

LUISS - LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

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Tesi di dottorato

Le Adr e i poteri giustiziali presso le Autorità indipendenti

(i casi di Bankitalia, Consob e Agcom)

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ABSTRACT

The thesis analyses the issue of Alternative Dispute Resolution (ADR), with particular reference to ADR systems of a decisive nature, in which the resolution of the dispute is delegated to a third party who is entitled to address a more or less binding measure to the parties, as happens in so-called arbitrations.

In particular, the objective of this work is to examine specific arbitration systems aiming to settle the disputes which are actionable before independent authorities governing specific areas of the liberalized market (banking, financial and electronic communications sectors), to fully understand their functioning and to evaluate whether for the users of these services they can really be considered as an alternative to ordinary justice, if not even better.

First of all, in order to conduct such a study, the general principles concerning ADR which may be found in the regulations issued by the European Union over the past twenty years are recalled in the work.

The aforementioned supranational legislation has also recently led to the introduction in the Italian system of the so-called compulsory mediation for civil and commercial matters, which is therefore recalled by underlining some problematic aspects.

On the basis of the European standards, the work identifies a number of "quality indicators" of ADR services of a decisive nature to be used in the study described above. Basically, if the quality of a service expresses its proper functioning with respect to the aim pursued, a quality indicator is nothing more than a specific feature of that service likely to significantly express satisfaction by users.

Looking at the European guidelines, it can therefore be asserted that with respect to decisive ADRs the best quality indicators - in terms of an alternative to the ordinary justice - are primarily those which relate to users' knowledge of it, bearing in mind that if the system does exist but is not known when necessary (that is to say at the time of the dispute) the protection it could provide is completely wasted. A second indicator to be evaluated is the one related to the composition of the judicial body, which must guarantee independence and autonomy, as well as impartiality, at least equal to those of ordinary courts. In addition, a third indicator is the access to ADR systems, meaning both its spread on the territory and the transparency of its procedure as, in the absence of such features, the user would probably prefer not to give up the arduous, but well-known, solution of ordinary courts. Another indicator concerns the effectiveness of the hearing, which must remain central, even in an alternative system. Finally, the last key indicator of the alternative quality of an ADR service when compared to the ordinary courts is the effectiveness of the protection it provides, because no one would choose an alternative system if they could not obtain an adequate and comprehensive protection, including the monetary one, of enforceable nature.

The quality indicators of ADR services in terms of added value (*quid pluris*) when compared to the ordinary justice are, instead, constituted by a set of features that should encourage the user to prefer this service to the traditional system. In this case the reference is primarily to the speed of the dispute resolution (to overcome the problem that has afflicted the ordinary justice for a long time); also relevant is the possible specialization of the judicial body, because in certain particularly technical matters it certainly constitutes a quality of the arbitrator, and finally the possibility of a cost-free procedure, that is to say the option of accessing it without the support of a lawyer.

Once the quality indicators of ADR decisionary services have been identified, the work continues with the analysis of three specific arbitration services provided by certain independent authorities. In particular, the banking and financial arbitrator of Bankitalia, the conciliation and arbitration Chamber of the Consob and the arbitration for the resolution of disputes between users and operators of the Communications Authority, are examined.

For each of the above-mentioned arbitral systems the examination is structured in accordance with the indicators described above and therefore considering (after having described the system in general and its legal basis) its prestige and dissemination, the guarantees of impartiality of the body, the procedural rules and the costs and effectiveness of the protection achieved, with reference to the competence and the legal nature of decisions.

The outcome of the study gives the impression that service users generally benefit from the availability of potentially good systems for the resolution of disputes, in many ways certainly easier than ordinary justice. There is however a significant difference between the most recently formulated means (ABF and Chamber) and the older ones (Agcom) in the sense that the latter seem to ensure a greater degree of protection. This bodes well that as time goes by procedures could improve so as to adequately respond to the request for justice which brought about their creation.

Finally, some doubts remain with respect to the impartiality of all the judicial bodies examined, as they are all literally embodied, in a more or less surreptitious way,

in the independent authorities governing the specific sector (banking, financial, electronic communications), on which they also carry out supervisory actions.

This mix of functions (administrative, supervision and control, sanction and judicial) may give the impression that the necessary independence and impartiality of the body can't exist, as it is not a third party, but more a "controller" of the professional operator. It should be noted, however, that in the perspective of the ADR service user, which appeals to it when dissatisfied with the treatment received in the execution of a contract, the interference in the decision of the guarantee authorities is undoubtedly the "winning card" of the system as a whole (because of their specialization, their authority and the deterrent resulting from possible penalties). From the operator's point of view, on the contrary, the issue should be resolved by accepting that today the administration is changing and adopting new and different perspectives, by now unavoidable, to ensure the proper functioning of a sector. On the other hand, the contractual violation does not necessarily coincide with the administrative one and, ultimately, if the latter is to be punished, the judicial seat is only a possible channel of information acquisition for the supervisory authority, but this does not necessarily mean compromising the impartiality of the parties involved, also understood as impartiality with respect to the object of contention.