind of dispute must maintain international peace and security, and shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Despite this preliminary statement, nowadays there is still the absence of some proper legislation regarding disputes' pacific settlements between States, probably this is due to the fact that the States want to keep their sovereignty and are not willing to cease their power of choosing the most proper method on a case by case basis.

---

[37] Ibidem.

[38] Institutional Provisions. Article 274 of Consolidated Version of the Treaty on the Functioning of European Union [2016] OJ C 202.

[39] Andrea Giordano, *Diritto tributario europeo e internazionale. Fonti, principi, singole imposte, tutele stragiudiziali e processuali* (Giuffrè Francis Lefebvre 2020) pages 123-145.

[40] Right of a fair trial. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [1977] OJ C 103.

[41] Pacific Settlement of Disputes. Article 33 of the Charter of the United Nations and Statute of the International Court of Justice [1945].

However, the analysis of the legislation on the issue is essential to understand the evolution process and the existing doctrine. The measures examined would take into consideration also the ones regulating cases of litigation between an investor and a State, that is for a better evaluation of the topic taking the stimulus from that type of normative to identify their strength and their weaknesses and see the hypothetical transposition into disputes concerning States. Even if the possible ADR systems would have different grounds depending on the fact that they are made for investors disputes or for States ones because the firsts would concentrate on the protection of the individual, while the seconds would focalised on the relationships between States, it cannot be excluded that they can develop the same result, *id est* the preclusion of court litigation and the implementation of consensual agreements. During the preliminary researches, it emerged the poor casuistry of the application of the regulations when there is the involvement of countries in the European territory, after the analysis of the current legislation it would be possible to reach final considerations regarding this issue and, as the benchmark of this work, try to articulate a potential way to actualise it.

3.2 EU Arbitration Convention 90/436/CEE

The unilateral solutions promoted by the various States, aimed at solving the problems generated in the taxation context, have been proved ineffective. For this reason, the need to find an international solution has been consolidated over time, the best result achievable was legislation promoted by the EU system. The first basis for a pacific resolution of the disputes was made by the Arbitration Convention[42] in 1990, in parallel to bilateral conventions and treaties. It was an additional tool between the EU States, which guarantees, or intends to guarantee, certain times and results in the solution of the case that the other bilateral conventions do not normally contemplate. The Convention was made to prevent double taxation occurs between enterprises of different Member States as a result of an upward adjustment of the enterprise's profits of one Member State.

The EU Arbitration Convention introduced an additional mechanism in respect of those cases where mutual agreement failed to resolve the dispute as a whole. The Convention provides for a mandatory and binding arbitration mechanism, according to which, if the Competent Authorities (CAs) do not reach an agreement within two years from the start of the procedure, the matter is referred to an independent consultative commission called to express an opinion for the purpose of eliminating double taxation. The opinion becomes binding if, within six months from when it is delivered by the advisory commission, the CAs do not reach an agreement.

The European Commission, following an analysis of the functioning of the described mechanism, found some critical issues in terms of, firstly limited scope of application; secondly, difficult access to the procedure, thirdly, excessive duration of the procedure; and lastly, scarce recourse to the arbitration phase.

[42] Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises [1990] 90/436/ECC.

But the problems of the Convention can be found in its preamble where there was a clear reference to the application of article 220[43] of the Treaty of Rome. This article was inviting the States to initiate negotiations among them for reaching the elimination of double taxation within the Community, but it has been revoked because its outcome resulted in a mere behavioural prescription, a mild invitation to accept a precept of good fiscal behaviour and certainly very far from assuming the effectiveness of a legal obligation.

In the concrete application of the Convention, several difficulties were encountered during the time in which it was operational, and only a handful of cases were resolved following the provisions of the Arbitration Convention. The reasons can be found starting from the purpose of the agreement mostly centred on transfer pricing disputes to the lack of clear rules for the correct practical procedure of the Mutual Agreement Procedure (MAP).
But above all, the absence of an international institution[44] that guaranteed and supervised the compliance of the obligations imposed on MS with regard to the provisions of the Convention.

Moreover, the critical issues highlighted at EU level by the European Commission are also widely found in the domestic environment in which both the legislator and the financial administration have intervened, severely limiting the possibility of using the Convention's tool.
Consider, for example, that according to the provisions of the Convention, the procedure is not applicable when one of the companies concerned is "liable to severe penalties"; however, as an example, this provision was declined by Italy at the time of its signature in the unilateral declarations, with the specification that by serious sanctions it is meant the penalties provided for crimes that can be configured, pursuant to national law, as a hypothesis of tax offense (thus also including the hypothesis of a mere false declaration) with the consequence that, on the domestic side, all disputes relating to transfer prices attributable to the criminal offense of unfaithful declaration cannot be solved by applying the 90/436 CEE Convention.

3.3 Article 25 of the Model Tax Convention and OECD Action 14 of Action Plan on Base Erosion and Profit Shifting

International tax disputes generally pertain to the Conventions for the avoidance of double taxation and the Arbitration Convention.
Double Taxation Avoidance (DTA) contains a specific tool for resolving disputes that may possibly arise between States, named the Mutual Agreement Procedure (MAP), outlined by article 25[45] of the Organization for Economic Co-operation and Development (OECD) Model Convention. Paragraph 3 of the article mentions that a MAP can be initiated by the Competent Authorities in order to solve issues relating to the

[43] General and Finals Provisions. Article 220 of the Treaty establishing the European Economic Community [1957].

[44] In 2002, the EU's Joint Transfer Pricing Forum (JTPF) was established, with the aim of providing assistance and advice to the European Commission on transfer pricing. However it could not give the certainty that was missing also before.

[45] Mutual Agreement Procedures. Article 25 of the OECD Model Tax Convention on Income and on Capital Consolidated Version [2017].

interpretation or application of the Convention. It enables also the CA to deal with cases of double taxation even if they are not within the scope of the provision, an example can be a double residence of a permanent establishment in two Contracting States.

Mutual Agreement Procedures can be defined as an institution of direct consultation between the Competent Authorities of Contracting States, that dialoguing in the most appropriate forms and with the common aim to reach an agreement, can prevent the rise of legal disputes by settling the problems through ADR.
It has to be said that these procedures, being colloquial and not fully formalized, did not work in a proper way during the past years, the context in which they operated was opaque. For these reasons in 2004, the OECD launched several initiatives to improve the functioning of the mechanisms for the settlement of international tax disputes. More specifically, on July 27th the improving process for resolving international tax disputes was started. Its origin was due to the fact that consultation in December 2003 has highlighted that businesses had concerns about the effectiveness of the mutual procedures and, for this, they were reluctant to use them in cases of disputes. This fact automatically leads to the nullification of the Convention's purpose, because the aim was based on the confidence that the competent subjects could have in the whole process. The trust in this procedure would discourage the adoption of unilateral solutions and tend to resolve more satisfactorily the controversies that may arise in the international tax law field.

Also crucial is the strict connection between MAPs and OECD, it is wanted to denote that OECD is a *consensus* organization that operates by soft law, so by principles and guidelines instead of laws and treaties. The connection is placed in the fact that also MAP is not a mandatory tool and there must be the agreement from both parties to engage it. Going further there can be found a correlation also in the approach of making a well-functioning mechanism work, even if they are different in many aspects they both need the confidence of the signer in the structure to make it operate in a proper way. The disbelief in the organization would lead to disuse and consequently to the obsolescence of the practices.

Action 14[46] of BEPS[47] project was made to fix the issues obstructing MAP process under article 25 of the Convention. The action introduced a Peer Review and Monitoring process of the initiatives adopted by the States, the establishment of the mechanism in question was essential to ensure the effective implementation of the minimum standards in order to give concrete efficaciousness to MAPs.
The document aims to provide all the information necessary to allow States to carry out an assessment of the dispute resolution mechanisms and it is made up of 4 parts, namely terms or references; assessment methodology; mutual agreement procedure statistics reporting framework; guidance on specific information and documentation for MAP assistance.

In the first part, the minimum standards have been transposed into 21 elements which complete the 12 best practices. Through the above-named section, the legal and administrative States' framework is evaluated, as

---

[46] Minimum Standard. OECD BEPS Action 14 on More Effective Dispute Resolution Mechanisms.

[47] The Action Plan on Base Erosion and Profit Shifting identified 15 actions to address BEPS in a comprehensive manner.

well as the efforts made for the implementation of the regulatory framework. The purpose is the delineation of methodologies for carrying out the MAPs within the individual States, analysing the fundamental areas, such as the implementation of the agreements or the availability and access to the MAPs.
The second part consists in the institution of detailed procedures and guidelines for the approach to the two steps constituting the peer review and monitoring process. So here is where the process is faced concretely. The two stages are stage 1[48] peer review and stage 2 peer monitoring. The first stage relates to the procedures for reviewing the implementation of the minimum standards already supplied. The second stage involves the examination of the measures adopted by the jurisdiction in order to fill the gaps identified in the first step. The third piece proposes a collaborative approach for the resolution of MAP cases through the adoption of common timings for both CAs.
The last part constitutes a *vademecum* for the Members regarding both the formation of the guides and the development of the MAPs themselves[49].

The aim pursued is assuring that Mutual Agreement Procedures arranged by the States would be effective and produce benefits. The process lets the Members review the measures already disposed of and evaluate the compliance with the minimum standards.
Moreover, it is expressly envisaged within the project how the methodological mechanism requires revisions and updates in the light of the experiences achieved following the completion of the review and monitoring procedures. This is due to the fact that the process has to be held updated during the years and not fossilise to the version of 2017. An example can be that on the 1st of February 2021, the OECD hosted a virtual public consultation during which institutional bodies, business representatives, non governmental organizations, universities, and others took part. The examination focused on improving the Mutual Agreement Procedure to enhance tax certainty, hopefully, this would be relevant for the next modification and implementation of the project.
The main slowdown that the BEPS Convention has is its non self executing nature, meaning that, each State will have to adopt a single ratification law, which will have effect on all the signatories and will have to notify the OECD of the list of bilateral treaties to which the Convention is to apply; with the consequence that it will be effective only with respect to the treaties identified and notified by the contracting parties. Nowadays there are still some countries that are missing the ratification of the Project due to their legal domestic bureaucracy[50].

In recent years we are witnessing the formation of a new panorama of international instruments, a decisive role is played by the BEPS Convention, which as soon as it is ratified by Italy, will modify the network of sources, procedures, and priorities. The aim is to make a profound change from the previous way of

---

[48] Some examples of Stage 1 procedures can be obtaining inputs (inputs that can be given by the other States); drafting and approval; adoption of reports for publication. While on Stage 2 there can be the monitoring of measures taken by assessed jurisdiction to improve the MAP regime.

[49] Antonio Viotto, *Overview del progetto OCSE in materia di Base Erosion and Profit Shifting (BEPS)* (Pacini Giuridica 2019) pages 205-211.

[50] The States that still have to ratify it are Italy, Bulgaria, Tunisia, Turkey and others. Website https://www.oecd.org/ctp/treaties/beps-mli-signatories-and-parties.pdf (last seen 15th June 2022)

conceiving the rules of international tax law, somehow completing a path that lasted several decades. In the classical conception, based on the exclusive attribution to the State of fiscal sovereignty, the only instruments that could be used to coordinate the claims of different States were bilateral conventions. In fact, they presuppose a conscious self-limitation of the sovereign sphere of the State consequent both to the choice of the Contracting States. Only under these conditions, which avoid surprises for each State either on the subjective side or on the objective side, can that partial renunciation of its own tax sovereignty be realised, which constitutes the prerequisite of the conventional discipline. However in more recent times, thanks also to the pressure induced by the effects of the global economic crisis, there has been a diffusion, even if limited, of multilateral instruments. The BEPS Multilateral Instrument (MLI) is a multilateral treaty with the function of modifying the system of bilateral conventions of the States that become parties to it. The multilateralism manifested by it would not serve to inaugurate a really new path in the management of the substantial discipline of the cases with elements of extraneousness; rather, it would represent a ploy to define once and for all a new regulatory framework, firmly based on bilateral conventions, without having to wait for the negotiation and consequent modification of each of the countless conventions against double taxation in force for each State. The MLI allows the direct and simultaneous modification of existing treaties, without these being replaced or integrated one by one. It should be noted that the amendments take place only for bilateral conventions notified to the depositary by both Contracting States. This approach is consistent with the need for speed and coordination of the BEPS project and at the same time allows governments to achieve their internal fiscal policy objectives without creating conflicts with existing treaties. Besides this, the previous finding does not exhaust the systematic framework profiles of the new agreement, there is, in fact, in its entire system an equally important function, that of transforming into positive law at least part of the recommendations formulated at the outcome of the BEPS project.

With regards to the Italian case, Italy participated in the signing ceremony of the Multilateral Convention on 7th June 2017 in Paris, however, it has not yet deposited an instrument of ratification, acceptance, or approval, so the Convention has not yet entered into force. Nonetheless, at the time of signing, the intentions regarding the exercise of reserves and options were provisionally communicated.
The Convention has been signed by more than 100 Jurisdictions but has only entered into force in a very limited number of States, so it can be concluded that the work of the international community is still in process and needs some implementation for reaching its initial scope.

3.4 EU Directive 2017/1852

As observed from the previous paragraphs, at the European level, there was no recognized provision administering a quick and reliable system for resolving tax disputes. The European Union had understood that, in order to obtain a single and free European market, it was necessary to remediate the lack of a recognized and binding European procedure for resolving tax disputes happening in the Member States.
It was, therefore, necessary to create a new directive that did not leave room for situations in which the various Member States interpreted or applied the provisions of the Arbitration Convention in a non-uniform way, and for these creating serious obstacles for cross-border operations. This need became even more pressing after the OECD forecasts, reached the anti-BEPS plan and the Multilateral Convention.

On the 1st of July 2019[51], the European response arrived, as a universal and sustainable procedure that came into force with the aim of creating a fairer and more harmonized tax environment.

The intentions that guided the Commission towards the birth of the Directive 2017/1852[52] were identified in the need to create a homogeneous tax system and mostly without procedural indecisions, which only entailed slowdowns and inefficiencies. The starting point for drafting the text of the Directive comes to life from the will of the Union to solve the limits encountered in the concrete application of the Arbitration Convention procedure. The main issue to solve was to create a procedure for the resolution of international disputes that had to be effective and efficient, but at the same time simple and sustainable, aimed at creating a legally certain and harmonized environment.

The principal goals were legal certainty for the subjects involved, defining with surety the procedural mechanisms for resolving tax disputes, especially with regard to time limits, terms, and conditions for taxpayers. For this reason, the Directive contemplates very strict timing that makes it dynamic and avoids the deadlock between one process and another; efficiency and effectiveness, simplify the resolution procedure, making it fast and essential, for this the dispute should be concluded within 4 years from its start; provide the process with greater transparency[53], article 18[54] provides for the full disclosure, prior the *consensus* of the interested parties of the final decision. If there is no consent, the CAs are still entitled to publish a summary of the final decision, which must contain a description of the problem, the object, and the final result; and at last, broaden the scope of application, by giving an extensive aim of application to the new directive than the very limited one of the Arbitration Convention. This last point, which is also the biggest difference with the Convention, is the starting point for creating a harmonized European environment.

It is noteworthy to see that in the preamble on the 10th point there is the consciousness that the objectives of the supra-mentioned directive cannot be achieved in a sufficient way by the MS, but they must be accomplished at the EU level according to the principles of subsidiarity and proportionality expressed in article 5[55] TUE.

The amicable procedure provided by the Directive is very similar to the one determined by the Arbitration Convention, which in turn is based on article 25[56] of the OECD Model Convention. The mutual agreement procedure can have two results: the first consists of reaching an agreement on how to resolve the dispute and

---

[51] The Directive entered into force on July, 1st 2019 and does not have retroactive effect, therefore it only applies to disputes regarding income filed from that date, while for disputes concerning capital filed from 1st of January 2018.

[52] Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265.

[53] Pasquale Pistone, *Diritto Tributario Europeo* (Giappichelli Editore 2018) pages 285-289.

[54] Publicity. Article 18 of Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265.

[55] Common Provisions. Article 5 of Consolidated Version of the Treaty on European Union [2012] OJ C 326.

[56] Ivi footnote 45.

in the consequent procedures to complete the procedure; the second consists of not reaching a common solution. In this case, the dispute resolution is entrusted to the Alternative Dispute Resolution Commission. The alternative commission is an *ad hoc* body created for the resolution of disputes and governed by article 10[57] of the Directive 2017/1852. It may differ from the advisory commission as regards its composition and form, it may also provide for more flexible operating procedures and be set up in the form of a standing committee. Regarding the resolution of disputes, it can be used the procedure stated in article 8[58] with an independent opinion, or the arbitration procedure with a final offer[59].

However, there are still present some criticisms, especially towards article 16[60] which provides for the possibility for the MS concerned to deny the dispute resolution procedure if there are active sanctions "for fraud, willful misconduct, and gross negligence". These terms are not directly defined by the directive, but, in article 2[61] it is specifically mentioned that the national definition of the States involved must be used. The lack of a recognized definition can create uncertainty because of the different interpretations that can be applied by the domestic law of Member States.

In Italy the directive was implemented through the Legislative Decree 49/2020[62], this decree establishes the rules relating to friendly procedures or other dispute resolution procedures between the competent Italian authority and the competent authorities of the other Member States[63] that derive from the interpretation and application of the agreements[64] and conventions to avoid double taxation on income and assets.

It is immediately noticeable that the decree has a very extensive application parameter. In fact, it also allows procedural questions to be conveyed within the scope of coverage, therefore also with regard to the interpretation of the MAP rules activated on the basis of other bilateral procedures. This perspective would seem to be able to create an intertwining of international procedures as a remedy for the inadequacies of bilateral instruments, laying the foundations for integrated, autonomous, and multilevel protection compared

---

[57] The Alternative Dispute Resolution Commission. Article 10 of Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265.

[58] The Advisory Commission. Article 8 of Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265.

[59] About these procedure there will be the explanation in Chapter 4 Different types of alternative dispute resolution methods.

[60] Interaction with national proceedings and derogations. Article 16 of Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265.

[61] Definitions. Article 2 of Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265.

[62] Decreto Legislativo of 10th June 2020, number 49. Attuazione della direttiva UE 2017/1852 sui meccanismi di risoluzione delle controversie in materia fiscale nell'Unione europea GU 146.

[63] Oggetto ed ambito di applicazione. Article 1 of Decreto Legislativo of 10th June 2020, number 49. Attuazione della direttiva UE 2017/1852 sui meccanismi di risoluzione delle controversie in materia fiscale nell'Unione europea GU 146.

[64] The use of this term would allow to include in the interpretation not only treaties, but also APAs if concluded on the basis of Article 25 OECD.

to the traditional way of internal processes. However, the doctrine believes that if problems of interpretation are raised, it would not always be possible to go into the arbitration stage, because the Agenzia Delle Entrate could refuse access to the procedure when the matter does not involve double taxation, it would be a rule related to the interest to act. Despite this, the directive, and consequently the decree, cancels the main weaknesses of the MAPs, which were the deficits in terms of certainty and timing. The previous solution relied on the expression "shall endeavour", therefore it was possible to justify all the inefficiencies behind the prospect of doing the best, but without having an obligation of result for the respect of times and certainties. While the two new tools ensure that a resolution can be reached through a mechanism of certain times, and in the event of failure of the MAPs, the triggering of a proceeding with an arbitration structure, becomes binding if accepted by the interested party.

In any case, there are still differences between the various legislations, for example, the model operating automatically in the BEPS Convention is referable to baseball arbitration as it is oriented towards greater decision-making speed, while according to Decree 49/2020 it would be favourable an arbitration according to law, positively more in line with Italian praxis. For this reason, the decision about the regime that can be adopted must be weighed, taking into account the most compliant procedural modulation on a case by case basis, thus implementing a cherry picking model.

3.5 Personal conclusions on the topic

As already written at the beginning of this paragraph the analysis of the past and present legislation has enormous importance to understand the issues behind the ADR system. It was intended to evaluate some precepts concerning it to have a broader view. The reasoning behind the comparison of different norms was the possibility to take the "best of both worlds", in other words, to take the benefits of the directives and the conventions and try to solve the problems that emerged during time so that they can be applicable in case of disputes between States.

Even if Directive 2017/1852 concerns mainly taxpayers and their protection, it could be transposed into the litigations between contracting States, at least in the part of the obligation to attempt to reach an agreement in fixed timings, terms, and conditions. The implementation in the last 5 years of the 2017 Directive and the already experienced caselaw regarding it could be a starting point for the pursuit of a more complete system when the litigation is not happening between a taxpayer and a State, but between the Member States.

Also, Mutual Agreement Procedures can be useful in case of conflicts, their *iter* is well established with the first possibility to reach an agreement within 4 years, and in case of failure the commitment of the parties to start a negotiation that would lead to a binding outcome. In this way there is not the chance of getting into a deadlock without a solution to the controversy, it can be called a fallback system because even if the first solution is not achieved, there is still the certainty that a decision would be reached.

This reality could affect the way of acting of the States assuring more confidence on *extra ordinem* methods, and that could also overcome the trust in the court systems. Given these guarantees, the main *ratio* for the Member States would concern the relationship between them. It is known that the political equilibrium may be subject to variations due to the smallest problematics, definitely in the case of a State suing another one before the CJEU, instead of the possibility of making use of an alternative method mainly focused on reaching an agreement in which only eventually the parties would go before a semi-process, but which regardless would lead to a response to the juridical issue arisen. It could be considered as a win-win since there would be a non alteration of the relation between the concerned States, *a fortiori* in case of reaching an immediate agreement, but also in the eventuality of a potential negotiation, given that it would have the ground of consensus, therefore for this reason deflationary of any litigation or discontent between States. All this without renouncing legal certainty and the demand for a binding conclusion of the dispute.
These ideas form the groundwork of the research project which is to be developed, as the author believes that they could only give benefit a society that will be more and more exposed to tax disputes.

Chapter 4 Different types of alternative dispute resolution methods

4.1 Responsibility deriving from the violation of EU law

The violation of the norms of the community legal system clearly entails the production of legal consequences for the subjects responsible for the conduct that led to the failure or incorrect application of the normative precepts. In particular, there are 2 levels of responsibility that can be identified: the liability towards the European Union produced as a result of the non fulfillment of the Community rules established in the treaties or in the derived tax law, it is called responsibility for non fulfillment. While the second type of liability is known as reparation liability, which is the responsibility towards the injured parties, which may be Member States, entities, or private individuals, to repair the damage caused and generate a realignment of national law with the European legal system.

It is important to note that the responsibility for non fulfillment essentially burdens MS and concerns both the violations committed by the State itself and the violations attributable to public administrations or territorial bodies since they are considered mere apparatuses of the State. But remains unaffected the faculty of the State to retaliate against the subjects who actually committed the error.
On the contrary, the liability for reparation is referred to as the single entities that have actually committed the violation of the Community rules, but it follows that the obligation to realign to the community principles always falls on the State as it is the main subject in the EU agreements and treaties. This responsibility also implies the obligation to restore the subjective legal position[65] affected by the violation through suitable legal instruments that can be compensated for damages or restitution for sums unduly obtained.

[65] The Court of Justice in its nomenclature defines the legal situation as legal positions.

4.2 Adjudicative and non adjudicative ADR options

Alternative Dispute Resolutions represent an episode of formation by private law, at the basis of the out of court dispute resolution formulas, there is always an arbitration clause, an arbitration compromise, or an agreement for a conciliatory petition. The choice of encouraging these alternative means is not accidental, the frequent disproportion between the modest economic consistency of the individual disputes and the time-costs necessary for the judicial resolution of the dispute has led the Community institutions to offer, in addition to traditional remedies, a series of non judicial procedures to allow a rapid settlement of their disputes at very low costs.

This formula is customary to designate a set of tools that are characterized by being alternative to ordinary justice. They are not based on the logic of confrontation, nor necessarily on the application of the law alone, but attempt to investigate more deeply the parties' requests, their needs, and the interests underlying the conflict. It is a set of various and heterogeneous tools that over time is being implemented precisely because it is removed from the logic of the fixed application of the law and by its nature modifiable and flexible The desire to attribute within the European context an instrument of guarantee complementary to the jurisdiction and therefore further to it has led the Union to favour the establishment of ADRs that are completely independent of the ordinary judicial power.

To start the explanation it has to be highlighted that ADRs are divided into two categories: Adjudicative ADR and Non adjudicative ADR. To briefly list the adjudicative ones are negotiation, good offices, mediation, inquiry, and conciliation, while the non adjudicative are arbitration and adjudication[66]. The main difference between the two is that the first ones are made to find a solution between the parties, with or without the help of a third person, the main goal is to reach an agreement between them and not impose a resolution made only by a subject not involved in the dispute. Moreover, as already said both procedures are based on the concept of *consensus*, but it has to be given in a different time period of the process. The diplomatic procedures result in the adoption of a non binding act that requires further consent of the parties to enter into force, while the non adjudicative means require the consent at the beginning of the process when the parties would accept that the decision taken by the arbitrator or the adjudicator will become binding, even if it is contrary to their interest, these types of instruments are characterized by the mandatory nature of the solution offered by the intervention of the third party and based on considerations that are rooted on law and legal principles. These second means are more similar to the *iter* that is followed by the courts but are distinct because the option to start them is not set by the laws, but by the parties' agreement, even if the outcome would be pretty much the same, a mandatory solution that the parties would have to apply.

The traditional means that would be analyzed are just three because in this way there would be the possibility to go more in detail and evaluate the most controversial aspects. The last part of the chapter would focus on different types of means that are working their way into the international tax panorama, namely APAs and hybrids.

---

[66] Attila Tanzi, *Introduzione al diritto internazionale contemporaneo* (Cedam 2022) pages 280-293.

4.3 Negotiation

Direct negotiation between the parties is the method most used by States to try to reach the settlement of an international dispute[67]. It is a process that consists in seeking a conciliatory agreement between the parties in case of a dispute, they would be assisted by their respective lawyers, without the help of third parties. This institute allows the parties to initiate a procedure in which the participation of lawyers is essential, as a co-managed procedure the outcome would be a conciliation agreement. The intended aim is the rapid resolution of disputes and eliminating the *apud judicem* phase, allowing the resolution of the dispute through the formation of a valid enforceable title[68]. Its main characteristics are being an alternative tool besides the ritual process and its self determination because the outcome would be a legal transaction.

The main role in this procedure falls into the figure of the lawyers that have to advise their client and try to find a possible solution that would be agreed upon by the opposite party.
There are three main strategies that can be used in the negotiation field, namely competitive, cooperative or collaborative[69].

The first one is about parties who adopt an approach to negotiation that want to obtain an agreement that is advantageous to them and detrimental to the other party. To do this, they try to intimidate the opponent, to make him lose confidence in his own negotiating strength, forcing him to accept the requests presented to him and convincing him to reach a compromise that is more disadvantageous than expected. Those who adopt this technique tend to open negotiations by presenting exaggerated requests, so as to be able to derive the maximum advantage from the negotiation and not to do, or make few, concessions, which are seen as necessary to avoid an impasse in the negotiation. Those who use this strategy believe that negotiation is a technique designed to divide existing resources and that, as they are limited, the benefit of one party is at the expense of the other. Consequently, an agreement is considered satisfactory when it is beneficial, regardless of whether it is fair. Therefore, those who are not interested in establishing a relationship of trust with the counterpart, allow the establishment of a stable business relationship. Even if there are some doubtless strengths for the party that uses it, this approach would not be useful in the long period for disputes that concern States. States and their representatives must try to solve the litigations that arise in the fairest way, when it comes to States there cannot be an unsuccessful party that has been exploited by the opponent. Moreover, the competitive strategy tends to emphasise differences and could create some misunderstandings, the negotiation could easily become a “battle” between the representatives of the States, which could lose sight of the real interests at stake.

The other strategy that can be used is cooperative, it focuses on reaching an agreement that is fair and acceptable to both sides. To do this, negotiations are opened by making concessions, presenting moderate

---

[67] Tullio Treves, *Diritto Internazionale. Problemi fondamentali* (Giuffrè Editore 2005) pages 580-586.

[68] Gianfranco Dosi, *La negoziazione assistita da avvocati* (Giappichelli Editore 2016) pages 1-10.

[69] Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2018) pages 167-182.

requests, which can be easily accepted by the counterpart, and sharing the information in possession. In this way, there is a demonstration to the other party about the will to reach an agreement and the commitment to ensuring it can be reached. However, this negotiation method works best when it is adopted by both sides. When, on the other hand, one of the parties adopts a competitive approach and tries to exploit the situation to his advantage, the one who adopts a cooperative approach just has to stop making new concessions, until the other party softens its position and begins to make concessions. Also, this strategy is not practicable, its aleatory could lead to unnecessary concessions with the advantage of the party that is not adopting it. Further, there is the possibility that the representatives take the settlement as the main goal of the dispute, rather than following the interest of the State and ensuring that the demands are met as satisfactorily as possible.

The last and maybe finest strategy is the collaborative one, in this approach the parties seek to find a solution to their conflicts that satisfies the interests of both, as the contenders aspire to maximise benefits and expand assets and resources. The competitors try to reach an amicable settlement in the dispute, a prerequisite for this technique to lead to a satisfactory solution for both parties is that the interests are not in sharp contrast, but there are only overlaps, on which, using a creative approach, it is possible to build an agreement. This style assumes the disputant working together to achieve a settlement that is objectively fair and meets the need of both groups, for this reason, the strategy is also called problem solving[70].

Seen all the strategies, it is largely notable that in disputes regarding States the most profitable policy that needs to be used during negotiation is the collaborative one, the reasons behind this choice are multiple. Firstly, the method has good chances of success because its focus is on the interests of the parties going forward, rather than the issues of the past; if both parties follow this form of negotiation is easily manageable because of its rationale; lastly, even if a total agreement could not be reached, the areas of conflict are frequently decreased, there could be some common views on a number of concerns that could find closure. Moreover, if a virtuous collaboration is made, there is the possibility to defuse eventual future conflicts because of the good faith that the parties have used during the negotiation.

4.3.1 Advantages of Negotiation

The main characteristics that differentiate this ADR from the others can lead to some pros and some cons. The principal advantage is that the parties are not left alone, they can count on their legal advisors. The lawyers have to work for the best interest of the client, so warning when they are exaggerating in their demands, but also when they are not requesting enough. The attorneys have to follow the deontological code during the negotiation, so the best gain of the assisted considering everything must try to be reached. Plus they are subjected to the duty of loyalty to the represented party and duty of confidentiality, the violations of these duties are sanctioned according to the deontological code[71]. Moreover, the consultant has a legal

---

[70] Gianfranco Dosi, *La negoziazione assistita da avvocati* (Giappichelli Editore 2016) pages 32-52.

[71] Fabio Diozzi, *Mediazione e negoziazione assistita. Tecniche di gestione delle controversie* (Giuffrè Editore 2017) pages 395-403.

background, he/she is a jurist, so should know the specific laws and practices that have to be used in the case. This is helpful when the concerned agent is not prepared in the law field, having the support of someone who is an expert in the matter can avoid improper settlement.

Another important aspect is the absence of thirds figure presences. Even if they could mitigate the conflict between the parties, there could be a further perspective that has not been analyzed yet. The fact that the parties are left alone without the mediation of a neutral figure could give them autonomy and self government, empowering and giving responsibility to the litigants could lead to a positive outcome, that is because the parties would know that they are unattended, assisted only by the lawyers, so the full responsibility of non reaching a settlement would fall on them. This type of pressure can lead to a real engagement of the parties that could collaborate for the production of the fairest agreement.

The last advantages are common to most ADRs, but they are important to be highlighted as well. They are the savings of costs and timing, these pros are maybe the intrinsic elements that lead the parties to engage in alternative resolution systems. The economy of costs and timeframe is an aspect that has to be reckoned with, in the *apud judicem* trials these two factors are linked to each other, the more is the duration of the process the more would be the costs. Looking at the statistics of the average trial, disputes before the CJEU have an average duration of 17.2 months, an increase compared to 2020 when the average was 15.4 months[72]. This parallel development in the total number of cases initiated and closed in 2021 also explains why the number of cases pending before the two courts remained stable at 2541, compared to the number of 2542 in 2020[73].

4.3.2 Disadvantages of Negotiation

The opposite aspect is the disadvantages of this alternative method. The main one has already been analyzed and regards the different strategies that can be applied, if the parties do not operate in a homogenous way, the outcome would be unfair because one party would benefit over the other's attitude. Different approaches would result in a settlement completely far from fairness, this could create strong divergences between the court approach and the alternative one, leading to the party's propensity to resort to the initial method that can guarantee legal certainty.

The other potential disadvantage has a double nature, it can be seen as an advantage but in some cases, it could become a con. It is the lack of a third impartial figure, as already written it could give responsibility to the parties and empower them to behave in the most honest manner, but in some cases, its absence could be a serious damage to the resolution of the dispute. If the parties start to get nervous and not cooperate together, a third body could mitigate their attitude and restore harmony during the discussion. If the neutral side is

[72] This phenomena could be explained by the measures adopted to mitigate the effects of the health crisis, including the granting to the parties of a further period of a month to present their written submissions or observations.

[73] Data taken from the web site of the Court of Justice of the European Union, web site https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-05/qd-aq-22-001-fr-c.pdf (last seen 15th June 2022).

absent the stress and agitation could escalate and the settlement fails, making effortless the recourse to the ADR method.

4.3.3 Italian overview on Negotiation

The statistics in Italy on the use of the negation process are auspicious because it can be seen an increasing trend in its use, at least in the domestic system. The data detected by ISTAT[74] at the national level shows that in 2019 the negotiation cases augmented to 37.7%, compared to the 32.2% in 2015[75]. This incrementation shows the willingness of the individual to seek redress to alternative means and not before the court, which could be taken as a starting point also for controversies that arise between States, that could shift the jurisdiction from the CJEU into different options, and negotiation could be one of them.

With regard to the Italian legislation, negotiation has been introduced in 2014, by d.l. 132/2014[76] that has been converted into law l. 162/2014[77], the scope of this law was meeting the demands of efficiency and simplification of the domestic judicial system. This contribution is in line with the previous reforms in the matter of conciliation, mediation, and arbitration, all of them had as their final purpose the extra judicial resolution of the disputes so that the court system could restart by deflating some litigations. In the drafting of the law, the legislator let freedom to the parties providing for a discipline of the procedure that is not rigidly structured. However, it regulates the proceedings of the methods, from the will of commencing the negotiation until its final phases. The last peculiarity is that the legislator stated that in some specific cases there is the obligation to try negotiation before undertaking the ordinary process. This is a step toward the djurisdictionalization and the abolition of the traditional conception of the centrality of jurisdiction.

4.4 Mediation

Mediation is a process in which an impartial third party, the so called mediator, assists the disputing States in resolving their differences or settling a dispute. There is not the requirement that a settlement would have to be reached, there is not the compulsion to resolve the dispute, but the aim is to facilitate the stipulation of an agreement between the litigating parties[78]. The key characteristic of this institution is neutrality, the mediator

---

[74] The Istituto Nazionale di Statistica, best known as ISTAT, is an Italian public research body that deals with general censuses of the population, services and industry, agriculture, sample surveys on households and general economic surveys at national level.

[75] Data taken from the web site of the Istituto Nazionale di Statistica, web site http://www.istat.it (last seen 15th June 2022).

[76] Decreto-legge of 12th September 2014, n. 132 Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile GU 212.

[77] Legge of 10th November 2014, n. 162 Conversione in legge, con modificazioni, del decreto-legge 12th September 2014, n. 132, recante misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile GU 261.

[78] Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2018) pages 224-259.

does not express an opinion on the merit, but incentives the parties to argue in a productive matter, so that they could autonomously find a solution.

The figure of the mediator covers the main role in this discipline, it can be said that the success of this means of ADR grounds essentially on the competence and expertise of the third party, it is his/her responsibility to conduct the mediation to a qualified achievement. As a consequence of this liability, the impartial figure has, or better, should be trained in the law, and in addition, should be prepared in the technical field relating to the dispute. These qualifications are not mandatory in the choice of the character, the parties are free to select whomever they prefer, the only mandatory requirement is compliance in the election of the mediator.
But it is clear that for a successful agreement, that would put an end to the litigation, a qualified chosen person would be the wiser option.

The role of the mediator also covers the common denominator of the three main models of mediation, namely facilitative, evaluative and transformative[79]. The differential aspects of these three schools of thought are essentially the function conferred and the nature of the intervention of the mediator.

The facilitative approach is the most widespread, it attributes to mediation the function of helping the parties to establish a path of dialogue and comparison that enables them to negotiate and find a solution together. The third figure focuses on the method, or rather on the process of interaction of the parties, without my interfering with their decision-making autonomy. This path is based on the assumption that the parties know their conflict better than any third body and that therefore from them can be born the best accord. Furthermore, the parties are more likely to respect an arrangement created by them, than one suggested by an outsider.

The evaluative method has as its primary aim the achievement of the agreement, the underlying reasoning is that from the agreement there is the possibility to lay the basis on which to rebuild the relationship between the parties. This method is given great importance to the analysis of the possible outcome of an eventual judgment and the comparison of costs/benefits, times, and risks of the judgment, all the preponderant factors in motivating the parties to define the dispute in an alternative way. The mediator uses techniques that minimise the opportunities for conflict expression, in fact, much of the work takes place through separate meetings between the mediator and each party, with the third in the role of the intermediary, who reports and re-elaborates the information, requests, and proposals from one party to the other. The valuation approach is considered more suitable for disputes of a purely economic nature in which the relationship between the parties is not particularly relevant. This method is therefore not very convincing in the State versus State dispute, but given its potential, it cannot be excluded *a priori*.

The last technique is the transformative one, the mediator does not have a solution-oriented directorial approach, but supports the parties in managing their own conflictual relationship and in changing it from destructive to constructive, creating a climate of communication based on mutual understanding, respect and

---

[79] Filippo Danovi and Federico Ferraris, *ADR una giustizia complementare* (Giuffrè Editore 2018) pages 109-170.

recognition. This model is based on two characteristics, empowerment and recognition, they are considered as values at the base of the transformative model in which the first is higher than the second. In the end, the agreement is seen as a mere consequence of an improvement in the interpersonal relationship.

All the approaches are valid ones and have the potential to solve disputes concerning States' controversies, maybe the second one is more peculiar and needs the ability of both parties and mediator to work in a proper way, but it could be implemented to be more effective. The reason behind the choice of one technique instead of another is really personal and depends on the skills of the third chosen figure. As an example nowadays in Italy, the most widespread technique is the facilitative one because the mediators are trained to use this style instead of the others, but also the transformative one is starting to develop, it is taught and spread by Quadra di Treviso[80], the only certified Italian training body that forms transformative mediators.
Analysing the entire system, in Italy, there was advancement since 1995[81] with the practical generation of mediators and schools expert in different approaches to mediation. This pilot experience was useful to the evolution of the tactics, adapting them to the specific Italian situation and making them suitable for operating in conflicts of a different nature.

4.4.1 Advantages of Mediation

Aside from the common advantages that the alternative options have, such as less onerous costs, stricter timings, flexibility, confidentiality, and so on, the main strength of this procedure, that differentiates it from the other possible choices, is, as already said, the figure of the mediator, that is because the intermediary can create a balance between the parties, mitigating the different styles of negotiation leading to a more comfortable discussion between them, furthermore, proposals offered through a mediator could be more appreciated, because they can appear more alluring than an attempt made directly by the counterpart, this regards also the concessions made by the third side can seem more assessable; plus with his/her patience, ability to listen, comprehension and authority can disarm eventual conflicts arisen between the parties with the encouragement to communication more constructive and at the end effective.

Another specific strong characteristic of this type of resolution's method can be the creativity, the parties are not obliged to consider options proposed by the third entity, such as a judge in the court trial or a negotiator in the negotiation process, but they are free to explore different alternatives that do not mandatory have to stick to common precedents, they are unrestrained to create innovative and ingenious settlements that best suit the underlying parties' concerns and demands.

The last main point that is wanted to be analyzed is that reaching a settlement by mutual agreement, which is a possibility that only the mediation has, is more likely to preserve a good relationship between the parties

---

[80] Quadra has been operating since 2003 as a private ADR provider for the management and mediation of disputes and civil and commercial conflicts. Web site https://www.adrquadra.com/ita/ (last seen 15th June 2022).

[81] Filippo Danovi and Federico Ferraris, *ADR una giustizia complementare* (Giuffrè Editore 2018) pages 109-170.

that an imposed solution. This aspect is fundamental in States relations because a well functioning communication can prevent the triggering of bigger and more complex disputes, maybe not only regarding taxation.

4.4.2 Disadvantages of Mediation

But seeing only the positive side would not give a complete view of the topic, so it is useful for the continuation of the research and also evaluates the negative aspects of the topic.
At the European level, the first one is that the standards used during the process are not harmonized yet, this is translated into the practice of non uniformity between the jurisdiction of the Member States with the existence of differences in the territories such as the training and accreditations of mediators; distinct codes of conduct of mediators; differences in the mode and frequency that mediation is promoted in individual States. Nowadays this ADR means is more common in international disputes and the hope that would be implemented also in State versus State controversies there is the need for the aspects of impartiality, neutrality, and confidentiality to be standardised[82].

Another contrasting issue can be the attitude of the parties, in this type of resolution is really complicated to distinguish between a genuinely sustainable position and mere posturing, not always do the parties contract in *bona fides* so they could claim certain solutions only to damage the opposite participant rather than reach a fair agreement. This approach could also lead to the lack of full disclosure of all relevant documents and information if a partaker disguises them because he would not benefit from the discovery of those proofs. The ADR process can be effective if, and only if, all the individuals at stake are really engaged in its success and if they follow the principles of transparency and good faith during the whole case.
The auxiliary concern related to the attitude of the parties involved can be the psychological subjection of one party against the opponent, this is more a political aspect that could occur in the eventuality of conflict between a State that is considered dominant in the European context or just superior compared to the State's party.

The last dubious argument is related to the role of the mediator, even if, as already said, he/she should be an adequate and capable figure, there are some points that could remain problematic, such as the correct evaluation of strengths and weaknesses of each party's case with the same level of accuracy, the *super partes* individual should remain neutral in the dispute, but it is justifiable an identification and empathy related to a party instead of the other, this could cloud the judgment and let him/her notice only some strengths or weakness in the disputant. The other problematic is that not always there is the possibility to a full quantification of the claim or the counterclaim, the whole process is based on the good faith of the parties, but not all the times this happens, the mediator could be deceived by the parties so that reaching a complete closure would not be achievable. But the case of not complete conclusion could also occur only for the reason of difficulty of the case, when not even the finest moderator could quantify the claim in its entirety. The last uncertainty in regard to this position is his/her integrity, despite the fact that the duty of mediating

[82] Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2018) pages 332-343.

should be assigned to a qualified and capable person, there is not the assurance that the role could be jeopardised by an attempt corruption from a party. It is important to underline again that these procedures would work only if all the subjects involved in the dispute would debate honestly, constantly guided by the principle of good faith. Only if these features would be respected there could be a satisfactory agreement, and a real evolution in these alternative methods[83].

With its strengths and flows, it is occurring the phenomenon of the growth of mediation in Europe, the success in Italy and in Europe must be measured not only in terms of quantitative dissemination, considered in itself, but, above all, in terms of recognition of its full citizenship in the context of dispute resolution, and in its prudent and balanced choice, based on the existence of adequate conditions, a decision that should also be made in the context of the proper functioning of the judicial system.
Thus, more than the quantity is important to analyse the quality, in Italy, for example, there is a constantly increasing rate of success with the reaching of an agreement of about the 47% (46,7%) in 2020, while in 2017 the rate was 43%. The rate is higher, about 50% in disputes in which the value is between 1000 and 10.000 euros. In 2020 the median value of the disputes was 11.650 euros, so a large part of the litigations had been solved using this alternative means of resolution[84].
The last data that shows the intensity of the trend is the necessary time to conclude mediation, also here there was an escalation in the last years, in 2014 the period to reach an agreement was 83 days, while in 2020 it has risen to 175 days. The need to have on average 92 days more could appear as a defeat for the process, but in my opinion, this is a symptom of the process' growth because it could be denoted that the cases had multiplied and that the necessary timings have inevitably enlarged.

The direction of the ADR process is even clearer if an examination of the phenomena in the UK[85] is made. Looking at the Eight Mediation Audit[86] of 2018 it can be observed that there is a very high overall success rate of mediation, with an aggregate settlement rate of 89%, also here the tendency has increased given the fact that the rate in 2016 was about to 86%[87].
These two examples within the European context are the cornerstone to understanding the development that has occurred in the last years, if a comparison of the last decade is made, it is immediately notable that the trend is regularly augmenting.

---

[83] Giuseppe De Palo and Dwight Golann, *Manuale del Mediatore Professionista. Strategie e tecniche per la mediazione delle controversie civili e commerciali* (Giuffrè Editore 2010) pages 157-224.

[84] Mediazione Civile ex D.L. 28/2010 Statistiche del 2020 intero periodo 1 Gennaio-31 Dicembre. Web site https://webstat.giustizia.it/Analisi%20e%20ricerche/forms/mediazione.aspx (last seen 15th June 2022).

[85] The data taken are before Brexit, so when the United Kingdom was still the the EU.

[86] It is a survey made by the CEDR (The Centre for Effective Dispute Resolution) of the attitudes of civil and commercial mediators on a range of issues with a primary focus of assessing how the market and mediation attitudes have changed over the previous years.

[87] The Eighth Mediation Audit A survey of commercial mediator attitudes and experience in the United Kingdom July 10th 2018 https://www.cedr.com/wp-content/uploads/2019/10/The_Eighth_Mediation_Audit_2018.pdf (last seen 15th June 2022).

4.4.3 Italian overview on Mediation

Regarding the legislation concerning mediation in Italy, the matter is regulated under the decreto legislativo 28/2010 that has implemented the Directive 2008/52/CE[88] which had the aim of cooperation, development, and harmonisation between different systems. The Union intended to dictate minimum rules to be observed in the event of recourse to ADRs, so Italy as a Member State had to carry out the same goals. The national intervention under the decreto legislativo (d.lgs.) 28/2010[89] stands out for having opted with great breadth and with peculiar provisions that have introduced a sort of Italian way to mediation, it seems to promote greater accountability of the involved parties and a concept of integrated justice that qualified the ordinary justice as an extrema ratio to use only after the failure of the alternative means. The Italian way of mediation meant the contemplation of mandatory mediation[90] and delineated a clear mechanism of concessions, mainly of economic nature. After the declaration of constitutional illegitimacy of the mandatory mediation, there was a substantial rewriting of the d.lgs. 28/2010, which lead to the introduction of the decreto legge 69/2013[91] transported into law 98/2013[92], this regulatory provision has undoubtedly revitalised the mechanism of alternative resolution introduced in 2010.
The discipline of 2013 follows the core idea of the original one, but it introduces significant changes in order to overcome the problematic risen in the past. The nucleus is the introduction of innovative measures of dispute management and finds its fulcrum in the provisions that reintroduce mandatory mediation in the light of the need to use the mandatory scheme as the only mechanism capable of guaranteeing the effective use of the deflationary instrument. There was an enhancement of mediation, giving the power to the ordinary judge to request the experiment of the procedure, this hypothesis represents the highest level of coordination between alternative instruments and the ordinary process and can be considered as the expression of the will to favour the entry into a new culture of the mediation.

Both negotiation and mediation belong to the same macro-category of adjudicative ADR, so they have multiple similarities in the process. Their main difference is in the role of the lawyer during the discussion. While in negotiation the lawyers of the parties normally carry out the whole development of the litigation, acting on behalf of the party they represent, so that they have the substantial control over the case; the mediation process instead does not subsume the presence of the lawyers, usually the mediator only interact with the parties, but it can happen that both parties and their lawyers would attend the encounter, in these cases the role of the lawyers would advise the clients, considering strengths and weaknesses of the potential offers that the parties would agree on.

---

[88] Directive (EC) 2008/52 of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136.

[89] Decreto Legislativo of 4th March 2010, n. 28 Attuazione dell'articolo 60 della legge of 18th June 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali GU 53.

[90] This concept has been abrogated by the Constitutional Court in 2012 because of the unconstitutionality of the precept. Sentenza 272 of 23rd October 2012 by the Constitutional Court GU 49.

[91] Decreto Legge of 21st June 2013, n. 69 Disposizioni urgenti per il rilancio dell'economia GU 194.

[92] Legge of 9th August 2013, n. 98 Conversione, con modificazioni, del decreto-legge of 21st June 2013, n. 69 Disposizioni urgenti per il rilancio dell'economia GU 194.

The importance of the inclusion of both practices could be inferred by the custom of using both negotiation and mediation in relation to the same case. In the circumstance that there is an impasse in the negotiation, the contracting panel could choose to shift into mediation, the same can occur when mediation is deadlocked in the early stages of the settlement, so it could arise the opposite switch into a negotiation that could reach an arrangement instead of going before the court.
This *consuetudo praeter legem* can explain the importance of the various methods of Alternative Dispute Resolutions, the use of one of these supplementary approaches does not preclude the possibility to opt for another type if the first one does not achieve the desired results. The main strength of the ADR is that they are interchangeable with each other because generally every one of them can be used to solve the litigations, there is not an impediment to use a type instead of another in a given case, but rather there is the choice of the method that suits better in the concrete case. The implementation of these mechanisms could not focus only on one of them, like nowadays that the most prominent technique used is the arbitration, but in the future, there should be a pursuit to develop in the same grades all the available options, so that States can have a wide variety of choices, a possibility that would lead to an increase in the decision of resort to alternative methods as a whole procedure compared to the judicial one.

4.5 Arbitration

Arbitration is the primary procedure through which to resolve disputes when both negotiation and mediation have failed. It is an alternative procedure of ordinary justice by means of which two or more parties agree through a compromise or an arbitration clause to delegate the resolution of the current or future dispute to private individuals holding the office of arbitrator.

The institution of arbitration does not always present itself univocally, depending on the perspective taken, it is in fact possible to identify different arbitration models characterized by peculiar traits and governed by specific rules. It is a typification that does not exhaust its significance in terms of mere dogmatic classification, but from which the consequences, on the level of the applicable discipline, are relevant.
It is possible to distinguish, from the perspective of the effects of the award, between ritual and non-ritual arbitration; from the perspective of the legal system, between mandatory and optional, from the perspective of the discipline of the arbitration procedure, between administered and ad hoc, from the perspective of the criterion of the judgment between arbitration according to law and according to equity[93].
These types are the most common ones, but this analysis is focused on new models that could change the actual perspective, and that could work on the State versus State disputes. For this reason, the study would concentrate on baseball arbitration or final offer arbitration.

Before going into detail on the method, it is important to evaluate the figure of the arbitrator. The possibility of effectively replacing ordinary justice presupposes the presence of a properly designated judicial body entrusted with the decision of the dispute. The appointment process is considered to be of voluntary

[93] Filippo Danovi and Federico Ferraris, *ADR una giustizia complementare* (Giuffrè Editore 2018) pages 45-105.

jurisdiction, the methods used to nominate the arbitrator, or panel of arbitrators, are obligatory written but they can variate according to the concrete will of the parties. The choice can be devolved to a third party or can be made following a binary clause by virtue of which each party design one arbitrator, and the two would agree on the third one. The mandatory requirements that an arbitrator must have are legal capacity, so the attitude of the subject to carry out legal acts aimed at acquiring or exercising their rights and assuming obligations; and there must be no incompatibility, which can be described as a situation that arises when the same person holds two or more offices at the same time or has some personal or professional characteristics which the legal system determines as conflicting. The appointment is in reality a mere proposal that is finalised only at the time of the relative acceptance of the assignment, that would be the outcome of the free and incoercible will of the subject. The role of the arbitrator is essential in this ADR because the third body would decide on the dispute and all its ancillaries, it has to be competent on the matter at stake, for this, it is not infrequent that the arbitrators are selected from a list of qualified persons in that field.

After this indispensable premise, the first reasoning that has to be done concerns the definition of baseball arbitration[94]. This kind of arbitration is also called final offer arbitration (FOA), pendulum arbitration, streamlined approach[95] , or in abbreviated terms “flip-flop”, “one or the other”, “straight offer”, “either-or” “last best offer” arbitration. In a nutshell just to give the first delimitation, as suggested by the many appellatives, it can be described as an arbitration procedure adopted by an advisory arbitrator, or a panel of arbitrators, which would give an opinion based on one of the proposals formulated by each competent authority of the States involved. The idea behind this resolution method is that the arbitrator is required to select one offer over the others, the third party cannot choose a midpoint between the offers or formulate a compromise proposal. So the States, conscious of the risk that an unrealistic proposal would not be chosen by the arbitrator, will make concessions to the other parties to get the acceptance of the dispute settler, the proposal cannot be too extreme or it will be rejected automatically and the choice will fall on the other presentations. In the end, the arbitrator must choose one of the offers and the selected one will be binding for both parties.

A peculiar form of this arbitration that variates from the general one is called “night baseball” arbitration, which requires that the arbitrator would make a decision without the benefit of seeing the parties’ proposals and then make the award to the party whose proposal is closest to what the appointee had deemed more fair and equal.

Further, there are other variants that consist of a final offer arbitration on an issue-by-issue or claim-by-claim basis. They are less stringent than the original one because each party submits its final offer on every separate question/claim advanced, and then the tribunal can forge the final decision by siding with one party’s offer on some points and with the other party’s offer on others, so basically there could be the combination of the two drafts. It is rather more complex and it has its controversy because the arbitrators

---

[94] Giuseppe De Palo and Dwight Golann, *Manuale del Mediatore Professionista. Strategie e tecniche per la mediazione delle controversie civili e commerciali* (Giuffrè Editore 2010) pages 43-52.

[95] Jérôme Monsenego, Introduction to Transfer Pricing (Wolters Kluwer Law & Business 2015) pages 160-167.

could just pick some solutions of a party and some of the other, just to find a common ground and a point between the opposite sides. But it also could lead to a more fair agreement with the choice of the most equitable positions given by each contractor. Everything is determined by the competence and the expertise of the dispute settlers.

The baseball arbitration method was born to shift the practice of "split the difference"[96] in traditional negotiating settlements, to explain in short terms in a typical negotiation the arbitrator would choose a compromise between the requests of the parties, thus in extreme simplicity, if a group requests 100 and the other 0, the result obtained would have been 50. The major unwanted effect is that the parties would attempt to exaggerate their demands, raising or decreasing in a significant way the amount, conscious that the arbitrator would agree to a middle ground. This undesirable, or better disloyal, the application is no more viable with the final offer technique.

Two are the main approaches: the independent opinion and the streamlined approach. The independent opinion method consists of a panel of arbitrators that have to solve the case in an autonomous manner in a range of 6 months. The streamlined approach is another denomination for the baseball arbitration, it is a quicker procedure that has to get a solution within 1 month period because the arbitrator has "just" to choose between the solutions proposed. The selection between the two approaches could be made on a case-by-case basis unless the disputing States have predetermined the type of procedure that they want to follow. The two mechanisms are outlined in the OECD Model Tax Convention and in the UN Model Tax Convention, whereas the first one has a preference for the independent opinion approach and the second one for the streamlined path. It is relevant to underline that independently from the procedure pursued the cases are mainly decided on the bases of tax treaties, domestic laws of the States involved, and the OECD Guidelines.

4.5.1 Advantages of Arbitration

Hence the main strength of final offer arbitration, probably the reason for its genesis, is that this mechanism encourages both parties to present reasonable offers because the choice of the arbitrator would necessarily be over one of the proposals. Presenting an extreme project will automatically lead to the approval of the counterpart suggestion, which could be defined as a defeat for the party that has not even tried to "win" the arbitration with a softer settlement.

Moreover, there could be a "battle" for the most reasonable offer in the time period in which the propositions can be adjusted after the parties have inspected the rival's suggestion. If the party considers its plan weaker in terms of conformity to UN Convention, tax treaties, and domestic law of the States, it could improve the vulnerabilities by modifying them to become more acceptable. Furthermore, the practice of splitting the difference is no more possible because, in the end, only one submission will be selected and there would not be a middle point reached midway.

---

[96] Roger I. Abrams, *Inside Arbitration: How an Arbitrator Decides Labor and Employment Cases (*Wolters Kluwer Legal & Regulatory U.S. 2020) pages 365-389.

Another important aspect is that the negotiating power gets on a subordinate ground, seeing that the offer would be selected following certain criteria of narrowing to the already mentioned laws, it does not matter the relevance of the party in the dispute but only the rationale of the assertions. For these reasons the litigants are more willing to contract in good faith, the fear of losing the settlement should lead to a *bona fide* bargain.[97]

In addition, a relevant fact is that a settlement has to be reached at the end of the arbitration, the arbitrator cannot conclude the dispute being neutral and without giving closure to the conflict, he would always establish a predominant offer among the proposals (in the following lines there would be proven that this pro could become a con in certain occasions).

Supplementary the decision taken by the panel of arbitrators would be binding for the parties that established the negotiation, this would conduct to a complete conclusion of the dispute. The defeated contractor would mandatorily fulfill the requests made in the victorious offer.

4.5.2 Disadvantages of Arbitration

On the other hand, the disadvantages are copious. The first one that appears immediately is that the arbitrator has a significant reduction of freedom in the decision, his power is shrunk to a choice between the two proposals. In the case where both solutions are drastic and exaggerated he is constrained to make a preference even if the two are not sufficient (or worst, illegitimate) in legal terms. As said in the previous part the arbitrator has to reach a settlement, so if both proposals are not in line with the tax treaties and the Convention one will have to dominate over the other, despite the fact that a totally different solution would have been achieved if the settler had more autonomy.

Another downside of a pro is the binding part of the agreement accomplished because there is not a written opinion, as said many times the arbitrator only chooses among the offers without giving his own opinion on the case, this influences its mandatory condition. The settlement will be compulsory only for the parties involved in the dispute, but it will not become a precedent for future cases and not even a support for the changes in legislation.

The timing concerning this procedure is also not very attractive, to start a Final Offer Arbitration the parties have to wait the passing of 2 years period during which the Mutual Agreement Procedure does not bring any result, exclusively after the deadline the FOA can be requested.
As well the limited appeals rights are problematic, the settlement is binding unless the decision is taken by fraud or corruption on the side of the arbitrator or the parties. Except for this case the parties do not have a 3 instances trial and the possibility to appeal if the first decision is not pleasant in their scope, they are bound to the choice made by the arbitrator.

---

[97] Micheal Palmer and Simon Roberts, Dispute Processes. ADR and the Primary Forms of Decision making (Cambridge University Press 2020) pages 213-224.

Another concerning factor is the poor relevance of the evidence, that is because the brief timings on the high low process could conduct to a decision despite the lack of a complete analysis of witnesses or information. In some cases could happen that although a settlement has been reached, new evidence emerges that would have switched completely the outcome if the panel of arbitrators had known them before. This is a concrete dilemma for the contractors that want to apply for baseball arbitration because due to the acceleration that the process undergoes there could be the possibility not to obtain the relevancies soon enough before the end of the settlement, once the decision is pronounced the parties are stuck to it, without the possibility to appeal or try to change the outcome.[98]

4.6 Comparison between the ADR analysed

To summarise the last subparagraphs it is useful to make a comparison between the three institutions. The distinction between arbitration and mediation is clear, it is based on two well-founded elements, namely the decision power of the third party and the nature of his decision. In arbitration the neutral third party issues a decision that binds the parties, a decision which must be based on law or equity, the award will rarely correspond to the interests of all the parties involved precisely because it must follow pre-established canons, the immediate consequence is that at least one party will feel discouraged to apply the decision spontaneously. While, as already written, the less restrained nature of the mediator could lead to a non binding creative proposal based on the offers and counter-offers of the parties and their interests, a decision that can also deviate from law or equity.

A common feature between negotiation and mediation instead is the search for an improvement in the quality of the agreements, the central aspect of an agreement wanted by both parties is that it can be qualitatively superior to the point of being able to reach a double victory for both parties, leaving them both winners and satisfied. The linked aspect is the procedures' flexibility in an attempt to avoid the rigidity of adversarial procedures, one of the main benefits of these two systems is their suitability to find solutions that are suited to the nature of the dispute and above all to the needs arising from it. This led to the concept that the procedure must adapt to the controversy and not vice versa, as it happens traditionally. While due to the strict factors governing arbitration these events are more difficult to occur.

The *fil rouge* that connects all these three practices is the third impartial figure, in the negotiation it is not present at all, in the mediation it has a really important role but the mediator has no binding power regarding the parties, ending with the arbitration where the arbitrator is the one deciding about the case so the most powerful figure within it. Anyway, being present or absent is the main figure in all the three ADR methods, it is a link between the threes and their main feature that characterise the entire process.

In the end, there is not a real classification of the ADRs analysed, they are all similar and different at the same time, each one has a peculiar form that can be adjusted in the concrete situation using a case by case base. But if a classification has to be made, it is notable that the most immediate one would definitely be the

[98] To be more exhaustive, the only possibility to invalidate the settlement is in case of fraud or corruption, not the extraordinary discover of evidences.

arbitration method, because once the arbitrator, or the panel of arbitrators, is appointed the parties would be less absorbed by the course of the events, substantially they would have to make their proposals and the third figure would be responsible to do the rest. It is true that this approach could be more unquestionable but in the writer's mind there is the more utopian idea of States' full commitment into, and during, ADR processes, the basic belief is that only through a serious liability of the concerned States the potentiality of the alternative methods would emerge, this means that States would not have to rely on a third figure but should be aware that the outcome would only depend on their actions.
Probably this path is more tortuous than the others, but the advantages that could derive are muchly sophisticated, that is because in this hypothesis the final result would be the avoidance of the disputes' initiation at all, the reasons behind this feeling are based on the trust that the States' empowerment would change the perception behind the arising of the litigations, creating some kinds of agreements that would implement States' relations and for that prevent the genesis of the disputes at the core, instead of simply arranging the emerged conflicts. I think that the final objective that ADRs should pursue is the attempt to create an environment where disputes are not raised anymore because the pacific resolutions would operate even before the emersion of potential litigation, acting *ex ante* and not *ex post*. There is the consciousness that this is probably a utopian view of thinking but only the flow of time with a concrete implementation of these systems would give the answers that nowadays are only imaginable.

4.7 Other Options

The traditional options of ADR were listed in the previous paragraphs, but it is important to state that it is not a complete inventory. The parties involved in a dispute can agree to any approach that they want if they are convinced that it would work. This field is in constant evolution and the options arising cannot fit in the conventional catalogue of adjudicative and non adjudicative means, for these reasons they are called other options, at least for now. The choices can be distinguished into two categories, such as the tool that can be used to prevent the rise of the litigation itself or the methods that can be a combination of the traditional instruments, trying to take all the benefits from each and leaving the disadvantages.
The reasons behind these new methods are found in the progressive increase of the phenomenon of fiscal conflictual at the European level is due to the growing mobility of taxpayers, the internationalization of economic activities, the increase of cross border transactions, and the different tax systems of the Member States that are poorly harmonized among them.

From an EU perspective, the judicial resolution of tax disputes represents the *extrema ratio*, given the fact that deflationary instruments have the scope of limiting and containing the distortion effects of international taxation, for that they are becoming the main path to follow in case of litigation. So has been created a heterogeneous range of institutions, in force or created specifically, to resolve or prevent the onset of tax disputes with a cross border characterization. The organs, not necessarily in reciprocal alternative, are essentially attributable to 4 distinct types, namely the Advanced Pricing Agreements; the non-conventional remedies of mutual agreements, or hybrids; the introduction of preventive and general rules; and the

cooperation in the control phase[99]. The last two tools are generic ways to avoid the issue *ab origine* through the achievement of agreements between the MS, they can be adopted by the drafting of common rules, or by the soft law tools resulting from cooperation, such as the generation inter state accords, or the spontaneous exchanges of data and information. However, the most interesting part is the first tool, namely the Advance Pricing Agreements, and the second one, the Hybrids, it is for this motivation that they would be analyzed in the next paragraphs.

4.7.1 Advance Pricing Agreements (APAs)

In the tax field, the interest in the topic of APAs derives from the solicitations of some qualified organizations such as the OECD and the International Monetary Fund, and from the recent European regulations relating to the automatic exchange of information.
The recourse to the institute includes various advantages, including the guarantee of legal certainty in the relations between the parties involved. This type of agreement is fully inserted in the tax compliance process aimed at developing the dialogue between taxpayers and the financial administration which, consolidating, has led to the creation of an information symmetry between the concerned parties. The main scope of the institute is the deflation of an eventual conflict.
To briefly define the APAs, they are agreements between EU's tax administrations that prescribe the taxation on future transactions happening between different MS. They can be unilateral or bilateral or multilateral, or eventually, they can derive from domestic law.

Leaving out the main subject of the APAs, namely the companies which have an international activity, the core concept of this agreement is to prevent disputes, establishing predetermined relevant elements for the purposes of fulfilling the tax obligation such as the transfer pricing scheme; the determination of the exit or entry values in the event of a transfer of residence; the preventive evaluation of the existence of the requisites that configure a permanent establishment; the attribution of profits or losses to the permanent establishment in another State of a resident company; and, the disbursement or receipt of dividends, interest, royalties, and other income components. They can be applied through bilateral or multilateral agreements concluded with the competent authorities of foreign States following the friendly procedures provided by international conventions against double taxation. They are also essential because of the exchange of information underlying their achievement, for this, the EU and the OECD are considering a network for the interchange of information relating to advance tax rulings when cross borders issue are involved[100], this would lead to greater transparency about tax positions of the States and also help to assess possible State aid. The proposal of EU consists in the amendment of the Directive 2011/16[101] and concerns the mandatory automatic exchange of information in the field of taxation. They could be applied in States relationships so that there

---

[99] Fabrizio Amatucci, *Diritto Processuale Tributario. Aspetti innovativi e criticità del contenzioso* (Giappichelli Editore 2020) pages 141-155.

[100] Jérôme Monsenego, Introduction to Transfer Pricing (Wolters Kluwer Law & Business 2015) pages 147-154.

[101] Council Directive (EU) 2011/16 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2016] OJ L 64.

would not be the necessity to initiate a dispute because the agreement subscribed would have to be applied because of its legal certainty. This could be a method that not only provides more trust in the tax field, but also it suppresses the compulsion to start litigation.

4.7.2 Hybrids

The experimentation with ever newer hybrid and multiphase procedures proves to be one of the main advantages of a dynamic conflict resolution system which consists of the constant search for formulas competent in identifying increasingly efficient mechanisms capable of adapting the procedure to the arisen disputes.

Some of the most common ones are the early neutral evaluation, the med-arb, and the arb-med, but the list has numerous other alternatives some already created, others that can be forged if needed.
The early neutral evaluation consists of the request to a neutral third party for a non-binding opinion on the probable outcome of the dispute, or on a particularly controversial point if it was brought before the court. This is done in order to facilitate or reactivate a discussion between the parties since in several cases the main obstacle to an agreement is the divergent forecasts of the parties regarding the respective probabilities of victory in the event of a dispute before the court. In such situations, the intervention of an external subject with experience in the given sector can be very useful for both parties to approach the negotiation in the light of realistic predictions.

The next two procedures are also known as biphasic because they are the mixture of two procedures, where if the first one fails, the second one would occur. The first one is the mediation-arbitration, it can be used in the event that the parties at the end of the mediation need a binding decision regarding unresolved issues, but do not intend to start a new proceeding that would take time and effort for both parties, the role of the arbitrator is covered by the mediator himself. In addition, to offer to the parties the opportunity to reach a binding outcome provides the mediator a means of pressure to induce the parties to agree during the same mediation, strong of the subsequent decision-making power the mediator/arbitrator can exercise a real influence on the litigants so that an amicable agreement could be reached[102].

The other hybrid procedure is the opposite of the previous one, it is the arbitration-mediation[103], the main difference is that the third figure has immediately the role of the arbitrator with the fundamental corollary of its power in governing the dispute process. It consists of a first phase of arbitration, where the award is established without bias from the arbitrator that has not entered into the vision of the parties yet. But before giving the award the binding nature, the arbitration is transformed into a mediation, where the parties try to reach an agreement, if all issues are resolved in mediation, the arbitration award is terminated and not used. If the parties cannot find a resolution in mediation, the arbitration award is given to the parties and it

---

[102] Susan Blake, Julie Browne, and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2018) pages 292-300.

[103] Ibidem.

becomes active. The advantage of this procedure is that it will lead to an outcome independently from the separate results of the two methods, it is impossible that both methods would fail. Moreover, the parties can be totally sincere in their relationship with the arbitrator/mediator because the award of arbitration is made in the first phase of the litigation, so during the second phase even if the third figure changes its mind regarding some issues at stake, he/she would not be able to modify the award. In this case, the parties have nothing to lose because in the worst scenario they would not reach an agreement through mediation, but they would have the award through arbitration. This could be inventive to a candid, genuine, and serious discussion between the involved ones that could reach an unexpected outcome.

4.8 Final considerations

In the social environment proper to international law, the solution of disputes between States does not take place in the exercise of a centralised judicial function carried out by superordinate judges with respect to the litigants, and on the solution based on a mere assessment of the law by the judicial bodies. Given the social basis and the structural characteristics of international law, non jurisdictional methods are considered more adequate and therefore more used, since, in addition to requiring the full consent of the parties for the dispute to be implemented, they are aimed not at establishing which State is right or wrong on the basis of law, but rather to agree with the parties of the dispute on a settlement that is welcome to all and effectively accepted. The assessment and application of the law are not a central aspect in the implementation of these methods, and for these reasons, ADRs are less taken into consideration by legal experts in the field, however, these are procedures of great importance and interest from the point of view of international law. The same includes them among the methods available to States to resolve their disputes and thus conform to one of the fundamental principles of contemporary international law, that of peaceful dispute resolution.

The two fundamental principles[104] that characterise international law are the principle of freedom about the choice of resolving disputes methods and the one about a peaceful, or better amicable, solution.
The first indicates that States have total freedom of choice as to the method by which they intend to pursue the solution of their dispute. That is on the basis of equality between States, the imposition of a certain method of resolution on a nation would constitute a manifestation of super ordination with respect to the State itself and would therefore be incompatible with the formally equal position in which all they are. The only possibility to keep the *inter pares* condition is to put in place a method that has been consensually chosen by all the States involved.
The second principle instead places a limit on the freedom of choice and, at the same time, a duty for States that are parties to international disputes, namely a ban on the use of force in international relations. In fact, it requires States to resolve international disputes by peaceful means so that peace, international security, and justice are not endangered. Meant in the sense that the principle of peaceful solution prevents States parties from resorting to the use of arms even if all States agree to start a war and to decide the dispute in favour of who was victorious in the armed conflict, this would be completely against the principle of peaceful

[104] Purposes and principles. Article 2 of the Charter of the United Nations and Statute of the International Court of Justice [1945].

solutions. Furthermore, also in this principle, the consensus is fundamental, it is because the conduct to ensure peace, security and justice has to be necessarily concordant between the States involved.

These peaceful methods of resolution should more appropriately be called models, whose respective characteristics are derived from the conventional legislation concerning the settlement of disputes and from the praxis practically carried out by States in their domestic system. Precisely the use of the term models is correct given that in the last decade it was noticeable the development of a free combination between more traditional models, which was no longer considered sufficient, which creates hybrid or mixed procedures which have characteristics of various models simultaneously. These methods are different from each other and each acts differently in achieving the resolution purpose. A common feature of all these methods is the nature of the agreement, in general, they are unsuitable for producing binding legal effects by reason of their mere execution, but the consent of the parties, which can be expressed *ex ante* or *ex post*, is required. Only after the *consensus* is reached the agreement would acquire a binding nature. Solely the possible conclusion of an agreement between the parties, following the completion of the method, will be suitable to settle the dispute, to bind the States to mutual respect of the arrangement reached.

Chapter 5 ADR in the next future

5.1 Raising awareness about dispute resolution mechanisms

The last two years have been characterized by the health emergency given by the Covid 19 pandemic. This metamorphosis, in addition to radically changing the lives of everyone, also created barriers in contexts that seemed to us to be among the most common and easily executable. It was a crisis in many respects new, unsettling, and certainly unexpected. After the first moment of total uncertainty and disorientation, however, there was the accomplishment of a non legislative response, which was able to solve the problems given by the social distancing and the forced isolation imposed in almost all States of the world.

In Italy as an example, the disputes encountered an initial period of paralysis that lasted for a couple of months, but the almost immediate reply was arranged with the technological means, continuing the started processes through the help of remote connections that allowed audio and video communication between the parties. Moreover, to decrease the quantity of the physical disputes before the courts and the judges, there was an incentive to appeal to alternative methods, through the advertisement and suggestions of the competent organs. This trend was already noticeable in the last decade, in which there has been an escape from traditional means, in order to arrive at new, and therefore potentially better, methods. In this manner, there was also an increment in the awareness of these alternative resolution methods, a major comprehension of their strengths and their weaknesses, that helped the bodies responsible to have a more general view which could implement the ADR systems too. This phenomenon can be defined as circular since the use of these tools leads to highlighting the critical issues and then managing to solve them, thus creating a greater influx of participation, that could underline the eventual concerns, and so on.

5.2 A new method: Online dispute resolution

The acronym ODR identifies the phenomenon of online dispute resolution, namely that the settlement of the disputes is reached online and not by physical presence, with a virtual system of meeting between the parties or between the parties and the impartial third figure, depending on the type of resolution method that has been adopted[105]. This evolution is due to the fact that people born after 1995 are considered digital natives, more used to technologies, and aware of the potential that can be exploited. Also, elderly people can improve their knowledge of technologies by becoming digital immigrants, even if they have been raised and educated before the development of digital technology, they are suitable to adapt and adjust so that the range of ODR would be affordable to everyone.[106]
In the case of State versus State litigation, this technic could be really useful since it prevents the mobility of the representatives of the States because the settlement can be reached by an, or a series of, online meetings.

5.2.1 Advantages of ODRs

The main advantage of this new system of resolution consists in this characteristic because the choice of the territory that would welcome the discussion is not that obvious. It does not regard the means of mobility that nowadays have reached a wide ranging of options and alternatives that could enable people to move effortlessly all over the world, but rather the choice of the territory for the reason that it could give an advantage to a party instead of the other. Each disputant would prefer to contract in its own nation that is, firstly because it could represent an initial statement of dominance and authority towards the opposite side, starting the discussion in the own country could intimidate the foreign party, that would have feelings of inferiority, a perception that could continue during the proceeding of the case and lead to a settlement more advantageous towards the hosting State. Secondly, it could involve also some psychological grounds for the receiving State that could feel more comfortable dealing in its territory rather than a foreign one.

Another important benefit, additionally to the need for physical presence that requires the ADR system, is that in ODR the dealings could start also when a contracting party is not available to be tangibly present. Eliminating this requirement could accelerate the whole process, avoiding bureaucratic delays that often postpone the final outcome. Instead with this new system the procedure could proceed without these types of obstacles.
All these potentially damaging factors would not occur anymore if a real implementation of the ODR system would be made in the future.

---

[105] Fabio Diozzi, *Mediazione e negoziazione assistita. Tecniche di gestione delle controversie* (Giuffrè Editore 2017) pages 275-296.

[106] Mark Prensky, *Digital Natives, Digital Immigrants* (MCB University Press 2001) on the Horizon vol. 9 n. 5.

5.2.2 Typologies of ODRs

There are three main distinctive hypotheses of online communication: the blind bidding model, or automatic negotiation; the open model, or assisted mediation; and, the e-arbitration, or the online arbitration[107].
The blind bidding model constitutes a practice in which there is not the presence of a third figure, the parties enter their proposed solutions into the automated system, communicating remotely via online connection systems. The settlement would be reached when the difference between the parties' proposals falls within an initially predetermined percentage, which usually fluctuates between 5% and 30%. Once the dissimilarity has reached the established percentage, the system elaborates its automatic proposal through a specific algorithm.
On the other side, the open model constitutes a form of mediation, the impartial party connects the litigants through email, online conferences, and virtual meetings in appropriate channels that allow compliance with the right of confidentiality.
Finally, the online arbitration entrusts the resolution of the dispute to a single arbitrator, or to a panel of three, the parties submit the subject of the dispute electronically via e-mail exchange, Skype, messages video calls, etc. The evidence is evaluated remotely by the arbitrator and the ruling will always be issued telematic.

All the procedures are terminated by the drafting of the minutes that can report the positive or negative outcome and that have to be signed by the parties. The most practical and in line with the digital natives' approach is that the settlement would be signed by the parties, and the third figure if present, as a digital document with their electronic sign and they share it by PEC with the digital sign. The document would meet the requirement of the written form and in terms of evidence is freely assessable in court.
This modern resolution system is determined by the EU Regulation 2013/524[108] in conjunction with the Directive 2013/11/EU[109] [110], this association of legislation aims to encourage the formation of stable rules coordinated and homogeneous that could grant the rapidity and effectivity of the resolution, thus the spread of e-commerce within a digital single market.
Nowadays the use of ODR is limited to controversies that have the characteristics of non complexity with narrow value[111], they are mainly used for disputes concerning individuals from different countries, using this method the litigation can be settled, while in its absence the quarrel would have remained unresolved, so they constitute a valid alternative to the waive of the claims.

---

[107] Leonardo De Oliveira and Sara Hourani, *Access to Justice in Arbitration* (Wolters Kluwer 2021) pages 221-251.

[108] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L 165.

[109] Directive (EU) 2013/11 of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L 165.

[110] These regulations focus on the consumer figure, but they are valuable to consider the new phenomena that for now does not possess a proper legislation. They are taken as an example to explain the concept, leaving the direct subject concerned external to the analysis.

[111] Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2018) pages 73-81.

The satisfaction of the parties for the use of this alternative instrument can most probably be traced back to the flexibility granted in the choice of the resolution instrument, but certainly also to the simplicity, cost-effectiveness, and speed of the procedure itself. Moreover, the decisions taken are published on the net, this factor could be useful also in the cases of State versus State because the reputation aspect has a significant remark, the representatives of a State want that the State fame remains unaffected, or better improves, but surely not negatively affected by the resolution of an agreement. The reason that could damage it is that a State has taken advantage of another one, maybe weaker during the negotiations, or a State had not done enough to accomplish the settlement itself.

However, taking a quick glance at the current panoramic, it is perplexing. Technologies relating to online dispute resolution have been developed and regulated on the basis of a regulatory framework that includes regulations and directives also concerning ADR, but the practice itself is very discontinuous and heterogeneous. The use of technology has not been extended in all countries in the same way, and in some, it appears to be marginal or non-existent at all.

Despite these factors, ODRs in the private sector had a quite success, this suggests the confidence that with an improvement they could be decisive also at the European level. The potential use of ODRs is so compelling that they could be called as a fourth party, because these procedures are capable of having an independent output to the management of the dispute, additionally to the contracting litigants and the third impartial figure. Of course, some are skeptical as to how far technologies can deal with intricate and arduous relationships and propose solutions that are likely to be accepted. However, technologies are constantly evolving, reaching new frontiers and overcoming boundaries, the issue that is bothering now the experts of the field would be passed through the proper progression of the legislation and digital world that could rationalise intensity in the most complex areas.

5.3 Uniform legal regime at the EU level

A system that is actually capable of responding to the specific needs of the society requires certain characteristics, these features include integration with ordinary jurisdiction. To this day ADR system is still seen as an alternative and conflicting one with the ordinary procedure, in a more evolved context it should be perceived not as mutual exclusion, but rather as a hopeful integration between the new methods and the statehood of the jurisdiction.
The other two characteristics are the progressive and systematic use of ADR procedures; and the training of all operators working in *extra forum* systems. The first one intends that the available procedures need to be ordered according to an internal logic that privileges the use of one rather than the other according to predetermined circumstances. moreover, their use should be systematic, ie foreseen in all cases deemed suitable. Finally, the last feature includes specific preparation and training, one of the macroscopic errors that are made is to consider the ADR a self functioning mechanism, but if the procedure is not conducted by expert and specialised figures there is very little chance of success in reaching a settlement.

The efficiency of any ADR system strictly depends on the existence of the above mentioned characteristics, but unfortunately today in there is not a single European country where these are present to an extent that could be considered attractive. There is the need to implement the system that has to be done at the European level, as already written in the drafting of this research paper, the Member States of the European Union are not only nations that operate without any type of cooperation between them, but they have to be considered as a whole subordinate to the respect of the Union laws, this subordination is also at the same degree for all the MS, irrespectively from their time within the EU, the countries have to be considered in the same position without distinctions for the maintenance of the Union principles and goals. Acting from the EU stratus would prevent the supremacy of some States over others, imposing their view on the matter, and would hopefully create a unitary discipline that could be applicable in State versus State disputes[112]. Furthermore, the implementation of a consolidated and coordinated discipline would amplify the phenomena of Alternative Dispute Resolutions that is because the States would have the possibility to recur on these methods for the legal certainty that it would derivate.

Conclusion

In the field of European and International law, the euclidean axiom "given a conflict" sees one and only one answer passing into the point of its solution, the judge's sentence[113]. The ADR approaches, instead, see and can reach a multiplicity of parallel solutions constituted by the different techniques applicable in relation to the typology of the parties and the characteristics of the conflict. The outcomes depend on the skills of the parties and third figures and can be reached immediately or after a necessary, more or less tortuous, path. Conclusively the Euclidean solution needs the judge, while the other multiple parallel solutions do not. This is a symptom of the evolution that is occurring in the field, a development that would not need anymore the decision of a third extraneous individual that would state who is right and who is wrong, but the awareness and consciousness of the disputants themselves to establish and agree on a settlement to the inevitable conflicts that would always arise.

The passage from the imposed order to the self determined one also reconstructs a different relationship between justice and judgment[114]. Traditionally the first one has been pursued thanks to the second, in the ADR the perspective is shifted completely, and the pursuit of justice renounces its pivotal instrument of external judgment. If there is the wish to see a judgment, it is the self judgment that the parties have to do on their own firstly; and, secondly, together, meaning the identification of their own responsibilities and the acquisition of the awareness that one becomes responsible towards the other. ADR system promotes an act of

---

[112] Antonina Bakardjieva Engelbrekt, Niklas Bremberg, Anna Michalski, Lars Oxelheim, *Trust in the European Union in Challenging Times* (Springer International Publishing 2019) pages 181-211.

[113] Elisabetta Silvestri, *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa* (Giappichelli Editore 2020) pages 1-30.

[114] Jacqueline Morineau, *L'esprit de la médiation* (Eres 1998).

responsibility that does not derive from an external constraint, but from a dialectical path of knowledge, and which tends the same to the restoration of the right infringed.
To fully achieve its objectives, the characteristics listed in the elaboration of this research should be present in their ideal form, ie in conditions tending to perfection. Although the level of perfection is difficult to reach, the more these strengths are present the more it will be possible to achieve the set goals. This is the reason behind a real unitary implementation of the ADR system at a worldwide level.

As already written in the previous chapters, at the European level the essential role for a real implementation is done by the principles which govern the Union. The main focus has to be on the EU's external action that is because through this means there is the concrete possibility to develop the system of ADR not only within the European territory but also in a worldwide context, EU as an independent legal person can act, contract and establish a set of rules for the application of alternative options, these standards could be applicable in cases of EU disputes versus third States, but also through the principle of consistency in the disputes between Member States. In this way, not only external relationships would benefit from a more pacific resolution system, but there could be a disarming of the eventual European internal conflicts. The gain would not terminate at this level, but the consistency principle would also affect the domestic system of MSs, the principle establishes an effective transposition into the internal law so that there could be an increase in the legislation at all the levels possible, starting from the relationships at global level, going into the European context and finishing in the single nations. Naturally, the aims pursued would differ with regard to the level at which the ADR would operate, in the case of relations between all the States it would be the avoidance of the escalation of the conflicts; in the cases of Member States there would be the same need, but in addition, there would be the respect of the ideology behind the creation of the Union, that is, not only a diplomatic alliance but a real engagement of the States to act as a whole, to consider them as a unitary group moved by the principle of solidarity between the participants; in cases of the internal level there would be the prevail of the protection of the taxpayers and the support in eventual diatribes. However, the thing that would not change regardless of the level of application is the main scope, which would still be the reach of an agreed resolution without the need to go before the courts when discord arises.

We have seen that the possibility of recurring ADR is constantly growing, it is sufficient to recall the situation that occurred in the last 4 months between Russia and the whole world. After the war started, it was immediately knowable that the only adequate response was imposing sanctions on Russia. The EU adopted five sanctions packages in response to the military attack on Ukraine and some of the measures were intended to impose clear economic and political costs on the Russian political elite responsible for the invasion. Among these penalties there are, the restricting access to EU primary and secondary capital markets for certain Russian banks and companies; blocking access to SWIFT for certain Russian and Belarusian banks; banning public financing or investment in Russia; ban on investing in or contributing to projects co-financed by the Russian Direct Investment Fund; and the exclusion of importation or exportation of specifying goods to Russia. Other than the sanctions, the response was also starting a negotiation process between the States to stop the war and to find a solution regarding customs and tax matters.

It is interesting to analyse a survey made by the Institution Demopolis[115] on the 18th of May 2022 in which it asked about the opinion of the Italians towards the war and its effects; and what was the most reasonable action that the EU could carry out. The 68% of the respondents answered that it would be desirable that the EU undertakes to assume a mediating role between Russia and Ukraine to reach an agreement[116]. The curious data emerging from this pool is that also at the Italian level, the population is starting to appreciate the potentiality of the ADRs, the society is probably ready for the implementation of these new methods, they acquired notoriety in the last decade and now there is the feeling that they could be an innovation in the global panorama. This war and its economic effects are the widest that the contemporary era has experienced since the Second World War, but nowadays the world has evolved and the States are more prepared and have more tools to resolve this kind of dispute than they were before. The fascinating characteristic is that the main tool that the population, at least in the Italian context, wants the States to use is a pacific resolution system, the key to the success of this practice is continuity, the lack of it would create skepticism about the reliability of the program. This has not happened in the project of ADRs, but instead, there has been a regular upgrading to their functionalities, which intensified the fidelity of the tools. This is the core of this research paper and the hope for the future, to implement these systems so that the process before the courts would become the exception, and this procedure the habit and the legacy for the next generations.

[115] The National Research Institute Demòpolis studies the trends of Italian society with targeted skills in the analysis of public opinion, in public opinion surveys, in social, political and market research, in communication and strategic consultancy.

[116] Data taken from the web site https://www.demopolis.it/?p=10301 (last seen 15th June 2022).

Bibliography

- Roger I. Abrams, Inside Arbitration: How an Arbitrator Decides Labor and Employment Cases (Wolters Kluwer Legal & Regulatory U.S. 2020) pages 365-389

- Fabrizio Amatucci, Diritto Processuale Tributario. Aspetti innovativi e criticità del contenzioso (Giappichelli Editore 2020) pages 141-155

- Antonina Bakardjieva Engelbrekt, Niklas Bremberg, Anna Michalski, Lars Oxelheim, Trust in the European Union in Challenging Times Springer International Publishing 2019 pages 181-211

- Chris J. Bickerton, European Integration: From Nation-States to Member States (Oxford: Oxford University Press 2012) pages 150- 156

- Susan Blake, Julie Browne, and Stuart Sime, A Practical Approach to Alternative Dispute Resolution (Oxford University Press 2018) pages 73-81; pages 167-182; pages 224-259; pages 332-343; pages 292-300

- Enzo Cannizzaro, The European Union as an Actor in International Relations (Kluwer Law International 2002) pages 51-77, 150-175

- Paul Craig and Gràinne De Bùrca, The Evolution of EU Law (Oxford University Press 2021) pages 431-479

- Marise Cremona, Development in EU External Relations Law (Oxford University Press 2008) pages 10-36; pages 38-95

- Filippo Danovi and Federico Ferraris, ADR una giustizia complementare (Giuffrè Editore 2018) pages 45-105; pages 109-170

- Alan Dashwood and Marc Maresceau, Law and Practice of EU External Relations. Salient features of a changing landscape (Cambridge University Press 2008) pages 70-103

- Leonardo De Oliveira and Sara Hourani, Access to Justice in Arbitration (Wolters Kluwer 2021) pages 221-251

- Giuseppe De Palo and Dwight Golann, Manuale del Mediatore Professionista. Strategie e tecniche per la mediazione delle controversie civili e commerciali (Giuffrè Editore 2010) pages 43-52; pages 157-224

- Eileen Denza, The Intergovernmental Pillars of the European Union (Oxford University Press 2002) pages 36-55

- Fabio Diozzi, Mediazione e negoziazione assistita. Tecniche di gestione delle controversie (Giuffrè Editore 2017) pages 275-296; pages 395-403

- Gianfranco Dosi, La negoziazione assistita da avvocati (Giappichelli Editore 2016) pages 1-10; pages 32-52

- Andrea Giordano, Diritto tributario europeo e internazionale. Fonti, principi, singole imposte, tutele stragiudiziali e processuali (Giuffrè Francis Lefebvre 2020) pages 123-145

- Francesca Ippolito and Maria Eugenia Bartoloni, The EU and the proliferation of integration principles under the Lisbon Treaty (Routledge 2018) pages 195-204

- Neil MacCormick, Coherence in Legal Justification in Theory of Legal Studies Volume 176 (Dordrecht Springer 1984) pages 235-251

- Jérôme Monsenego, Introduction to Transfer Pricing (Wolters Kluwer Law & Business 2015) pages 147-154; pages 160-167

- Jacqueline Morineau, L'esprit de la médiation (Eres 1998)

- Micheal Palmer and Simon Roberts, Dispute Processes. ADR and the Primary Forms of Decision making (Cambridge University Press 2020) pages 213-224

- Pasquale Pistone, Diritto Tributario Europeo (Giappichelli Editore 2018) pages 285-289

- Mark Prensky, Digital Natives, Digital Immigrants (MCB University Press 2001) on the Horizon vol. 9 n. 5

- Elisabetta Silvestri, Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa (Giappichelli Editore 2020) pages 1-30

- Attila Tanzi, Introduzione al diritto internazionale contemporaneo (Cedam 2022) pages 280-293

- Tullio Treves, Diritto Internazionale. Problemi fondamentali (Giuffrè Editore 2005) pages 580-586

- Antonio Viotto, Overview del progetto OCSE in materia di Base Erosion and Profit Shifting (BEPS) (Pacini Giuridica 2019) pages 205-211