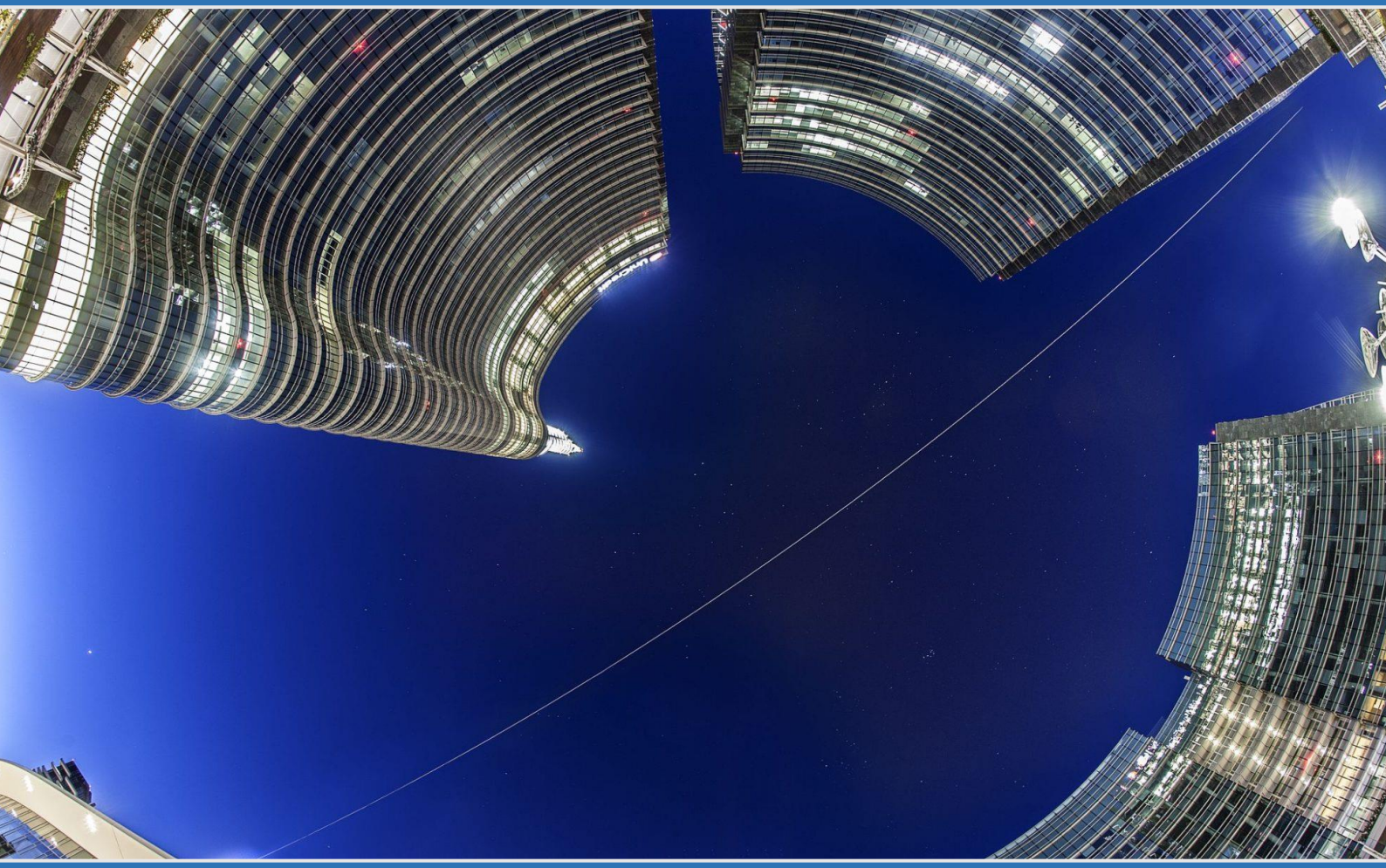
ISSN 2732-5687

Vol. 1 (2015)



Arbitration in Italy

News on international and domestic arbitration in Italy

Vol. 1 (2015)

Arbitration in Italy

News on international and domestic arbitration in Italy

Published in May 2020 by
Arbitration in Italy Ltd
61 Bridge Street
HR5 3DJ Kington
United Kingdom

Judicial decisions referred to in this journal, which were published in 2005, are available on the journal's website: https://www.arbitratoinitalia.it/en/

TABLE OF CONTENTS

⁂

Arbitration and insolvency

by Roberto Oliva

In insolvency matters, Italian law does not favour arbitration. On the one hand, the *vis attractiva concorsus* principle pursuant to article 24(1) of the Italian Insolvency Law states that "*the Court which opens the insolvency proceedings shall have jurisdiction on all the civil actions resulting from such proceedings.*" On the other hand, Article 83/*bis* of the Italian Insolvency Law notes that "*if a contract containing an arbitration clause is terminated in accordance with the provisions of this Section, the pending arbitration proceedings shall not continue.*" The interaction between both Articles results in a significant reduction of the scope of the arbitrability of the disputes a party to which is subject to insolvency proceedings. And this reduction also interferes with the principle of separability of the arbitration clause. Indeed, the explanatory memorandum to the decree introducing the comprehensive reform of the Italian Insolvency Law states that "*(…) the already pending arbitration proceedings shall not continue if the contract containing the arbitration clause is terminated pursuant to the provisions of section IV. The purpose is to prevent that the arbitration proceedings survives the agreement, terminated as a consequence of the bankruptcy, which contained the arbitration clause.*"

A recent order of the Supreme Court sitting *en banc* (order no. 10800 of 26 May 2015) concerns the relationship between arbitration (in the case at hand, international arbitration) and insolvency proceedings.

The case may be summarised as follows.

In 2007, an airline company and an airport management company entered into a service contract, which contained an arbitration clause. According to this clause, all disputes arising between the parties would have to be referred to arbitration under the rules of the London Court of International Arbitration (LCIA).

Once the agreement expired, the airport management company (in the meantime admitted to a pre-bankruptcy) requested, and was granted a European order for payment, issued by an Italian Court. However, the air transport company appealed the order, first of all, objecting to the jurisdiction of the Italian Courts, since the parties had agreed upon the referral of all their disputes to a foreign

arbitration. During the appeal proceedings, the airport management companies went bankrupt. The proceedings were then reinstated and, finally, the air transport company referred the case to the Supreme Court, so as to have a final decision on the issue of jurisdiction.

The Supreme Court's ruling is interesting under many points of view.

First of all, the Court analysed the objection raised by the bankruptcy's receiver, whereby the arbitration clause at hand provided for the referral to an "*arbitrato irrituale*" (*i.e.*, an alternative arbitration procedure which does not result in an enforceable award and does not give rise to jurisdictional issues). To this respect, the Supreme Court held – following its own case law – that "*international arbitration can only be arbitrato rituale*" (*i.e.*, the regular arbitration procedure resulting in an enforceable award), since "*the distinction between arbitrato rituale and arbitrato irrituale, is well known to the existing law [as well as the Italian Code of Civil Procedure], but is rarely applied abroad.*"

Moreover, the Supreme Court used a strict construction of Article 83/*bis* of the Italian Insolvency Law. To this respect, the Court ruled that "*(…) we cannot draw a general rule, whereby arbitration proceedings cannot continue, from Article 83/bis of the Insolvency Law. However, the opposite rule may also be drawn. Indeed, the above mentioned Article (…) states that the arbitration clause is terminated in the case governed by it (that of pending arbitration proceedings and the termination of the contract containing the arbitration clause pursuant to Article 72 of the Insolvency Law). On the basis of the same provision, we must conclude that, if the bankruptcy's receiver avails himself of the rights arising out of the contract containing the arbitration clause, this clause is binding on him. Otherwise, the receiver would be allowed to terminate only certain clauses of the agreement, while claiming the fulfillment of other clauses of the same agreement (…).*" The Supreme Court sitting *en banc* added, then, that "*it does not matter that the agreement had expired and had not been renewed at the time of the appeal of the payment order. Indeed, the purpose of the arbitration clause is to settle the disputes arising out of the agreement, in accordance with the proceeding laid down therein.*"

Another interesting issue arose from the fact that in the LCIA arbitration proceedings the aviation company brought a counterclaim against the bankrupt company. In the opinion of the bankruptcy's receiver, the Arbitral Tribunal did not have jurisdiction on that counterclaim (in fact, according to the decision no. 9070 of 6 June 2003 of the Supreme Court "*the jurisdiction of the Arbitral Tribunal, arising from the arbitration clause, is in any case (…) prevented by the opening of the insolvency proceedings. Indeed, as a consequence thereof, the claims against the bankrupt debtor shall be determined by the Insolvency Court, which sole has jurisdiction on them.*")

In the ruling at hand, the Supreme Court partially weakened the principle of *vis attractiva concursus* and reaffirmed the *Kompetenz-Kompetenz* principle. More specifically, the Court stated: "*this Court is prevented from deciding on the jurisdiction of the Arbitral Tribunal on the counterclaim (…) concerning the alleged credit towards the bankrupt debtor. Indeed, once excluded the jurisdiction of the Italian Courts, as a result of*

the arbitration clause which referred the dispute to a foreign Arbitral Tribunal, it is on the Arbitral Tribunal to determine the rules governing the arbitration procedure."

We will probably read another decision on this case, when the recognition of the LCIA award is sought in Italy.

The official abstract of the ruling at hand is less than clear-cut, not least because it focuses on a portion of the order, which does not represent the rationale of the decision. In any case, the official abstract is the following: "*If an agreement stipulated before the opening of the insolvency procedure involving one of the parties thereto contains an arbitration clause (in the case at hand, an international arbitration clause), the office held by the Arbitral Tribunal is not subject to termination pursuant to Article 78 of Insolvency Law. Indeed, all the involved parties granted the Arbitral Tribunal with the relevant powers. This construction is indirectly confirmed by Article 83/bis of the Insolvency Law, which states that if arbitration proceedings may not continue because of the termination of the agreement containing the arbitration clause, it must be held that the clause is effective and binding if the bankruptcy's receiver does not terminate the agreement containing it: indeed, the receiver is not allowed to only terminate certain clauses and at the same time claim the fulfillment of other clauses*" (Supreme Court sitting *en banc*, order no. 10800 of 26 May 2015, official abstract no. 635360).

⁂

Construction of arbitration clause

by Roberto Oliva

The wording of the arbitration clause should be carefully selected, as it constitutes the basis of the jurisdiction of the Arbitral Tribunal. A possible wrong wording will not always be emended, once the dispute has arisen.

Nevertheless, it is commonplace that due attention is not devoted to this clause, either because it is inserted at the last minute in an agreement (known as the "*midnight clause*" effect), or because the agreement is reached after long negotiation on its commercial terms, underestimating the risk of a possible dispute.

The Court of first instance of Milan, in its order of 19/22 of January 2015, construed a strange arbitration clause.

The Court of first instance was requested to issue an interim measure: an order to stay the effects of a resolution approved by the shareholders of a company. The defendant appeared in the interim proceedings and, among other things, it raised an objection based on the existence of an arbitration clause.

The arbitration clause, stipulated in the Articles of association of the company, reads as follows: "*any dispute arising between the shareholders and the company, including those relating to the validity of the resolutions approved by the shareholders (…) concerning negotiable rights regarding the corporate relationship, may be referred to a sole arbitrator.*"

The Court of first instance of Milan held that "*the clause gives the shareholders the right to commence arbitration proceedings, without imposing on them an obligation to do so*." In other words, "*the parties have the right to commence arbitration proceedings, but if a party disagrees with that choice, the dispute shall be referred to the Court.*" In this respect, the Court found that "*the use of the verb 'may' is unusual in arbitration clauses, where a mandatory referral to an Arbitral Tribunal is expressed, either with the use of the auxiliary 'shall', or with the verb 'refer' in its future tense (will be referred).*" In fact, the model clause for corporate arbitration drafted by the Chamber of Arbitration of Milan reads as follows: "*all the disputes concerning company relations, including those related to the validity of general meeting's resolutions, brought by or against shareholders, by or against the company, by or against the directors, by or against auditors, by or against liquidators, shall be settled by arbitration under the Rules of the Chamber of National and International Arbitration of Milan (the Rules). The Arbitral Tribunal shall be composed by a sole*

arbitrator/three arbitrators, appointed by the Chamber of Arbitration. The arbitration shall be «rituale» and the arbitrators shall decide in accordance with the law."

I believe that the conclusion attained by the Court of first instance of Milan, whereby the jurisdiction rests with it, is correct. Nonetheless, I do not agree with certain reasons of the ruling. First of all, the existence and scope of the arbitration clause were, in this very case, an irrelevant issue. Indeed, it is a well-established principle that the Court has jurisdiction to issue interim measures until the Arbitral Tribunal has been constituted. This principle, in fact, is also referred to by the Court of first instance of Milan in the ruling at hand.

Moreover, it seems to me that the conclusion reached by the Court is wrong and it is maybe the result of a negative attitude towards arbitration. According to the Court, "*the parties have the right to commence arbitration proceedings, but if a party disagrees with that choice, the dispute shall be referred to the Court.*" In my view, the clause at hand should be construed as follows: it allows the claimant to choose the dispute resolution mechanism (Court or Arbitral Tribunal). This provision, in fact, provides for the right (the mere right and not an obligation) to refer the dispute to an Arbitral Tribunal, so that it is not necessary to obtain a new consent by the respondent to refer the dispute to arbitration. Such consent is, in fact, already contained in the arbitration clause.

A very similar case was decided by the Court of first instance of Bari in its decision no. 2379 of 5 July 2011 (decision referred to by the Court of first instance Milan). On that occasion, the auxiliary verb "*may*" led the Court to rule that "*the parties stipulated the mere right to refer a dispute to an Arbitral Tribunal. However, the parties retained the right to refer the dispute to the Court.*"

⁂

Arbitration and companies financial statements

by Roberto Oliva

The Court of first instance of Milan, in its decision no. 9115 of 28 July 2015 of the Court of first instance of Milan, went back to analyse the relationship between Courts' jurisdiction and the jurisdiction of Arbitral Tribunals, with respect to the challenge of the resolution approving the company's financial statements (in this case, a limited liability company whose Articles of association included an arbitration clause).

In my point of view, this ruling is interesting in two different ways.

First, the Corporate Chamber of the Court of first instance of Milan ruled that the challenge of the resolution approving the financial statements could be referred to an Arbitral Tribunal if the parties claim that the resolution is void due to a procedural defect. However, the Court retains its exclusive jurisdiction on disputes in which the claimant claims that the financial statements are void due to their wrongful content. More specifically: "*the principle of non-arbitrability of resolutions approving financial statements (…) concerns (strictly and exclusively) the compulsory nature of the law rules governing the financial statements as mandatory documents addressed, not only to quotaholders but to all and any third parties. Consequently, the Courts' exclusive jurisdiction does not concern the procedural errors by the general meeting. It concerns (…) properly and exclusively (substantial) errors regarding clarity and accuracy of the financial statements.*"

The same Corporate Chamber, in the past, gave a different construction of the scope of arbitrability of corporate disputes, which was considered broader, to the point that it included the breaches of the rules governing the content of the financial statements (see, for example, decision no. 6595 of 10 May 2013 of the Court of first instance of Milan).

However, the Supreme Court found that the construction of the Court of first instance of Milan was wrong and reversed the above mentioned decision. In that case, the Supreme Court affirmed the jurisdiction of the Court, noting that a dispute concerning the validity of a resolution approving the financial statements is not capable of arbitration, if the alleged grounds for the resolution challenge concern the content of the financial statements (decision no. 13031 of 10 June 2014 of the VI Chamber of the Supreme Court, also referred to by the decision at hand).

This decision could be intended to resolve the contradictions among the constructions of certain lower Courts (among them, the Court of first instance of Milan) and the Supreme Court. These contradictions hindered the corporate arbitration. In any case – *amicus Plato sed magis amica veritas* – the previous construction of the Court of first instance of Milan was preferable.

In the ruling of 2013, the Court of first instance affirmed the arbitrability of disputes concerning the challenge of resolutions approving the financial statements, ruling that the concept of the non negotiability of rights should not be mistaken with the imperative nature of the relevant law rules. More specifically, it stated that "*the imperative nature of the rules, such as those concerning the financial statements, should not be mistaken with the non-negotiable nature of certain rights that arise from these rules. The imperative nature of certain rules means that the law prevents the parties' autonomy (…) The non-negotiability of certain rights means that the parties may not create or waive a right by contract (…) However, even if the rule is imperative, the rights arising from this rule may be negotiable. This happens with consumer protection rules, which are imperative, despite the purchase being an agreement. Indeed, the imperative nature of these rules aims at protecting the agreement. In corporate matters, there are also imperative and non-negotiable matters: for example, Articles of association providing for an unlawful corporate scope of activities are null and void. However, this is not the case of the financial statements, where the share/quotaholder is requested to accept or reject the draft prepared by the directors.*"

The fact that the share/quotaholders are required to grant or deny their consent on the financial statements suggests the negotiable nature of this dispute. Therefore, I do not agree with the reasoning followed by the Supreme Court to get the opposite result.

The Supreme Court followed its own line of cases, started before the reform of the Italian corporate law. The Supreme Court explicitly enumerated the reasons supporting its construction, stating that "*this line does not impact upon the existing procedural instruments available for the protection of the interests of the share/quotaholders and third parties.*"

This is due to the idea according to which non-negotiable rights concern "*all substantive situations excluded from the regulation of private autonomy, which are governed by a legal regime that excludes any autonomy of the parties. Consequently, the parties may not derogate them, give them up or otherwise modify them.*" In other words, the old theory (that I consider wrong) according to which non-negotiable rights and imperative rules are two sides of the same coin.

The Supreme Court then goes on to say that "*the share/quotaholder or the third party may waive their claim concerning the resolution approving the financial statements drafted in breach of the principles of clarity, truth and fairness. However, the parties may not agree with the director on whether and to what extent those principles should be applied, nor waive those principles being followed. Conversely, they would be liable for that breach.*" The reasoning of the Supreme Court on this point is not particularly clear. Indeed, I do not understand how this liability may exclude that a shareholder, approving non clear financial statements, waives its right to have clear financial statements. And that waiver does not amount to a tort nor to a breach.

Back to the ruling of the Court of first instance of Milan, another interesting point is that this ruling implement the principle of the so-called parallel paths, as

per articles 817 and 819/*ter* of the Italian Code of Civil Procedure. Indeed, the same resolution had been challenged both in arbitration proceedings and in proceedings pending before the Court (the two challenges are due to the uncertain case-law concerning the arbitrability of that kind of disputes). The two proceedings continued in parallel and reached complementary results. On the one hand, the Arbitral Tribunal ruled on the procedural defects of the challenged resolution. On the other hand, the Court of first instance of Milan ruled on the defects that concerned the content of the financial statements.

⁂

Challenge of shareholders' resolutions

by Roberto Oliva

Order no. 17283 of 28 August 2015 of the Italian Supreme Court affirmed the jurisdiction of an Arbitral Tribunal on the challenge of certain shareholders' resolutions, pursuant to the arbitration clause stipulated in the company's Articles of associations. The clause at hand only referred to the arbitrators "*all disputes which may arise between the company and any shareholder or among the shareholders (…) concerning the company's activities.*"

Two minority shareholders of the company challenged before the Court of first instance of Rome two resolutions of the general meeting. The first one approved the company's financial statements, which in the claimants' opinion were drafted in breach of the valuation criteria in Article 2426(1)(8)/*bis* of the Italian Civil Code. The second resolution increased the share capital and, in the claimants' opinion, it was unlawful since the majority shareholder abused the majority rule.

The company (and the shareholder allegedly abusing the majority rule) appeared in Court, objecting to the jurisdiction of the Court of first instance of Rome, pursuant to Article 23 of the company's Articles of association, whereby "*disputes which may arise between the company and any shareholder or among the shareholders (…) concerning the company's activities*" should be settled by an Arbitral Tribunal.

The Court of first instance of Rome partially upheld the objection. The Court affirmed the jurisdiction of the Arbitral Tribunal on the challenge of the resolution increasing the share capital. With respect to the challenge of the resolution approving the company's financial statements, the Court followed the guidance of the Supreme Court. According to the case law of the latter, the challenge of a resolution approving the financial statements may not be referred to an Arbitral Tribunal, if the claim concerns substantial errors of the financial statements (in this respect, see decision no. 13031 of 10 June 2014 of the VI Chamber of the Supreme Court).

The claimants referred the case to the Supreme Court, claiming that the decision of the Court of first instance of Rome was wrong. In their opinion, the disputes

concerning the challenge of shareholders' resolutions might be referred to arbitration only if the arbitration clause expressly provided for the jurisdiction of the Arbitral Tribunal on these disputes. If such a clause does not exist, as it happened in the case at hand, jurisdiction would rest with the Court.

On this point, the Supreme Court noted that "*there is no reason (neither literal, nor substantive in nature) whereby it may be inferred that the law precludes the jurisdiction of the Arbitral Tribunal (…) on the disputes concerning the challenge of shareholders' resolutions (…) provided that these resolutions concern negotiable rights*." The Supreme Court expressly upheld the reasoning of the Court of first instance of Rome, according to which "*the challenge of a company's resolution is nothing more than a dispute between one or more shareholders and the company*" and therefore rejected the appeal and confirmed the jurisdiction of the arbitrators.

⁂

Arbitrators' fees
by Roberto Oliva

In its decision no. 17956 of 11 September 2015, the Supreme Court applied for the first time Article 816/*septies* of the Italian Code of Civil Procedure concerning the arbitrators' fees. In this decision, the Court examined the scope and conditions of application of the above mentioned provision.

Pursuant to article 816/*septies*(1) of the Italian Code of Civil Procedure: "*The arbitrators may make the continuation of the proceedings subject to the advance payment of the foreseeable expenses (…).*" The second paragraph of that Article also provides that "*Should one party fail to pay the requested advance, the other may advance the totality of the expenses. Should the parties fail to provide for the advance within the time limit established by the arbitrators, they are no longer bound by the arbitration agreement with regard to the dispute out of which the arbitral proceedings originated.*"

Because of the parties' failure to pay the requested advance (which also included the arbitrators' fees), an Arbitral Tribunal held that the parties were willing to terminate the arbitration agreement and, consequently, the Arbitral Tribunal ruled that the arbitration could not proceed.

The Court of Appeal of Naples was requested to set aside the award and it did so. Its decision was later confirmed by the Supreme Court.

First, the Supreme Court found that article 816/*septies* of the Italian Code of Civil Procedure did not apply to this case as the arbitrators only requested the parties to pay an advance and the parties failed to do so. On the contrary, according to the Supreme Court "*the arbitrators should clearly state that the continuation of the proceedings is subject to the advance payment.*" And this clear statement was missing in the case at hand.

The Supreme Court also added that the reference to "*foreseeable expenses*", contained in Article 816/*septies* of the Italian Code of Civil Procedure, cannot be broadly construed. This provision only covers the arbitrators' expenses (and therefore it does not cover their fees). The scholars agree with this reading, although some Arbitral Tribunals use a broader construction of "*foreseeable expenses*", including the arbitrators' fees.

In this respect, it could be useful to analyse the Arbitration Rules of the Chamber of Arbitration of Milan. The relevant provision is Article 38, which states: "*where a party fails to lodge an advance as requested, the Secretariat may direct the other party to make a substitute payment, setting a time limit therefor, or may divide the value of the dispute, if it has not already done so, and direct each party to deposit an amount based on the value of its claim, setting a time limit therefor. If any of the advances directed is not made within the time limit set therefor, the Secretariat may suspend the entire proceedings or only the proceedings related to the claim to which the lack of payment relates. The Secretariat shall lift the suspension when the payment is made. Where the parties do not deposit the amount within one month of the notice of the order of suspension under paragraph 2, the Secretariat may declare the closing of the entire proceedings, or the proceedings related to the claim to which the lack of payment relates, without affecting the arbitral agreement.*"

The provision of the Rules of the Chamber of Arbitration of Milan has some broader scope of application than Article 816/*septies* of the Italian Code of Civil Procedure. This provision, in fact, concerns all the costs of the proceedings, including the fees of the Chamber of Arbitration, those of the Arbitral Tribunal and the possible experts. This broader scope is counterbalanced by the less serious consequences arising out of the lack of payment. Indeed, the failure to pay does not determine the termination of the arbitration agreement (albeit only with respect to the dispute out of which the arbitral proceedings originated), but the mere closing of the arbitration proceedings.

⁂

Arbitration and shareholders' loan

by Roberto Oliva

If an arbitration clause is stipulated in the company's Articles of association, disputes between a former shareholder and the company, concerning the repayment of a shareholders' loan, shall be referred to an Arbitral Tribunal. This is, in a nutshell, the rationale of decision no. 18316 of 17 September 2015 of the Third Civil Chamber of the Court of first instance of Rome.

A (former) member of a cooperative company, after exercising the right of withdrawal, obtained from the Court of first instance of Rome a payment order against the company, for the repayment of a shareholders' loan.

The company challenged this payment order pleading, inter alia, the lack of jurisdiction of the Court according to Article 35 of its Articles of association. This provision states that "*All disputes arising out of these Articles of association, the rules approved by the members' meetings and, in any case, the corporate relationship, including those disputes relating to the validity, construction and fulfillment of the Articles of associations and rules, or the resolutions adopted by the Board of Directors concerning the withdrawal or exclusion of members, which may arise between the cooperative company and its members, or between the members themselves, and which refer to negotiable rights, even if the disputes concern the membership as such (subject to Article 10, which concerns the members' resolution in the event of the Board of Director's refusal to admit a new member), shall be referred to an Arbitral Tribunal (…).*"

The Court of first instance Rome found that the loan the former member granted to the cooperative company "*was arising out of the relationship that he had with the company and, as a consequence, the grounds of his claim rest on the relationship with the company, even if it ceased.*" Therefore, the Court granted the objection raised by the company. The Court also noted that the objection is grounded even taking into account that the claimant ceased to be a member of the cooperative company. The reason is that the arbitration clause stipulated in the Articles of association also refers to an Arbitral Tribunal those disputes "*where certainly one of the parties is no longer a member (…) (i.e., those concerning the withdrawal or exclusion of members).*"

However, the Court did not declare its lack of jurisdiction. Indeed, the Courts declare that the jurisdiction rests with the Arbitral Tribunal if the arbitration clause provides for the so-called "*arbitrato rituale*" (that is, the regular arbitration procedure which results in an enforceable award). On the contrary, if the arbitration clause provides for the so-called "*arbitrato irrituale*" (that is, an alternative arbitration procedure which does not result in an enforceable award), the Courts declare that the claim is inadmissible. In the case at hand, since the Articles of association provided for an "*arbitrato irrituale*", the Court of first instance of Rome declared that the claim was inadmissible.

Although the claimant lost the case, the Court did not award attorneys' fees, noting that the former member's claim was not inadmissible at first. However, it became inadmissible after the company raised its objection based on the arbitration clause. This seems to me a very broad construction of Article 92 of the Italian Code of Civil Procedure, pursuant to which the Court does not award attorneys' fees if there is no winning party or for "*other serious and exceptional reasons.*"

⁂

Construction of the arbitration clause in the Articles of association

by Roberto Oliva

In its decision no. 10610 of 22 September 2015, the Court of first instance of Milan declared its lack of jurisdiction on the challenge of a resolution of a cooperative company. The Court used a broad construction of the arbitration clause contained in the company's Articles of association.

A member of a cooperative company challenged, before the Court of Milan, the resolution whereby she had been excluded from the company.

The company objected to the jurisdiction of the Court of first instance of Milan, and claimed that the jurisdiction rested with an Arbitral Tribunal according to Article 35 of its Articles of association. This provision held that "*any dispute arising between the members and the company, or among the members themselves, concerning negotiable rights related to the corporate relationship, as well as the disputes brought by the Directors, the Supervisory Body and the liquidators, or against them, pursuant to Article 34 of Legislative Decree no. 5 of 17 January 2003, shall be settled by an Arbitral Tribunal of three members. The arbitrators shall be appointed by the President of the Court of first instance where the company has its registered office. The arbitration clause is binding on the directors, the members of the supervisory body and the liquidators, after their acceptance of the appointment.*"

In the claimant's opinion, the arbitration proceedings under Article 35 of the Articles of association did not preclude the Court's jurisdiction for two reasons. First of all, arbitration would be purely optional in the disputes between the members and the company, since the arbitration clause in the Articles of associations was expressly binding on the directors, the members of the supervisory body and the liquidators after their acceptance of the appointment. However, it was not binding on the members of the company. In addition, arbitration would be optional because, pursuant to Article 12 of the Articles of association, "*the member may challenge his/her exclusion before the Arbitral Tribunal (…).*" Therefore, the member would have the choice between proceedings in Court and arbitration proceedings.

The Court of first instance of Milan rejected both of these arguments.

First of all, the stipulation whereby the arbitration clause should be binding on the directors, members of the supervisory body and liquidators only after their acceptance represents "*a principle recognised by the settled case law and unanimously recognised by the scholars.*" This principle does not preclude that the arbitration clause was binding on the company's members. Indeed, it was binding on them because it was included in the Articles of association.

The Court of first instance of Milan acknowledged that the wording of Article 12 of the Articles of association could give rise to doubts. This provision uses the auxiliary "*may*" ("*the member may challenge his/her exclusion before the Arbitral Tribunal (…).*") Therefore, it could be construed as allowing the members to commence arbitration proceedings, without imposing on them an obligation to do so. In fact the Court of first instance of Milan has recently held that an arbitration clause (which provided that "*any dispute (…) may be referred to a sole arbitrator*") merely attributed to the shareholders the right to commence arbitration proceedings, without imposing any obligation to do so (we talked about it here).

In the case at hand, the Court adopted a broad construction of the scope of application of the arbitration clause, pursuant to Article 808/*quarter* of the Italian Code of Civil Procedure ("*In case of doubt, the arbitration agreement shall be in the sense that the arbitral jurisdiction extends to all disputes arising from the contract or from the relationship to which the agreement refers.*")

Therefore, the Court of first instance of Milan declined its jurisdiction in favour of the Arbitral Tribunal, pursuant to the arbitration clause contained in the Articles of association.

⁂

Once again, on arbitration and insolvency

by Roberto Oliva

Two recent rulings of the Italian Supreme Court analysed the relationship between arbitration and insolvency proceedings.

The first ruling (decision no. 13089 of 24 June 2015 of the of the I Civil Chamber of the Supreme Court) established that "*claims against a bankrupt party may not be brought before an Arbitral Tribunal. Indeed, the jurisdiction of the arbitrators is in any case prevented due to the prevailing jurisdiction of the Insolvency Courts on such claims.*"

The second ruling is more interesting (decision no. 15200 of 21 July 2015 of the Supreme Court sitting *en banc*). This judgment focused on the issue of the relationship between arbitration and insolvency when an arbitration procedure is pending abroad and therefore EC Regulation no. 1346 of 29 May 1999 concerning insolvency proceedings applies.

Pursuant to EC Regulation no. 1346/2000, the law of the Member State of the opening of insolvency proceedings also determines, among other things, the effects of the insolvency proceedings on proceedings brought by individual creditors, except for pending lawsuits (Article 4(2)(f)). The effects upon the pending lawsuits are determined by the law of the Member State in which they are pending, pursuant to Article 15 of the Regulation.

Some Member State's Courts hold that the above mentioned provisions exclusively concern the individual enforcement proceedings that may continue if allowed by the legal system where the proceedings are pending, regardless of the debtor's divestment. The High Court of Ireland ruled in this sense in Flightlease Ireland Ltd., Re [2005] IEHC 274.

On the other hand, other rulings hold that Articles 4(2)(f) and 15 of the EC Regulation no. 1346/2000 also apply to proceedings on the merits, including arbitration proceedings (in this respect, see Syska v Vivendi Universal SA & Ors [2008] EWHC 2155 (Comm), which was uphold by Syska & Anor v Vivendi Universal S.A. & Ors [2009] EWCA Civ 677).

EU Regulation no. 848 of 20 May 2015 should settle these doubts. Article 18 of this Regulation, which will apply starting from 26 June 2017, holds that "*The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.*"

The ruling at hand of the Supreme Court sitting *en banc* reached a different conclusion.

The case concerned an Italian company (Valtur) and an Egyptian company (Nesco). In August 2000, they entered into an agreement, whereby Nesco leased two hotels to Valtur.

In December 2010, a dispute arose between the parties with respect to an alleged breach on the part of Valtur. In Nesco's opinion, such breach resulted in the termination of the agreement. Consequently, Nesco commenced the ICC arbitration provided for in the lease agreement.

During the arbitration proceedings, at the end of 2011, Valtur was declared bankrupt by the Court of first instance of Milan.

In February 2012, Nesco requested to be admitted to Valtur's statement of liabilities. In its application Nesco noted the pending ICC arbitration proceedings (that is, arbitration proceedings governed by French law) and, referring to Article 15 of EC Regulation no. 1346/2000 and the French procedural rules, requested to be admitted to the statement of liabilities on a temporary basis, subject to the outcome of the arbitration proceedings.

In June 2012, the Court of first instance of Milan ruled in favour of Nesco and admitted it to Valtur's statement of liabilities on a temporary basis, pursuant to article 55(3) of the Italian Insolvency Law.

Nonetheless, in October 2012, Nesco opposed the ruling of the Court of first instance of Milan. In fact, Nesco claimed that the Court's decision was partially wrong, because it applied the pari passu principle to its credit. Valtur appeared in Court opposing Nesco's claim and counterclaiming the exclusive jurisdiction of the Italian Courts (preventing the jurisdiction of ICC Arbitral Tribunal) on Nesco's credit towards Valtur.

In February 2014, Nesco referred the case to the Supreme Court, so as to have a final decision on the issue of jurisdiction on its credit (under Italian law, until the case is decided on the merits in the first instance, each party may request to the Supreme Court to solve issues of jurisdiction).

First of all, in Nesco's opinion the jurisdiction on the dispute was governed by EC Regulation no. 1346/2000. Pursuant to Articles 4(2)(f) and 15 of this Regulation, the opening of insolvency proceedings in a Member State (in this

case, in Italy) would not prevent the jurisdiction of another Member State (in this case, France), where a lawsuit was already pending. Indeed, only French law might determine the effects of the opening of insolvency proceedings on French pending lawsuits. And according to French law, if the Arbitral Tribunal had already been appointed at the time of the opening of insolvency proceedings, arbitration proceedings may continue as long as the claimant requests to be admitted to the debtor's statement of liabilities subject to the outcome of arbitration proceedings. All these requirements were fulfilled in the case at hand.

However, the Supreme Court held that Nesco's request was inadmissible for several reasons. First, the referral to the Supreme Court of the issue of jurisdiction was inadmissible because it happened in February 2014, after the decision on the merits in first instance (that is, after the decree of the Court of first instance of Milan, issued in June 2012, whereby Valtur's statement of liabilities was approved). Moreover, the Supreme Court ruled that the issue at hand did not amount to a proper issue of jurisdiction. Indeed, it was rather an issue concerning the effects of the opening of insolvency proceedings on pending arbitration proceedings, or the enforceability of the arbitration clause.

Despite the declaration of inadmissibility of Nesco's referral, in the last pages of the decision at hand the Supreme Court indicated its construction of Article 15 of EC Regulation no. 1346/2000. This construction reaffirms the exclusive and imperative jurisdiction of the Insolvency Courts.

The Supreme Court held that, in the case at hand, the above mentioned Regulation did not apply, because it only regulates "*the relations arising from insolvency proceedings of parties having their residence or registered office within the European Union*" (Nesco is an Egyptian company).

Even if EC Regulation no. 1346/2000 applied, it would govern "*only the effects of the opening of insolvency proceedings on pending proceedings, not the effects of pending proceedings on the jurisdiction of Insolvency Courts. Articles 4 and 15 of the Regulation do not regulate the jurisdiction, although these provisions identify the law governing the effects of insolvency proceedings on pending proceedings.*"

The Supreme Court reached the conclusion that the case at hand (arbitration proceedings were commenced in France before the opening of insolvency proceedings in Italy) "*is not governed by Articles 4(f) and 15 EC Regulation no. 1346/2000.*"

It seems that the Supreme Court considers that Article 15 of the Regulation in force only concerns the effects of the opening of insolvency proceedings on a lawsuit pending in another Member State. In other words, that lawsuit may continue if allowed by the law of the Member State where it is pending. Nonetheless, the effects on bankruptcy's statement of liabilities of the decision issued in the pending proceedings are governed by the law of the Member State where the insolvency proceedings was opened. In fact, the Supreme Court ruled "*it is settled case law of this Court, that the parties are not allowed to bring before an Arbitral*

Tribunal claims towards a bankrupt debtor. Indeed, the jurisdiction of the arbitrators is in any case prevented due to the prevailing jurisdiction of the Insolvency Courts on such claims."

At this point, a doubt arises on the rationale (and scope of application) of the above mentioned Regulations.

⁂

Waiver to the right to arbitrate

by Roberto Oliva

The Court of first instance of Rome (decision no. 19215 of 28 September 2015) ruled in a complex case concerning the relationship between a limited liability company and its former director. First of all, the company sued the former director before the Court, claiming his liability. In a second case (the case of the decision at hand), the former director requested the Court to issue a payment order against the company, in order to obtain the amounts allegedly owed to him. The parties did not take into account the arbitration clause stipulated in Article 26 of the Articles of association. This provision notes that "*all controversies arising among the quotaholders or among the quotaholders and the company, the directors, liquidators and statutory auditors shall be settled by a sole arbitrator appointed by the President of the Certified Public Accountants Register of the place where the company has its registered office (….).*" In the judicial proceedings commenced by the company, the former director objected that the Court did not have jurisdiction, due to the above mentioned arbitration clause. On its turn, the company raised this objection when challenging the payment order issued in favour of the former director.

Did the parties waive their right to arbitrate, by initiating Court proceedings?

The Court of first instance of Rome referred to the settled case law according to which the stipulation of an arbitration clause does not preclude the jurisdiction of the Court to issue a payment order (which, under Italian law, is an ex parte order). Consequently, it is the burden of the ordered party to timely object that the jurisdiction rests with the Arbitral Tribunal (if the arbitration clauses provides for the regular arbitration procedure which results in an enforceable award: the so-called "*arbitrato rituale*"), or the inadmissibility of the claim (if the arbitration clause provides for an alternative arbitration procedure which does not result in an enforceable award: the so-called "*arbitrato irrituale*"). It is a consequence of the "*non ultra petita*" principle: the Court is not allowed to declare its lack of jurisdiction (or the inadmissibility of the claim), if the concerned party fails to timely raise the relevant objection (among the many examples, see decision no. 3246 of 9 July 1989 of the I Civil Chamber of the Supreme Court; decision no. 8166 of 18 July 1999 of the I Civil Chamber of the Supreme Court; decision no. 12684 of 30 May 2007 of the the I Civil Chamber of the Supreme

Court; decision no. 5265 of 4 March 2011 of the the II Civil Chamber of the Supreme Court).

Furthermore, the Court stated that the parties did not waive their right to arbitrate even if they brought a counterclaim in judicial proceedings (a counterclaim would entail that the Court has jurisdiction over the claim) or they commenced proceedings in Court with respect to a different dispute concerning the same relationship. In this case: "*there is no waiver (implicit or explicit) of the right to arbitrate, due to the fact that a counterclaim was brought and other proceedings in Court were commenced.*" In this respect, the Court referred to a recent ruling of the Supreme Court (decision no. 3463 of 20 February 2015 of the II Civil Chamber). This ruling states that "*in an arbitration case, the arbitration clause may refer to arbitration all civil and commercial disputes concerning the negotiable rights arising from the contract in which the clause is stipulated. However, the waiver of the right to arbitrate with respect to a certain dispute arose between the parties does not entail the waiver of the right to arbitrate with respect to any future dispute. The only possible exception is an agreement between the parties, whereby they explicitly waive their right to arbitrate (…).*"

Therefore, the Court ruled that the parties did not waive their right to arbitrate and, thereafter, decided upon the issue of the arbitrability of the dispute.

The Court ruled that the dispute was arbitrable, although its reasoning seems to mistake the concept of the non-negotiability of rights with the imperative nature of the relevant law rules. The Court ruled: "*it is necessary to examine on a case-by-case basis every situation according to the scope of the dispute, the negotiability or non-negotiability of a given right, and checking if the given right may be waived or not according to the applicable rules. It is also important ascertaining whether the violation of a certain rule determines a Courts' reaction without the need of any initiative by the parties. It seems clear that the case at hand concerns a dispute that the parties may freely regulate or settle by concluding agreements thereof (…).*"

The Court of first instance of Rome set aside the payment order and declared that the former director's claim was inadmissible. The reason was that the arbitration clause provided for the so-called "*arbitrato irrituale*" (that is, an alternative arbitration procedure which does not result in an enforceable award). Therefore, the court re-carachterised the objection raised by the company aiming at "*declaring the Court's lack of jurisdiction*". On the other hand, the Court did not set a time-limit to re-commence the proceedings before the Arbitral Tribunal, ruling that article 819/*ter* of the Italian Code of Civil Procedure did not apply. In fact, by virtue of the decision no. 223 of 19 July 2013 of the Constitutional Court, a claim brought in Court may be transferred to an Arbitral Tribunal (and vice versa) only if the arbitration clause provides for the so-called "*arbitrato rituale*" (that is, the regular arbitration procedure which results in an enforceable award).

⁂

Arbitration and statute of limitations

by Roberto Oliva

First Civil Chamber of the Supreme Court by its order no. 20101 of 7 October 2015 requested the First President of the Court to transfer to the Supreme Court sitting *en banc* a case concerning the relationship between arbitration and the limitation period provided for by a specific statute of limitations. The dispute concerned Article 2527(3) of the Italian Civil Code, which states that the member excluded from a cooperative company is entitled to challenge the relevant resolution within 30 days of its communication. The current rule in force is Article 2533(3) of the Italian Civil Code, which extended the limitation period to sixty days, the same limitation period provided for by Article 2287(2) of the Italian Civil Code with respect to partnerships.

A remarkable line of cases of the Supreme Court considers that the above mentioned limitation period does not apply in arbitration proceedings (in particular, taking into account the timing required for the constitution of the Arbitral Tribunal). Therefore, the referral of any dispute (including those concerning an exclusion resolution) to an Arbitral Tribunal, by virtue of an arbitration clause stipulated in the Articles of association, would imply that the time-limit is lifted (in this respect, the order at hand refers to several precedents, such as decision no. 2084 of 30 March 1984 of the I Civil Chamber of the Supreme Court, decision no. 2657 of 7 March 1995 of the I Civil Chamber of the Supreme Court and decision no. 11436 of 12 November 1998 of the I Civil Chamber of the Supreme Court).

According to the Court this line of cases should be thoughtfully examined.

First, it is difficult to justify that the statute of limitation applies (or does not apply), depending on the method chosen by the parties to settle their disputes (an Arbitral Tribunal instead of the Court).

Moreover, the Court considered that the jurisdictional nature of arbitration proceedings must be taken into account.

Indeed, the request for arbitration tolls the statute of limitations, as per Article 2943(4) of the Italian Civil Code, amended by article 25 of Law no. 25 of 5

January 1994. Furthermore, it also has the effect of suspending the period of limitations, which is a typical effect of judicial proceedings, according to Article 2945(4) of the Italian Civil Code.

To this respect, the Supreme Court also took into account a decision of the Constitutional Court (decision no. 223 of 19 July 2013), which ruled that Article 819/*ter*(2) of the Italian Code of Civil Procedure is constitutionally unlawful. More specifically, the Constitutional Court ruled that it was unlawful to exclude the application of Article 50 of the Italian Code of Civil Procedure to the relationship between arbitration and judicial proceedings (the so-called "*translatio iudicii*"). In other words, the Constitutional Court ruled that, as to their effects, there is no difference between a claim filed in arbitration and a claim filed in Court.

The Supreme Court concluded that the short time-limit provided for by Article 2527(3) (now 2533(3) and 2287(2) of the Italian Civil Code) could also apply in arbitration proceedings. Indeed, it is wrong to regard the constitution of the Arbitral Tribunal as the activity to be timely performed in order to avoid the time limitation. This activity, in fact, is the service on the other side of the request for arbitration.

A further issue, which was not addressed by the Supreme Court in the ruling at hand, is whether it is possible to issue interim measures in favour of the excluded partner before the constitution of the Arbitral Tribunal. In my view, the Court is allowed to issue interim measures, as in any case of challenge of a resolution. Among the several rulings concerning this topic, the decision of 28 February 2014 of the Court of first instance of Milan is particularly interesting. This ruling rejected the application by analogy to limited liability companies of the time-limit set in Articles 2287 and 2544 of the Italian Civil Code. Conversely, the Court of first instance of Milan stated that the only applicable limitation period is that in article 2479/*ter*(1) of the Italian Civil Code. This limitation period is 90 days of the registration of the resolution in the company's books. However, several Italian Courts do not support this view.

⁂

The case of the additional preposition

by Roberto Oliva

A recent judgment of the Supreme Court (decision no. 18707 of 22 September 2015) dealt with a very peculiar case. A party objected that an arbitration clause was unenforceable, since it included an additional preposition (more precisely the preposition "*di*", which in Italian means "*of*").

In this case, the Supreme Court, as well as the Court of first instance, avoided a formalistic excess. The Court did not repeat the old case, referred to by Gaius, in which a party lost the case due to a lexical mistake.

In 2009 two companies entered into an agreement and they also stipulated that any dispute concerning the validity, construction and fulfillment of such agreement shall be settled by an institutional arbitration under the rules of the Arbitration Chamber of Padua, which is part of the Chamber of Commerce of Padua.

The only problem is that the Arbitration Chamber of Padua (Camera Arbitrale di Padova) did not exist, as it had merged with the Arbitration Chamber of Veneto on 1 January 2004. The resulting entity is the Padua Arbitration Chamber (Camera Arbitrale Padova, without the preposition "*di*").

Moreover, the rules of the latter (Padua Arbitration Chamber) state that any arbitration clause stipulated after the merger, providing for an arbitration administered by one of the merged institutions, shall not be construed as providing for an arbitration administered by the Padua Arbitration Chamber (Camera Arbitrale Padova, without "*di*") . This provision is contained in the preamble of the current rules of the Padua Arbitration Chamber (Section "*On the Arbitration Chamber*", Article 2; "*La camera arbitrale*" in Italian).

Under these circumstances, a party to the agreement requested and obtained a payment order against the other party. The latter challenged the order, objecting to the Court's jurisdiction, due to the arbitration clause. The claimant replied to that objection alleging that the arbitration clause was unenforceable, because it referred to the Court of Arbitration of Padua with the preposition "*di*" (Camera Arbitrale di Padova). The Chair of the Padua Arbitration Chamber (Camera

Arbitrale Padova) also supported this view in a letter in which he claimed that the arbitration clause at hand was void.

Nevertheless, the Court of first instance of Padua ruled that the jurisdiction rested with the Arbitral Tribunal.

The Court's ruling was appealed before the Supreme Court, which confirmed it.

First of all, it is unlikely that the parties chose an arbitral institution which ceased to exist in 2003, given that the agreement was stipulated in 2009. The preposition "*di*" ("*of*" in English) only seems a typing mistake.

The intention of the parties to refer their disputes to an arbitration administered by an existing arbitration institution, and not by an institution discontinued in 2003, seems clear from the arbitration clause. Indeed, in such clause the parties even referred to the "*rules of the arbitration chamber in force when the claim is brought*."

As to the different construction of the Padua Arbitration Chamber, that construction cannot lead to the conclusion that the arbitration clause is unenforceable. Indeed, article 832 of the Italian Code of Civil Procedure states that "*Should the arbitral institution decline to administer the arbitration, the arbitration agreement shall remain effective (…).*"

Despite its particular features, the case confirms the need to carefully draft the arbitration clause.

⁂

Arbitration clause and payment order

by Roberto Oliva

It is quite usual that, when inserting an arbitration clause in an agreement, a party would like to preserve its right to file with the Court a request for a payment order (which is an ex parte order). The purpose would be to attain a temporarily enforceable payment order, since it would be an effective and fast solution to protect its rights.

Nonetheless, the outcomes of such choice could be different from those expected. The VI Civil Chamber of the Supreme Court, in its order no. 21666 of 23 October 2015, analysed the possible consequences.

A dispute arose between an association and a member thereof. The member did not wait for the association to file its claim. Indeed, he requested the Court to declare that the association's claim was ungrounded.

The association objected that the jurisdiction rested with an Arbitral Tribunal. To be more precise, the association claimed that Article 36 of its Articles of association included an arbitration clause.

The Court of first instance granted the objection and declared its lack of jurisdiction.

The member appealed this decision before the Supreme Court.

He pointed out that another provision of the Articles of association (the last paragraph of Article 10) excluded proceedings for the recovery of membership fees from the scope of application of the arbitration clause. Such exception would not only apply to the judicial recovery of membership fees, but all the disputes concerning the membership fees – that is, also the case at hand, where the claimant requested the Court to declare that the association's claim was ungrounded.

The Supreme Court confirmed the ruling of the Court of first instance, whereby the latter stated that the jurisdiction rested with the Arbitral Tribunal, pursuant to the Articles of association.

First, the Supreme Court stated that the arbitration clause stipulated in the Articles of association was clear as to the will of the parties to refer any dispute to an Arbitral Tribunal.

It is not possible to reach a different conclusion, even if the arbitration clause excludes from its scope of application the judicial recovery of membership fees. According to the Supreme Court: "*the rationale of this limitation is based upon the important role played by the membership fees, which are the main financial source of the association. Therefore the association needs to be able to recover these fees as soon as possible, also requesting a payment order, which cannot be obtained in arbitration proceedings. If the association is prevented from using such mechanism, it would suffer a damage, even if the existence and amount of its credit are undisputed.*" The Supreme Court also ruled that "*the above does not mean that the Arbitral Tribunal does not have jurisdiction at all. The jurisdiction to issue a payment order rests with the Court, but the ordered party is allowed to challenge the payment order and request the Court to set aside it, also objecting the jurisdiction of the Arbitral Tribunal.*"

It seems to me that the reasoning of the Supreme Court is not entirely right.

First, the Court is prevented from declaring the jurisdiction of the Arbitral Tribunal if the parties did not timely raise the relevant objection. Consequently, the stipulation of an arbitration clause does not prevent the issuance of a payment order. Thereafter, the ordered party is entitled to challenge the order, objecting that the Court does not have jurisdiction. The Supreme Court had previously ruled on similar matters and the relevant decisions were also referred to in the ruling at hand (decision no. 5265 of 4 March 2011 of the II Civil Chamber of the Supreme Court, and decision no. 8166 of 28 June 1999 of the I Civil Chamber of the Supreme Court).

In other words, even when the contract establishes that the possible disputes between the parties shall be settled by an Arbitral Tribunal, the parties are entitled to request the Court to issue a payment order, without the need of any additional agreement. Therefore, when such additional agreement is stipulated, it would be important to construe the actual intention of the contracting parties.

⁂

Preliminary agreement and arbitration clause

by Roberto Oliva

An arbitration clause stipulated in the preliminary agreement (that is, a kind of agreement to agree, which is enforceable under Italian law) was not included in the final agreement. In any case, the disputes concerning the later have to be referred to the Arbitral Tribunal. This was the ruling of the Court of Appeal of Venice (decision no. 2361 of 12 October 2015 of the I Civil Chamber of the Appeals Court of Venice).

The case concerned a sale of shares agreement. A dispute arose when the parties had to determine the price that the buyer had to pay the seller.

The seller referred the dispute to arbitration pursuant to article 7 of the preliminary agreement. The Arbitral Tribunal ruled that the buyer had to pay the full price of the shares, as determined by the Arbitral Tribunal.

The buyer challenged the arbitration award on several grounds: lack of jurisdiction of the Arbitral Tribunal, contradictions of the reasoning, *ultra petita* and, as a consequence thereof, breach of adversarial principle.

However, the most interesting issue concerns the lack of jurisdiction of the Arbitral Tribunal. Such lack of jurisdiction would be the result of the absence of an arbitration clause in the final agreement. This clause was stipulated in the preliminary agreement, but was not stipulated again in the final agreement.

The Court of Appeal analyses this issue in depth.

The ruling of the Court of Appeal does not clarify if the claimant contested the jurisdiction of the Arbitral Tribunal during the arbitration proceedings. This is the duty of the parties, pursuant to 817(2) of the Italian Code of Civil Procedure. This provision states that: "*The party that does not object in the first statement of defense subsequent to the arbitrators' acceptance that they lack jurisdiction by reason of the non-existence, invalidity or ineffectiveness of the arbitration agreement, may not challenge the award on this ground, except in case of a non-arbitrable dispute.*" Nevertheless, the Court analysed this ground and rejected the challenge. Therefore, I assume that objection was timely raised during the arbitration proceedings.

As said, the Court of Appeal of Venice rejected the challenge. The Court followed the argumentative line of the Supreme Court, whereby "*the validity and efficacy of any arbitration clause must be evaluated separately from the agreement in which it is stipulated. Consequently the clause will be valid, despite not being included in the final agreement. The reason is that the preliminary agreement is separated from the final agreement and serves different purposes*" (decision no. 22608 of 31 October 2011, of the I Civil Chamber of the Supreme Court).

Once excluded that the arbitration clause is unenforceable because it was not stipulated again in the final agreement, the Supreme Court also ascertained that, in the case it decided, the jurisdiction to settle the dispute rested with the Arbitral Tribunal. On the contrary, the Court of Appeal of Venice did not examine this issue in its ruling. In any case, this issue could be deemed as redundant. Indeed, article 808/*quarter* of the Italian Code of Civil Procedure states: "*in case of doubt, any arbitration agreement shall be interpreted as covering all disputes arising from the agreement or the dispute to which the agreement refers.*"

⁂

Grounds for setting aside

by Roberto Oliva

Decision no. 22007 of the I Civil Chamber of the Supreme Court deals with the issue of the grounds for setting aside an arbitration award delivered in proceedings commenced pursuant to an arbitration clause stipulated before the entry into force of Legislative Decree no. 40 of 2 February 2006.

Before the reform, this issue was governed by the old article 829(2) of the Italian Code of Civil Procedure. This provision held that "*A request for setting aside may also be filed where the arbitrators did not decide according to rules of law, unless the parties have authorised them to decide ex aequo et bono or they have declared that there may be no recourse against the award.*"

On the contrary, now, according to article 829(3) of the Italian Code of Civil Procedure, "*The recourse for violation of the rules of law relating to the merits of the dispute shall be admitted if so expressly provided by the parties or by the law (…).*"

The purpose of the reform is to achieve further stability of the arbitration awards, limiting the grounds for their setting aside. In order to do so, the lawmakers used the natural tendency to avoid changing the *status quo*.

The transitional provisions contained in article 27 of Legislative Decree no. 40/2006 seem to require that the new rule, which exclude the recourse for violation of law relating to the merits, applies even to arbitration proceedings commenced pursuant to arbitration clauses stipulated before the reform. That is, arbitration clauses stipulated when the silence of the parties had a totally different meaning.

A similar option could be justified according to the procedural principle "*tempus regit actum*" (whereby the legal regime applicable is that in force at the time of the relevant activity). Simultaneously, this principle would determine a modification of the arbitration clause and the retrospective application of the new grounds for setting aside.

The Supreme Court is starting a new line of cases, which concerns the analysed transitional provisions.

The Supreme Court ruled that "*legislative decree no. 40 of 2 February 2006 modified article 829 Code of Civil Procedure in order to restrict the grounds for setting aside an arbitration award. According to this provision, the arbitration clauses stipulated before its entry into force shall continue to be governed by the laws previously in force, which allowed the recourse for violation of the rules of law relating to the merits of the dispute. The only exception is that the parties agreed otherwise. In the absence of a provision that determines the nullity of the arbitration clause or establishes the obligation of the parties to adapt to the new model, the validity of those clauses must be considered implicit, despite the absence of a transitional provision thereof.*"

This ruling refers to other precedents, such as decision no. 6148 of 19 April 2012 of the I Civil Chamber of the Supreme Court, decision no. 12379 of 3 June 2014 of the I Civil Chamber of the Supreme Court, decision no. 13898 of 3 June 2014 of the I Civil Chamber of the Supreme Court, and decision no. 745 of 19 January 2015 of the Supreme Court. Furthermore, the Supreme Court also mentioned another precedent that contradicts this line of cases (decision no. 21205 of 17 September 2013 of the Supreme Court).

⁂

Corporate arbitration: the twin-track approach is wrong

by Roberto Oliva

Decision no. 22008 of 28 October 2015 of the I Civil Chamber of the Supreme Court followed the line of cases opposing the so-called "*twin-track approach*" to corporate arbitration. This judgment ruled that the only arbitration clause that may be stipulated in the Articles of association of an Italian unlisted company is the one pursuant to Article 34 of Legislative Decree no. 5 of 17 January 2003.

After the reform made by Legislative Decrees nos. 5 and 6 of 2003, that amended Italian corporate law, a new approach arose among scholars and Courts. According to this view, two different types of corporate arbitration proceedings were possible: on the one hand, corporate arbitration pursuant to article 34(2) of Legislative Decree 5/2003, which states that "*the arbitration clause shall specify the number of the arbitrators and how to appoint them. In any case, the arbitrators shall be appointed by a third party unrelated to the company; otherwise, the clause shall be deemed as null and void (…).*"; on the other hand, common arbitration pursuant to Article 808 of the Italian Code of Civil Procedure.

According to the Supreme Court, the only arbitration clause that may be validly stipulated in the Articles of association is a clause pursuant to Article 34 of Legislative Decree no. 5/2003. Indeed, in the decision no. 21202 of the VI Civil Chamber, the Supreme Court ruled that "*the liability of the Notary subsists, as per Article 28(1) of Law no. 89 of 26 February 1913, for having drafted a deed that is explicitly prohibited by law, if after 1 September 2011 the Notary drafted Articles of association providing for a common arbitration and, therefore, containing an arbitration clause not in compliance with Article 34 of Legislative Decree no. 5/2003. Indeed, starting from 1 September 2011 it is undisputed that such clause is null and void.*"

The decision I am commenting confirms the approach of the Supreme Court. According to this ruling: "*article 34 of Legislative Decree no. 5 of 17 January 2003 provides for the only arbitration clause that may be stipulated in the Articles of association of a company, other than a listed company as per Article 2325/bis of the Italian Civil Code. Any alternative or additional common arbitration clause pursuant to 808 Code of Civil Procedure (…) is, thus, not allowed. Therefore, a clause of the Articles of association, which is not in compliance with Article 34 of Legislative Decree 5 of 17 January 2003, is null and*

void. In the case at hand, the clause does not set forth that the appointment of the arbitrators has to be done by a third party. Such clause would also be void even if it set forth that the arbitrators shall settle the dispute trough a contractual determination. The consequence of the above is that the arbitration clause at hand is null and void and, thus, the jurisdiction on this dispute only rests with the Court."

Another interesting issue concerns the available means of challenge against the decision of the Court, which states the jurisdiction of an Arbitral Tribunal. Indeed in the case heard by the Supreme Court, an appeal was filed with the Court of Appeal against the decision of the Court of first instance that ruled that the jurisdiction rests with the Arbitral Tribunal. However, the Court of Appeal ruled that the appeal was not allowed, according to the most recent case law of the Supreme Court. This case law states that "*the appeal before a Court of Appeal against the decision of the Court of first instance whereby it declared the jurisdiction of the Arbitral Tribunal is not allowed. The jurisdiction of the Arbitral Tribunal is the same as the jurisdiction of the Court. Therefore, it is only on the Supreme Court to decide on the jurisdiction issue*" (decision no. 17908 of 13 August 2014 of the I Civil Chamber of the Supreme Court).

The Supreme Court recently started a new line of cases on this matter. Indeed, the Supreme Court used to rule that the decision concerning the jurisdiction on a dispute (whether it rests with the Court or with the Arbitral Tribunal) is a decision on the merits (decision no. 9289 of 25 June 2002 of the Supreme Court sitting *en banc*) and therefore a decision to be challenged by an appeal filed with the Court of Appeal.

Consequently, being aware of that change in case law, the Supreme Court ruled that, in the case at hand, it was not wrong to challenge the decision of the Court of first instance by an appeal filed with the Court of Appeal.

⁂

Optional arbitration

by Roberto Oliva

An arbitration clause stipulates that all the disputes arising out of the agreement may be referred to an Arbitral Tribunal. Is that an optional arbitration, in the sense that the claimant may choose between the Court and the Arbitral Tribunal? Does the jurisdiction exclusively rest with the Arbitral Tribunal? Or is it a void or ineffective arbitration clause?

Recent rulings of the I Civil Chamber of the Court of Appeal of Bologna (decision no. 1884 of 12 November 2015) and the VI Civil Chamber of the Supreme Court (decision no. 22039 of 28 October 2015) have shed light on this issue again.

I will first analyse the case of the Court of Appeal of Bologna.

It concerned a tender agreement entered into in May 2000. The project owner was a State entity. The agreement included an arbitration clause, whereby "*all the disputes arising out of the fulfillment of the agreement may be referred to an Arbitral Tribunal, including the disputes arising out of the failure to reach an amicable settlement as stated above. If the jurisdiction rests with the Arbitral Tribunal, Law no. 109/94 and its subsequent amendments and modifications shall apply. Jurisdiction: Court of Bologna.*"

A dispute arose between the parties and the contractor served on the project owner a request for arbitration, commencing the arbitration proceedings in October 2004. The project owner appeared in the proceedings, objecting that the Arbitral Tribunal did not have jurisdiction. In any case, it also raised its objections on the merits.

After the taking of evidence, the project owner withdrew the objection concerning the lack of jurisdiction of the Arbitral Tribunal: it is likely that some evidence emerged that strengthened its position. More specifically, the project owner declared to waive "*the objection concerning the lack of jurisdiction of the Arbitral Tribunal, restoring its full jurisdiction and acknowledging all the activities carried out by the Arbitral Tribunal.*" At this point, the contractor objected that the Arbitral Tribunal did not have jurisdiction.

That led the Arbitral Tribunal to issue a partial award on jurisdiction, whereby the Tribunal affirmed its own jurisdiction. In fact, the Arbitral tribunal ruled that, despite the lack of an effective arbitration clause in the tender agreement, an arbitration agreement was subsequently entered into. Such arbitration agreement would be the result of the request for arbitration of the constructor and the acceptance of the project owner.

The constructor also lost on the merits and, consequently, appealed the partial and final awards before the Court of Appeal of Bologna.

The Court of Appeal of Bologna considered that the tender agreement did not contain an arbitration clause, as previously stated by the Arbitral Tribunal. According to the Court, "*the clause is not binding upon the parties because it does not express the will of the contracting parties to refer all contractual disputes to an Arbitral Tribunal. This clause has only the meaning of allowing a future agreement between the parties to refer any dispute to an Arbitral Tribunal.*"

The Court also excluded that an arbitration agreement might be stipulated in the course of arbitration proceedings. In other words: "*the alleged agreement was unable to remedy the total lack of jurisdiction of the arbitrators in proceedings flawed from the beginning.*" Therefore, the Court of Appeal set aside the awards.

The ruling of the Supreme Court is completely different.

An arbitral clause was stipulated in an agreement for professional services. This clause sets forth that "*any dispute arising out of this agreement, which may not be settled through amicable negotiations, may be referred to an Arbitral Tribunal composed of three arbitrators, which shall only decide on the basis of the law. The Arbitral Tribunal shall not decide ex aequo et bono.*"

A dispute arose and the professional obtained a payment order issued by the Court of first instance of Milan. However, the ordered party appealed this decision, objecting that the Court did not have jurisdiction, due to the arbitration clause stipulated in the agreement. The Court overturned the payment order and acknowledged that the jurisdiction rests with the Arbitral Tribunal.

The professional appealed this decision before the Supreme Court, claiming that the arbitration clause provided for an optional arbitration, in the sense that the claimant was allowed to choose the mechanism to settle the dispute. In particular, the professional claimed that: "*by signing the arbitration clause, the parties agreed to allow the claimant to decide the mechanism to settle possible disputes.*"

In the proceedings before the Supreme Court, the Prosecutor supported the professional's claim. Indeed, he stated that "*if a doubt arise as to the construction of an arbitration clause, a strict construction has to be given, so as to state that the jurisdiction rests with the Court.*" Nevertheless, article 808/*quater* of the Italian Code of Civil Procedure clearly supports the opposite construction. This provision clearly sets forth that "*in case of doubt, the arbitration agreement shall be in the sense that the arbitral*

jurisdiction extends to all disputes arising from the contract or from the relationship to which the agreement refers." Conversely, the Prosecutor reached the conclusion that "*the parties contemplated arbitration as a facultative mechanism to which they may resort. In any case, such mechanism was only an alternative to proceedings in Court.*"

However, the Supreme Court rejected the appeal. Indeed, the Supreme Court ruled that "*the construction that the Prosecutor did of the verb 'may' used in the arbitration clause, lacked any legal basis.*"

To this respect, the Supreme Court referred to a precedent (decision no. 6947 of 8 April 2004 of the I Civil Chamber). In that case, the Court dealt with the recognition and enforcement of an arbitration award rendered by a Chinese Arbitral Tribunal. The arbitration clause granting jurisdiction to the Chinese Arbitral Tribunal included the verb "*may*" as well.

The theory of the optional nature of the arbitration clause, according to which there was no obligation to refer the dispute to arbitration and thus, arbitrators lacked any jurisdiction in that case, has been rejected by the Supreme Court. The Court stated that such theory "*is affected by a substantial mistake as to the understanding of the civil action. The legal nature of civil action (either before a Court or before an Arbitral Tribunal) implies that it is a right of the concerned party, which have the burden to use it to attain judicial protection when needed. The adversary party would hold a position of mere subjection. In any case, it would never be considered a duty or an obligation. This is enough to conclude that the parties could never have included a verb meaning an obligation or duty. Nevertheless, if this was the only proper means to express the will of the parties to refer a given dispute to an Arbitral Tribunal, the opposite statement is also right. That is to say, that the clause at hand could not have another purpose but to impose a referral of any dispute to an Arbitral Tribunal. Otherwise, the arbitration clause would have no meaning, and would only allow the parties to enter into an arbitration agreement. This is, in any case, something that could be attained without the existence of an arbitration clause.*"

⁂

Arbitration and embargo

by Roberto Oliva

The Supreme Court recently ruled on an interesting matter (decision no. 23893 of the Supreme Court sitting *en banc* of 24 November 2015). The case dealt with the consequences of the prohibition to undertake or continue economic transactions with a sovereign State (a State under embargo), with respect to an arbitration clause stipulated in an agreement previously entered into with the embargoed State.

In November 1983, an Italian company entered into an agreement with the Iraqi government, governed by French law, for the sale of five helicopters. The Italian company also issued a "*guarantee in favor of the purchaser for an amount equal to the advance payments.*" It is likely that such guarantee was a first demand bank guarantee. In any case, the ruling at hand clarifies that the guarantee has been issued by an Iraqi bank, couter-guaranteed by an Italian bank.

The agreement contained a rather complex arbitration clause. First of all, it provided for a mechanism for the settlement of the disputes and, in case of failure, an ICC arbitration: "*any dispute shall be settled by one or more arbitrators in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce of Paris. The decision of the Arbitral Tribunal shall be binding and final upon the parties.*"

The Iraqi government failed to pay one of the price instalments, due for payment in November 1986. As a consequence, the Italian seller did not deliver the helicopters subject of the contract.

Later, in August 1990, Iraq invaded Kuwait. After that, the UN Security Council passed resolution 661 of 6 August 1990, which states that: "*all States shall prevent: (…) (c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products*" (paragraph 3)

and "*all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs*" (paragraph 4).

The Regulations of the European Economic Community were even stricter (due to their imperative nature). In particular, it is worth mentioning: (i) Council Regulation (EEC) no. 2340/90 of 8 August 1990; (ii) Council Regulation (EEC) no. 2340/1990 of 29 October 1990, both preventing trade by the Community as regards Iraq and Kuwait; and (iii) Council Regulation (EEC) no. 3541/1992 of 7 December 1992, which expressly prohibits "*to satisfy or to take any step to satisfy a claim made by: (a) a person or body in Iraq or acting through a person or body in Iraq; (b) any person or body acting, directly or indirectly, on behalf of or for the benefit of one or more persons or bodies in Iraq (…)*" (Article 2). Under the Regulation, a claim shall be understood as "*any claim, whether asserted by legal proceedings or not, made before or after the date of entry into force of this Regulation, under or in connection with a contract or transaction*" (Article 1).

In light of the factual circumstances, in November 1991 the Italian seller commenced proceedings in Italy, requesting the Court to terminate the sale agreement and claiming compensation for the suffered damages. The seller also requested the Italian Court to declare the termination of the counter-guarantee issued by the Italian bank in favour of the Iraqi bank.

The Iraqi government failed to appear in Court by the first hearing, but it did so later in the proceedings. It argued that the Italian Court lacked jurisdiction on this matter (as the Iraqi government acted as a sovereign entity) and raised the "*exceptio compromissi*", objecting that the jurisdiction – if any – rests with the Arbitral Tribunal.

The Court of first instance issued an order pursuant to Article 700 of the Italian Code of Civil Procedure, preventing the Italian bank from paying the amount due under the counter-guarantee.

In November 2003, the Court of first instance ruled that the jurisdiction on the claims against the Iraqi government rests with the Arbitral Tribunal. This decision was issued after a rather complex taking of evidence, which also included two expert opinions (on the value of the helicopters and on the content of the French law governing the agreement).

However, this decision was overturned in appeal. In December 2012, the Court of Appeal ruled that the Court had jurisdiction on the matter, and accepted the claims brought against the Iraqi government.

The Iraqi government filed an appeal to the Supreme Court, claiming that the decision of the Court of Appeal was wrong.

The stipulation of an arbitration clause, and therefore the jurisdiction of the Arbitral Tribunal (maintained by the Court of first instance and denied by the Court of Appeal), was one of the grounds for appeal to the Supreme Court.

The Supreme Court confirmed the ruling of the Court of Appeal.

In a nutshell, the ruling of the Supreme Court states that the embargo resulted in the non-negotiability of the rights object of the sale agreement entered into between the Italian seller and the Iraqi government. Such embargo therefore determined the non-arbitrability of any dispute relating to that agreement.

This reasoning is enough to rule that the arbitration clause at hand is null and void and, thus, confirm the decision of the Court of Appeal.

The Supreme Court also dealt with the issue of the jurisdiction to state that the arbitration clause became null and void. The Iraqi government alleged that this jurisdiction only rests with the Arbitral Tribunal. However, this assertion is inconsistent with the principle according to which each Court has the authority to determine its own jurisdiction. As the Supreme Court ruled: "*article II(3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards clearly determines that the Court will decide on its own jurisdiction, regardless of the existence of an arbitration agreement. Therefore, it is on the Court – and not on the Arbitral Tribunal – to determine the jurisdiction of the Court if the arbitration agreement is null and void.*"

Moreover, the Supreme Court ruled that the partial lifting of the embargo did not imply a revival of the arbitration clause. Instead, the Court held that the embargo is "*a sanction that rendered illicit and immediately inadmissible arbitration proceedings and irreversible any claim filed with the competent Court, according to the lex fori.*"

Nevertheless, the case did not end after that. Indeed, the Supreme Court only confirmed that the jurisdiction rests with the Italian Court. The grounds of the appeal on the merits will have to be examined by the I Civil Chamber of the Supreme Court.

⁂

Review of an award on the merits

by Roberto Oliva

The Court of Appeal of Venice, in its decision no. 2722 of 30 November 2015, deals with the issue of the possible review on the merits of an arbitration award rendered in proceedings commenced after the entry into force of Legislative Decree no. 40 of 2 February 2006 pursuant to an arbitration clause stipulated prior to the reform.

Under the old Article 829(2) of the Italian Code of Civil Procedure, "*A request for setting aside may also be filed where the arbitrators did not decide according to rules of law, unless the parties have authorised them to decide ex aequo et bono or they have declared that there may be no recourse against the award.*" Nevertheless, the reform gave the opposite meaning to the silence of the parties on this point. Accordingly, the new Article 829(3) of the Italian Code of Civil Procedure reads as follows: "*The recourse for violation of the rules of law relating to the merits of the dispute shall be admitted if so expressly provided by the parties or by the law (…).*"

Article 27 of Legislative Decree no. 20/2006 contains the applicable transitional provisions. According to it, new Article 829(3) applies to all disputes initiated after the entry into force of the reform, despite the arbitration clause having been stipulated while the old provision was still in force.

The Court of Appeal of Venice, in its ruling, describes the two existing lines of cases on this subject. On the one hand, it analyses the reasoning of the Supreme Court that states that the above mentioned transitional provision cannot prevent the review of an award on the merits. On the other hand, the Court analysed the opposite line of cases and referred to decision no. 21205 of the VI Civil Chamber of the Supreme Court and the order no. 29075 of the I Civil Chamber of the Supreme Court.

The Court of Appeal followed the latter line of cases and therefore ruled that the review of an award on the merits is only allowed if such review has been agreed by the parties in the arbitration clause. In other words, the admissibility of the review would not be affected by the legal regime in force when that clause was stipulated. In this respect, the Court stated that "*transitional provisions are clear in preferring the law in force at the time the arbitration award was delivered, to the legal regime*

in force before that. There are no reasons to justify a different interpretation of a clearly defined rule. To this respect, there is no constitutional provision that guarantees the immutability, and the inalterability of the scope of the grounds of challenge on the basis of a fortuitous fact, such as the time of stipulation of the arbitration clause."

Some doubts arise due to the lack of a settled opinion regarding the possible review of an arbitration award on the merits. Are there remedies to counterbalance such uncertainty? I think that the easiest manner in which the parties could avoid such uncertainty, is by specifying, at the latest at the time of the constitution of the Arbitral Tribunal, if they accept the review on the merits. Nevertheless, this solution may only be implemented in new proceedings. And it also requires that the parties reach an agreement on an important and controversial issue, which may prove extremely difficult.

⁂

Once again, on the review on the merits

by Roberto Oliva

This is the third time in row we deal with the issue of the review on the merits of an arbitration award, rendered pursuant to an arbitration clause stipulated before the 2006 reform of Italian arbitration law, in proceedings commenced after the reform.

Before the reform made by Legislative Decree no. 40 of 2 February 2006, Article 829(2) of the Italian Code of Civil Procedure had a different wording. It held: "*A request for setting aside may also be filed where the arbitrators did not decide according to rules of law, unless the parties have authorised them to decide ex aequo et bono or they have declared that there may be no recourse against the award.*"

New Article 829(3) of the Italian Code of Civil Procedure sets forth an opposite rule. Indeed, it states that: "*The recourse for violation of the rules of law relating to the merits of the dispute shall be admitted if so expressly provided by the parties or by the law (…).*"

A question then arises as to which is the applicable rule when an arbitration award was rendered in proceedings commenced after the 2006 reform pursuant to an arbitration clause stipulated prior to the reform.

Article 27 of Legislative Decree no. 40/2006 holds that "*Articles 21, 22, 23, 24 and 25 shall apply to arbitration proceedings, in which the request for arbitration was made after the entry into force of this decree.*" Article 24 of Legislative Decree no. 40/2006 amended, among other provisions, Article 829 of the Italian Code of Civil Procedure.

Because of the above, new Article 829 of the Italian Code of Civil Procedure should apply to any procedure for setting aside an arbitration award rendered in arbitration proceedings started after Legislative Decree no. 40/2006 entered into force (on 2 March 2006), irrespective of the date on which the arbitration clause was stipulated or the law rules applicable at that time.

A first line of cases of the Supreme Court follows this approach, and abundant case law applied this construction.

However, there is a new line of cases that contradicts the above mentioned case law. According to this new line, it is allowed to request the setting aside, due to a violation of the rules of law relating to the merits of the dispute, of arbitration awards delivered pursuant to an arbitration clause stipulated before the 2006 reform even if the arbitration proceedings commenced after the reform. In other words, according to this line of cases, old Article 829(2) of Italian Code of Civil Procedure applies to these awards.

The I Civil Chamber of the Supreme Court requested the Supreme Court sitting *en banc* to unify the case law (order no. 25040 of 11 December 2015).

In this order, the Supreme Court stated that, in its opinion, it is not allowed to request a review of the award on the merits. The Court ruled that, having been established that "*the jurisdiction of the Arbitral Tribunal is the same as the jurisdiction of the Court, arbitration proceedings may only be governed by the procedural rules in force at the time of their commencement – i.e., at the time of the request for arbitration. A different conclusion cannot be drawn from the fact that, when the arbitration clause was stipulated, the parties took into account different procedural rules, namely those in force at the time of the stipulation.*"

Nonetheless, being aware of the existence of the above mentioned lines of cases, the First Chamber requested the President of the Supreme Court to transfer the case to the Supreme Court sitting *en banc*. We are awaiting their ruling.

⁂

Corporate arbitration and interim measures

by Roberto Oliva

The Court of first instance of Milan in a recent order of 22 December 2015 deals with the issue of the relationship between corporate arbitration and the residual jurisdiction of the Courts to issue interim measures. This ruling is in line with the settled case law of the Court of Milan (as well as of several other Italian Courts).

The case in which such order was issued may be summarised as follows.

A quotaholder of a limited liability company challenged some company's resolutions (increase of corporate capital and change in corporate scope of activities). To this purpose, he commenced arbitration proceedings, pursuant to Article 35 of the company's Articles of association.

Pending the appointment of the Arbitral Tribunal, the claimant requested the Court to order the stay of the challenged resolutions, pursuant to article 2378 of the Italian Civil Code. This rule refers to limited companies by shares and also applies with regard to limited liability companies pursuant to Article 2479/*ter* of the Italian Civil Code.

Despite acknowledging that the challenge of the company's resolutions had to be settled by an Arbitral Tribunal, pursuant to the arbitration clause stipulated in the Articles of association, the Court of first instance of Milan ruled that it had jurisdiction to issue interim measures. Such decision is in line with the settled case law, whereby "*the jurisdiction of the Arbitral Tribunal, to order the stay of a challenged resolution of the general meeting, only subsists after the appointment of the Tribunal. On the contrary, the residual jurisdiction of the Court to issue interim measures subsists if such measures are requested before the appointment of the Tribunal. The aim is to ensure the constitutional right of defense; right of which the request for interim measures is an integral part during all the phases of the dispute and arbitration proceedings.*"

The orders of the Court of first instance of Milan of 28 February 2014 and 7 November 2013 are precedents sustaining this position. The latter ruling has clarified that "*article 35(5) of Legislative Decree no. 5/2003 differs from the general provision of Article 669/quinquies of the Italian Code of Civil Procedure, since it introduces*

a diachronic division of the jurisdiction to order the stay of a challenged resolution. According to this provision, as a general rule, the jurisdiction rests with the Arbitral Tribunal if it has been already appointed. Otherwise, the residual jurisdiction rests with the Courts, in order to guarantee the right of defense during all the phases of arbitration proceedings."

Although it does not concern the relationship between interim jurisdiction of the Courts and that of the Arbitral Tribunal, another interesting issue is whether it is possible to order the stay of a challenged resolution. Such order may be issued, even when the resolution has been implemented. The only requirement is that the resolution still has effects on the structure and upon the organisation of the company. Among the many precedents in this issue, I would like to mention the well-grounded order of the Court of first instance of Milan of 4 November 2012.

⁂

Law journal published by
Arbitration in Italy Ltd