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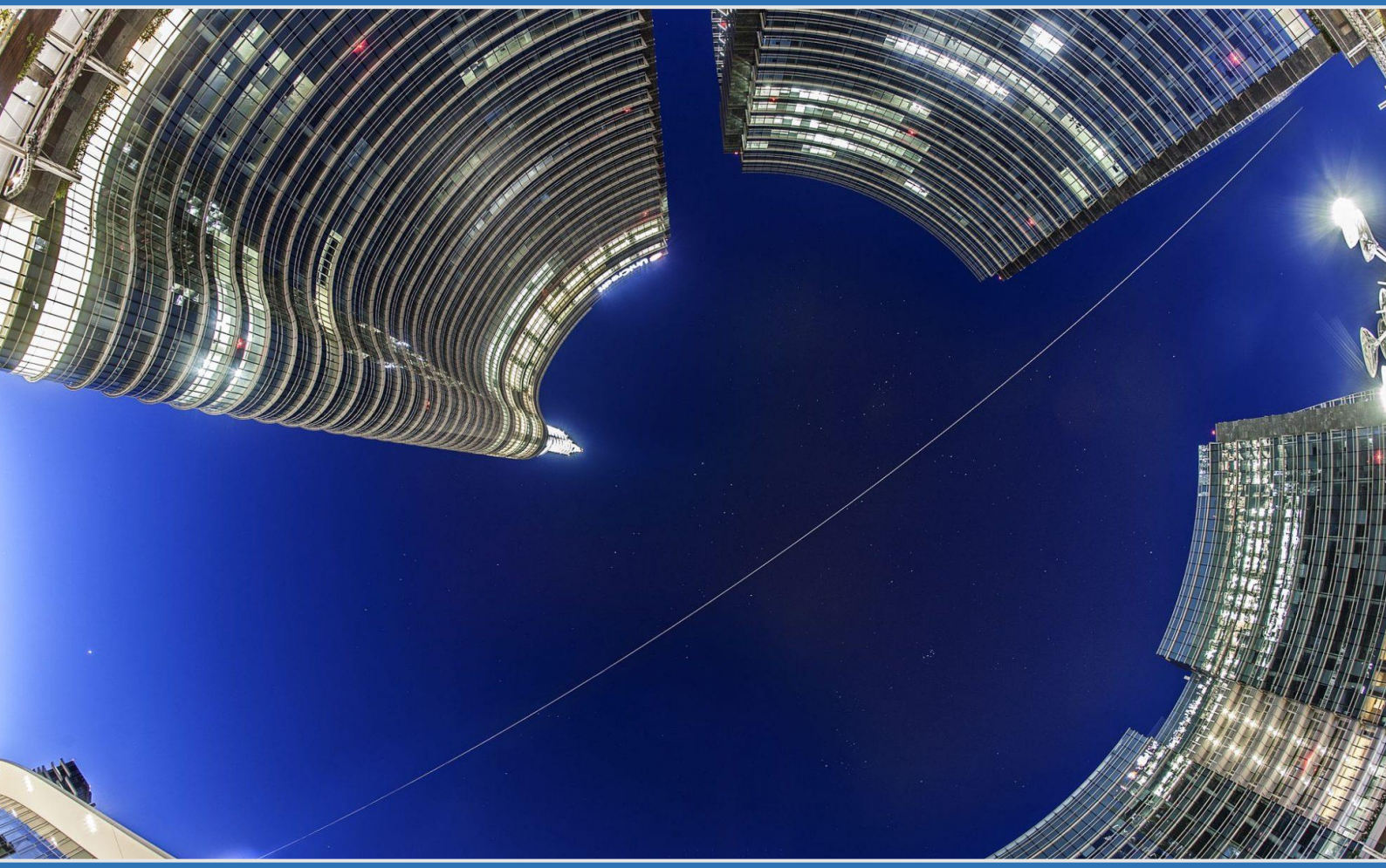

Arbitration in Italy

News on international and domestic arbitration in Italy

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Corporate arbitration and insolvency proceedings

by Roberto Oliva

After a year-long pause, a new issue of Arbitration in Italy is on the press. This first article of the brand-new issue concerns a matter already analysed in the past: the relationship between arbitration and insolvency proceedings and, in particular, between arbitration and bankruptcy proceedings.

I took the opportunity to further investigate the matter since it was examined by the Court of first instance of Turin in a recent decision (no. 2510 of 23 May 2019).

The case heard by the Turin Court was as follows.

The receiver of a bankrupt company sued the company's former director, as well as a third-party, claiming that a certain amount of company's money had been taken by the director and given to that third-party. As a consequence, he claimed towards the director and the third-party the refund of the said amount.

The respondents raised a number of objections on the merits and on the procedure and, in particular, they objected to the jurisdiction of the State Court asserting that the jurisdiction lies with the Arbitral Tribunal provided for by the arbitration clause contained in the bankrupt company's articles of association.

The said arbitration clause sets forth that the possible disputes between the shareholders and the companies, as well as the disputes commenced by or against the directors and the statutory auditors, shall be submitted to an Arbitral Tribunal.

The respondent's objection to the State Court jurisdiction was rejected.

First of all, the Court of Turin stated that the said arbitration clause cannot be enforced in the relationship between the bankruptcy receiver and the third-party. Indeed, under Italian law an arbitration clause contained in the articles of association of a company is not binding in the relationship between the company and a third-party. It only binds the shareholders and, under certain conditions, the directors and statutory auditors.

Moreover, the Court of Turin also stated that the above mentioned arbitration clause cannot be enforced in the relationship between the bankruptcy receiver and the company's former director. In this respect, the Court of Turin referred to a decision of the Italian Supreme Court (Italian Supreme Court, VI Civil Chamber, decision no. 28533 of 8 November 2018, Italian text available here), that addressed the matter in an obiter dictum. The principle established by the said decision is that "*the arbitration clause contained in the articles of association of a bankrupt consortium is binding in proceedings instituted by the bankruptcy receiver to claim a right arisen before the insolvency proceedings are opened, while the said clause is not binding in proceedings instituted by the bankruptcy receiver against the consortium's directors, since they are aimed to restore the consortium's assets in the interest of consortium's members and creditors and the arbitration clause is not binding on the creditors because they are not parties thereto.*" Nonetheless, the Supreme Court upheld the lower Court's decision that stated that the jurisdiction lies with the Arbitral Tribunal provided for by the arbitration clause contained in the articles of association since, in the case at hand, the bankruptcy receiver was claiming a right which has arisen out of the said articles before the opening of the insolvency proceedings.

However, the decision of the Court of Turin is in line with the established case-law (see Italian Supreme Court, I Civil Chamber, decision no. 19308 of 12 September 2014), whereby the claim brought by the bankruptcy receiver is other than the the general claim concerning directors' liability under Italian companies' law (Article 2393 of Italian Civil Code) and therefore it cannot be deferred to an Arbitral Tribunal.

Under Italian law, the company (or, under certain circumstances, the company's shareholders in a derivative action) may bring the general claim concerning directors' liability under Article 2393 of Italian Civil Code. If the articles of association of the company contain an arbitration clause, this claim is submitted to the Arbitral Tribunal.

In addition, the company's creditors are also entitled, under certain circumstances, to bring a claim against the company's directors (Article 2394 of Italian Civil Code). This claim is not a derivative claim and cannot be referred to arbitration under the arbitration clause possibly contained in the company's articles of association.

The claim brought by the bankruptcy receiver under Article 146 of Italian bankruptcy law combines the general claim under Article 2393 of Italian Civil Code (which can be referred to arbitration) and the creditors' claim under Article 2394 of Italian Civil Code (which cannot be referred to arbitration). This is the reason why, in case of claims under Article 146 of Italian bankruptcy law, the arbitration clause possibly contained in the company's articles of association does not apply.

In the light of the above and to sum up, under the established Italian case-law the arbitration clause contained in the articles of association of a company is also

binding after its bankruptcy, but it does not apply in proceedings under Article 146 of Italian bankruptcy law. Moreover, it could be maintained that the said clause does not apply in proceedings under Article 150 of Italian bankruptcy law (concerning the order of payment in relation to the unpaid share capital), but this topic could be addressed in a further article.

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Prague Rules: minimal notes from an Italian perspective

by Roberto Oliva

In the last months, the international arbitration community has discussed on a new topic: the Rules on the efficient conduct of proceedings in international arbitration (Prague Rules), officially presented on 14 December 2018.

The Prague Rules are a soft law tool aimed at increasing efficiency and reducing the costs of international arbitration. Their working group, mainly composed of practitioners from Eastern Europe and the CIS, believes that this goal may be achieved by granting the arbitral tribunal with a more active role in the case management.

The Prague Rules, on the other hand, are no longer openly opposed (as they were, for example, in their September 2018 draft) to the IBA rules on the taking of evidence in international arbitration.

The first comments on the Prague Rules can be divided into two categories: some authors harshly criticized them, alleging a risk of 'russification' of international arbitration (see, for example, the article by Lawrence W. Newman and David Zaslowsky, of Baker and McKenzie New York office, significantly entitled The Russians are coming, and they want to change how we conduct international arbitration); other authors stress that these rules do not present a radical change, since their provisions on case management and taking of evidence are already contained in a number of institutional arbitration rules, as well as in the IBA Rules (see, for example, Sol Argerich, a civil law practitioner).

Which is the right perspective?

Neither of them.

The Prague Rules have a number of downsides (I intend to analyse them in a separate article), but they have no revolutionary content. With a few exceptions, their provisions can also be found in the IBA Rules. Nonetheless, they may present a material change from the point of view of the civil law practitioner. And also from the point of view of the common law practitioner.

First of all, I think that it is really significant that the Prague Rules, before addressing the topic of the taking of evidence, address the one of case management (Article 2). Other soft law tools address the same topic (for example, the ICC Note to parties and arbitral tribunal on the conduct of arbitration). However, the emphasis on the relationship between case management and taking of evidence is the true new feature of the Prague Rules.

With respect to the taking of evidence, the Prague Rules contemplate the same procedural tools of the IBA Rules; however, from the point of view of civil law practitioners.

In this respect, I will not carry out a detailed analysis of the differences between IBA Rules and Prague Rules; I will focus instead on the provisions that drew my attention.

First of all, those relating to the experts.

Both the IBA Rules (Article 6) and the Prague Rules (Article 6) provide for the possibility of the appointment of an expert by the arbitral tribunal. It is well known, however, that, under the IBA Rules, this appointment is uncommon, as it is preferred to have parties-appointed experts (expert witnesses) under Article 5 of the IBA Rules (for instance, this is the position of Christopher Harris, QC: annual conference of the Swiss Arbitration Association of 2 February 2018).

Under the Prague Rules, on the contrary, the default rule is that of the appointment by the arbitral tribunal. A rule very close to that contained in the Italian code of civil procedure (Articles 191 ss. of the Italian code of civil procedure).

The Prague Rules have an even more restrictive approach with respect to the documentary evidence, in its particular form of the request for production of documents that one party may address to the other.

The IBA Rules have tried to limit this tool and to depart from its common law model (Article 3). The Prague Rules, on the contrary, adopt a different model (Article 4), which is also very similar to that of the order of production provided for by Italian procedural law (art. 210 of Italian code of civil procedure).

Further, the Prague Rules introduce in international arbitration another principle provided for by Italian law: the *iura novit Curia* principle. In fact, while the Rules reiterate that the parties bear the burden of proof with respect to their legal position (Article 7.1), they also add that the arbitral tribunal may apply legal provisions not pleaded by the parties or refer to authorities not submitted by the parties, provided that they have been given an opportunity to express their views (Article 7.2).

Are the Prague Rules useful? We will be able to answer this question only in the light of and depending on their practical application. Clearly, this application will also point out their downsides and the provisions that need to be amended.

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Scope of corporate arbitration clauses

by Roberto Oliva

A recent decision issued by the Court of Cosenza (no. 1171 of 4 June 2019) addresses the topic of the scope of corporate arbitration clauses.

The dispute decided by the Court of Cosenza concerned the request for judicial removal of the director of a company, based on several alleged serious breaches to his duties, and the compensation of the relevant damage.

Since the dispute concerned a partnership ('*società di persone*'), the proper venue was the ordinary Court of Cosenza and not the Commercial Court provided for by Italian legislative decree no. 168 of 27 June 2003, which is the proper venue, amongst other things, for similar disputes concerning limited companies ('*società di capitali*').

The respondent raised a number of objections on the merits and also objected to the jurisdiction of the State Court, on the basis of the arbitration clause stipulated in the company's articles of association.

The Court of Cosenza rejected the said objection.

First of all, the Court stated that, even though corporate disputes may be usually deferred to arbitration, arbitral tribunals have no jurisdiction with respect to disputes involving the interests of the company or concerning the violation of law rules protecting collective interest of the partners/shareholders or third parties.

On the basis of the said principle, the Court held that the arbitral tribunal provided for in the company's articles of association had no jurisdiction on the case at hand, since it concerned, amongst other things, alleged omissions on the part of the director concerning the company's financial statements. In this respect, the Court of Cosenza referred to a handful of precedent decisions, including some decisions issued by the Italian Supreme Court (the most recent of which is Italian Supreme Court, I Civil Chamber, decision no. 18600 of 12 September 2011).

I regard that the decision of the Court of Cosenza, although issued in accordance with the case law of the Italian Supreme Court, is nevertheless wrong. In my opinion, the principles laid down by some arbitral tribunals (see for example the award published on Corriere Giuridico 1999, p. 613, with a comment by Prof. Salvaneschi) or certain lower Courts (Court of Monza, 14 December 2001, on Società, 2002, p. 1019; Court of Bari, 7 February 2007, on Il Merito, 2007, p. 39; Court of Torino, 11 March 2011, on Dejure) are more persuasive. According to the said decisions, there is no doubt that the liability action against a director and the request for her or his removal may constitute the subject matter of a settlement. These disputes concern disposable rights and, as a consequence thereof, there is no law rule preventing the arbitral tribunals jurisdiction on them. Otherwise, on the basis of the principle laid down by the Court of Cosenza, we would reach the conclusion that the dispute concerning the removal of a company's director would be subject to the arbitral tribunal or the State Courts jurisdiction in the light of the actual alleged grounds for the requested removal (*e.g.*, State Court jurisdiction if the removal is requested on the basis of omissions concerning the financial statements; arbitral tribunal jurisdiction if the request is based on other grounds), which is clearly non-sense.

In addition, it could also be stated that the decision of the Court of Cosenza is wrong since there is no law rule preventing the jurisdiction of arbitral tribunals on disputes concerning the company's financial statements.

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New arbitration rules of Milan Chamber of Arbitration

by Roberto Oliva

Milan Chamber of Arbitration published its new arbitration rules. These new rules apply to arbitration proceedings commenced after 1st March 2019 unless the parties have agreed, under Article 832 of the Italian code of civil procedure, that the arbitration proceedings shall be subject to the arbitration rules in force at the time of the stipulation of the arbitration clause (however, in this case, the Arbitration Chamber may refuse to manage the proceedings).

The new rules improve and rationalise various provisions of the previous arbitration rules and also contain some new interesting provisions.

First of all, with respect to the interim and provisional measures. The new rules confirm that the arbitral tribunal may issue all urgent and provisional measures of protection, also of anticipatory nature, that are not barred by mandatory provisions applicable to the proceedings (Article 26). The same provision was already contained in 2010 arbitration rules (Article 22; the old rules are available here). The new element is that the arbitral tribunal has also the power to adopt any determination of provisional nature with binding contractual effect upon the parties. This is a significant innovation and perhaps it would have been appropriate to provide for its application only in arbitration proceedings commenced on the basis of a clause entered into after the entry into force of the new rules, as it is provided for the emergency arbitration.

The other significant innovation concerns emergency arbitration (Article 44). Emergency arbitration is a procedure for the issuance of urgent and provisional measures pursuant to Article 26 by a specifically appointed emergency arbitrator. The request is submitted to the emergency arbitrator within 5 days and she or he shall issue the relevant decision in the following 20 days after having heard the parties (or in the following 5 days, without notice to the other party, if prior disclosure risks causing serious harm to the applying party). The arbitration proceedings on the merits, if not already commenced, shall be instated within 60 days from the filing of the request, or within the time limit set by the emergency arbitrator. Otherwise, the emergency measure becomes ineffective.

This provision, as mentioned, only applies in arbitration proceedings pursuant to an arbitration agreement entered into after the entry into force of the new rules. It appears to be the answer to that minority line of cases holding that the stipulation of an arbitration clause prevents the parties from filing with the State Courts an application for urgent and/or provisional measure if the arbitral tribunal is vested with the power to issue provisional measures. For the time being, it is not possible to predict whether this provision would also induce Italian Courts to overrule the majority line of cases whereby State Courts may issue urgent and/or provisional measures before the constitution of the arbitral tribunal. I do hope that Italian Courts would reaffirm the majority line of case, also in the light of the fact that, in cases of the utmost urgency, State Courts are able to provide the parties with a protection of their rights faster and more effective than the emergency arbitration provided for by the new arbitration rules of Milan Chamber of Arbitration: indeed, State Courts might issue a preliminary measure even the very same day of its request.

The new rules of the Milan Chamber of Arbitration also set forth precise disclosure duties with respect to third-party funding (Article 43).

As far as corporate arbitration is concerned, the new rules set forth that, if the arbitration clause contained in the company's articles of association does not provide for the appointment of the arbitral tribunal by a third party, the appointment is made by the Arbitral Council (Article 17). This provision clearly aims at avoiding the arbitration clause being deemed as null and void under Article 34(2) of Italian legislative decree no. 5 of 17 January 2003, whereby the corporate arbitration clause that does not provide for the appointment of the arbitral tribunal by a third party, unrelated to the company, is null and void. In the next few years, we will be able to understand if this provision would be able to achieve its purpose, as I hope it would be able to do, and if the case law would hold the arbitration clause enforceable, as supplemented by the arbitration rules.

Other interesting provisions are also those concerning the replacement of the arbitral tribunal (Article 23) and the duty to act in good faith during any phase of the proceedings (Article 9).

At the end of the day, it could be maintained that the new rules take into account the developments in international arbitration and its best practices and contribute to enhancing and promoting Italy as the venue of international arbitration proceedings.

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Wording of the arbitration clause and setting aside of the award

by Roberto Oliva

The wording of the arbitration clause is of utmost importance. A recent decision of the Court of Appeal of Milan (No. 2528 of 10 June 2019) confirms this importance also with respect to the possible recourse for setting aside the award.

In 2013, a Romanian company and the Italian subsidiary of a Japanese company entered into a contract for the engineering, procurement, construction, commissioning and start-up of a PV plant in Romania.

A dispute arose between the parties with respect to the fulfilment of the contractual obligations. This dispute was referred to the arbitral tribunal provided for in the contractual arbitration clause.

The losing party in arbitration seized the Court of Appeal of Milan requesting the setting aside of the arbitration award, alleging that the arbitral tribunal misapplied the law rules concerning the merits.

As we know, in the case of arbitration proceedings instated on the basis of an arbitration clause entered into after the 2006 reform of Italian arbitration law, this appeal (concerning the merits) is only allowed if the arbitration clause expressly provides for it.

This is the nerve centre of the case. The arbitration clause set forth that "*The decision made by Arbitration shall be final and binding for the Parties, except for refutations that may be allowed by the law.*"

On the basis of this clause, the losing party in arbitration argued that the appeal on the merits under Article 829(3) of Italian code of civil procedure was allowed since this appeal may be listed amongst "*refutations (…) allowed by the law.*"

The Court of Appeal had a different view. It referred to the case law holding that the appeal on the merits is only allowed if the parties clearly and without any ambiguity expressed their intention to allow this recourse (as stated by Italian Supreme Court, I Civil Chamber, decision No. 19075 of 25 September 2015).

Since in the case at hand the wording of the arbitration clause was unclear and ambiguous, the Court of Appeal rejected the appeal.

Would it had been possible to avoid this dispute? I regard that the answer is 'yes' if the arbitration clause had different wording. Was it necessary to stipulate in the arbitration clause that "*The decision made by Arbitration shall be final and binding for the Parties, except for refutations that may be allowed by the law*"? I believe that the answer is 'no', given that this provision, at the end of the day, has no true content.

In the light of the above, the paramount importance of the wording of the arbitration clause is confirmed: on the one hand, with respect to the choice of the proper words; on the other hand, with respect to the need to avoid non-sense jargon expressions that could be exploited by a malicious counterparty.

⁂

Corporate arbitration: the doctrine is (finally) right, its application is wrong

by Roberto Oliva

Corporate arbitration is a major topic for Italian arbitration practitioners. The Italian Supreme Court developed a doctrine and laid down principles not entirely right. Some lower Courts tried to take a more appropriate approach, but to no avail.

A recent decision issued by the Court of first instance of Bologna (No. 1378 of 13 June 2019) ostensibly applied the right doctrine (or the doctrine I deem right); nonetheless, it came to the wrong conclusion.

The case heard by the Court of Bologna concerned some resolutions of a limited company.

The claimant's case was that these resolutions were null and void since they were aimed at circumventing several law rules on corporate governance.

The respondent, amongst other things, objected to the jurisdiction of the State Court, because of the stipulation of an arbitration clause in the company's articles of association.

The Court rejected the objection to its jurisdiction, stating that that particular dispute cannot be referred to arbitration.

Under Italian law, corporate disputes are capable of arbitration if they concern negotiable rights (Art. 34(1) of Legislative Decree No. 5 of 17 January 2003).

What is the meaning of 'negotiable rights'?

The Court of Bologna referred to the Supreme Court case law holding that "*the disputes that cannot be referred to an arbitral tribunal are only those concerning non-disposable rights and therefore disputes concerning an absolute nullity*" (Italian Supreme Court, decision No. 15890 of 20 September 2012).

The doctrine is right.

Under this doctrine, in corporate matters the sole disputes that cannot be referred to an arbitral tribunal are those concerning corporate resolutions whereby the corporate purpose was changed to an impossible or unlawful purpose. Indeed, Italian law only provides for an absolute nullity with respect to these resolutions (Article 2479/*ter*(3) of the Italian Civil Code).

The Court of Bologna misapplied the right doctrine.

As said, in the proceedings before the Court of Bologna the claimant claimed that some resolutions of a limited company were null and void since they were aimed at circumventing a number of law rules on corporate governance and therefore they were unlawful. Under Italian law, the Court, on its own motion, may declare these resolutions null and void. Nonetheless, any claim concerning these resolutions is time-barred after three years of their adoption. This implies that Italian law does not provide for an 'absolute nullity' and therefore that the relevant dispute may be referred to arbitration.

I trust that in the (hopefully, near) future, I will discuss a decision that, on the basis of the right doctrine, would come to the right conclusion.

⁂

Assignment of credit and arbitration clause

by Roberto Oliva

The Italian Supreme Court has recently upheld its doctrine on the circulation of the arbitration clause in case of credit assignment (Italian Supreme Court, First Civil Chamber, decision No. 16127 of 14 June 2019).

The Italian case law laid down a peculiar doctrine that applies in case of assignment of a credit arising out of a contract containing an arbitration clause. In a few words, this doctrine entitles the obligor to raise procedural objections regardless of the procedural choices made by the assignee.

In fact, the assignee is not entitled to enforce the arbitration clause (it is not entitled to commence arbitration proceedings against the obligor); nonetheless, the obligor is entitled to object to the jurisdiction of State Courts if the assignee commences proceedings in Court.

This is a well established doctrine (see the decision of the Italian Supreme Court sitting *en banc*, No. 12616 of 17 December 1998) that, as mentioned, was recently upheld by the Supreme Court.

The case heard by the Supreme Court was extremely complex from a factual point of view. In a nutshell, it concerned the relationship between a municipality and a private company and the credits of the latter arising out of a contract for works concerning a public housing project containing an arbitration clause. The contractor went bankrupt and, as a consequence, the contract was terminated by law (Art. 81 of Italian bankruptcy law); thereafter, the contractor sold to a third party a business branch also including (in its opinion) the contract for works; later, the credits arising out of the contract were also assigned to the same third party. The assignee commenced the arbitration proceedings provided for by the arbitration clause contained in the contract for works. The arbitration award granted the requests of the assignee and the municipality seised the Court of Appeal requesting to set it aside. The Court of Appeal granted this request, stating that the assignee was not entitled to enforce the arbitration clause, and its decision was appealed before the Supreme Court. The Supreme Court upheld its doctrine: "*according to the principle laid down by said case law, which this Court deems*

right, the assignee, which merely bought the credit, without the debtor's consent, does not become a party to the arbitration agreement, which continues to apply between the original parties, so that it cannot enforce the arbitration agreement, with respect to which it is a third party."

In this intricate context, an extremely interesting issue was submitted to the Supreme Court: if the entity that bought a business branch including a contract from which a credit arose (but not the credit) and, thereafter, the same entity becomes assignee of that credit, is it entitled to enforce the arbitration clause provided for by the contract? Unfortunately, we have no answer since, in the case heard by the Supreme Court, the contract containing the arbitration clause was not assigned under the sale of the business branch. We have to wait (and hope) that the Supreme Court (or a lower Court) will examine the issue in the (hopefully, near) future.

⁂

Review on the merits

by Roberto Oliva

A recent decision issued by Italian Supreme Court (No. 17159 of 26 June 2019) gives me the chance to make brief comments on the scope of possible review on the merits of arbitration awards by Italian State Courts seised in proceedings for setting them aside.

The case heard by the Supreme Court concerned an award delivered by an arbitral tribunal in relation to compensation due to an individual by a company.

The unsuccessful party seised the Court of Appeal requesting it to set aside the award on the basis of three separate grounds. It alleged a violation of due process; inconsistency and illogicality of the award reasoning; incorrect assessment of the merits of the case.

Although the first two grounds could also be of interest, I think it is appropriate to dwell on the third one.

The Supreme Court, in fact, upheld the doctrine whereby, in the proceedings for setting aside arbitration awards, the applicant is only entitled to claim the violation of certain procedural rules indicated in the exhaustive list provided for by the Italian Code of Civil Procedure (Article 829, para. 1), and the violation of law rules concerning the merits, to the extent that this claim is allowed pursuant to Article 829, para. 3, of the Italian Code of Civil Procedure.

The latter claim (concerning the violation of law rules concerning the merits), however, should not be confused with a claim aimed at obtaining a new assessment on the merits of the dispute. Italian law does not allow a review, on the part of the Court of Appeal, on the merits of the dispute. On the contrary, the Court of Appeal may only assess (if and when it is allowed) whether the arbitral tribunal misidentified the law rule that applies to the merits or whether the said rule, although correctly identified, have been misapplied.

In other words: Italian law does not allow the parties to request the Court of Appeal to review the award on the merits, to re-examine the facts, and, on that basis, to set aside the award.

A new factual assessment may only be carried out by the Court of Appeal after the award has been set aside (on the basis of one of the grounds indicated in the exhaustive list provided for by Italian law) and only if the dispute falls within one of the cases in which the Court of Appeal has jurisdiction to issue a decision on the merits (Article 830 of the Italian Code of Civil Procedure). Otherwise, the decision on the merits shall be issued by a new arbitral tribunal (unless, of course, the award has been set aside due to the fact that the arbitration clause was invalid/unenforceable). However, the decision on the merits is issued by a new arbitral tribunal in case of international arbitration proceedings sitting in Italy, unless otherwise agreed.

Italian law, which does not follow UNICTRAL model law, is nevertheless inspired by similar principles. As a consequence, it is no by chance that the new arbitration rules of Milan Chamber of Arbitration, which have recently come into force, are in line with international best practice. I hope that, also as a result of these new rules, the number of international arbitration proceedings sitting in Italy will increase, and that international arbitration practitioners realise that Italy is a true arbitration-friendly jurisdiction.

⁂

Distinguishing Achmea

by Roberto Oliva

Two ICSID Arbitral Tribunals, on the basis of similar reasons, reached the same conclusion: Achmea decision does not affect their jurisdiction.

In a nutshell, this is the principle laid down in 9Ren v. Spain (final award of 31 May 2019) and in Rockhopper v. Italy (partial award of 26 June 2019).

In 9Ren v. Spain, the Arbitral Tribunal issued a final award, therefore also addressing the merits (ordering Spain to pay the investor approximately 40 million euros); nevertheless, I will focus on the most interesting issue: that relating to the arbitral jurisdiction.

In a nutshell, the Arbitral Tribunal states that it has jurisdiction on the basis of the following grounds.

First of all, the European Court of Justice judgment in Achmea does not extend to the treaty relevant in 9Ren v. Spain. Indeed, Achmea case concerned an intra-EU BIT (between the Netherlands and Slovak Republic), while in 9Ren the claim was brought on the basis of the Energy Charter Treaty (ECT), which is not an intra-EU BIT and has as its contracting parties EU States, non-EU States, and the EU itself. The Arbitral Tribunal, therefore, rejects Spain's argument that within the remedial provisions of the ECT there are different categories of members with different access to different remedies, and that EU members ought to be considered to constitute a subset of countries with investor rights and remedies different to the rights and remedies available generally to ECT arbitral parties. And rejects this argument clearly stating that it "has no basis in the text of the ECT itself or in the Achmea decision."

The Arbitral Tribunal further states, rejecting additional arguments brought by Spain, that there was (and is) no material conflict between the ECT and EU law; that the latter does not modify Spain's obligations under the ECT; that the Tribunal's jurisdiction and its exercise rests upon the ECT; and that ICSID arbitration proceedings, under the ICSID Convention, do not have a seat or legal place in any national jurisdiction, still less in any EU Member State.

The Arbitral Tribunal in Rockhopper v. Italy, in its partial award (on the issue of jurisdiction) also takes a clear stand and points out that, so far, no Arbitral Tribunal has granted an objection to its jurisdiction on the basis of Achmea.

The Arbitral Tribunal in Rockhopper carries out a detailed analysis of Achmea decision and reaches the conclusion that the principles laid down therein are of very limited application, exclusively concerning the BIT relevant to that dispute (as said, between the Netherlands and the Slovak Republic), and that they do not apply to the ECT.

Also in this case, the Arbitral Tribunal states that it has jurisdiction on the case and the proceedings continue on the merits.

Meanwhile, it seems that the investor in 9Ren is enforcing the award in the US (as reported here): this choice is probably aimed at avoiding possible oppositions to the recognition and/or enforcement of the award before EU Courts on the basis of the Achmea arguments that have already been rejected by the Arbitral Tribunal.

⁂

General terms and conditions

by Roberto Oliva

Arbitration clause provided for by general terms and conditions: is it enforceable? The issue was recently addressed in a decision issued by the Court of first instance of Brindisi (decision No. 1077 of 8 July 2019).

The case heard by the Court of Brindisi concerned a contract for the supply of industrial equipment. The claimant was the purchaser of this equipment, which was never delivered, therefore claiming the return of the paid advance, and damages.

The defendant, amongst other things, objected to the Court's jurisdiction, on the basis of the arbitration clause contained in the contract.

The Court of Brindisi rejected the objection, as it held that the arbitration clause was unenforceable.

In fact, under Article 1341 of the Italian Civil Code, arbitration clauses are characterised as unfair terms, that is to say, clauses that shall be specifically approved in writing if they are contained in general terms and conditions. Otherwise, lacking such approval, they are unenforceable.

The case law of the Italian Supreme Court provides a narrow interpretation of the said provision, for the purpose of facilitating arbitration. Indeed, under the Supreme Court's doctrine, only clauses contained in contractual documents intended to regulate an indefinite series of relationships (proper general terms and conditions) require specific approval in writing. On the contrary, this specific approval is not required in the case, which is materially different, of a party drafting a contractual document, approved by the other party, with respect to a specific relationship (in this respect, see for instance Italian Supreme Court, I Civil Chamber, decision No. 12153 of 23 May 2006).

The Court of Brindisi maintained that, in the case at hand, Article 1341 of the Italian Civil Code applies, and therefore that the arbitration clause was unenforceable. Unfortunately, it is not possible to understand whether this conclusion is right, *i.e.* whether the arbitration clause was actually contained in

general terms and conditions (drafted by a party to regulate an indefinite series of relationships) or in a contractual text, drafted by a party, but only with respect to that specific relationship.

It could happen that I will re-examine the topic, in case of appeal to the decision of the Court of Brindisi, when the decision of the competent Court of Appeal of Lecce will be issued.

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Challenges to awards

by Roberto Oliva

The Court of Appeal of Milan issued a very interesting decision in proceedings aimed at setting aside an ICC award (decision No. 3123 of 12 July 2019).

The case was significantly complex, as demonstrated, among other things, by the stature of the members of the Arbitral Tribunal and the involved practitioners.

In a nutshell, with some degree of approximation, the case concerned the fulfilment of some IRU and O&M contracts.

As the fee due in 2014 under the O&M contract was not paid, the O&M operator (Interoute) obtained from State Court an order for payment. The (alleged) debtor (Clouditalia) filed an appeal to the said order, objecting to the State Court's jurisdiction in the light of the arbitration clause stipulated in the contract, providing for ICC arbitration in Milan. As a consequence, Interoute withdrew from the State Court proceedings.

Clouditalia thereafter commenced arbitration proceedings claiming, among other things, the breach on the part of Interoute of its obligations arising out of the O&M contract, and also requesting the Arbitral Tribunal to ascertain its right to renegotiate the terms of the said contract.

Interoute, in turn, requested to dismiss Clouditalia's claims and counterclaimed the payment of the overdue fees under the O&M contract.

The Arbitral Tribunal ascertained the existence of the obligation to renegotiate the O&M contract, and the breach of this obligation on the part of Interoute. Moreover, the Arbitral Tribunal also re-characterised Clouditalia's claims in terms of withholding performance, and as a consequence stated that only a part of Interoute's receivables was actually due and payable.

Interoute challenged the award on several grounds: in particular, two of these grounds seem interesting.

Interoute claimed that the Arbitral Tribunal misapplied the law rules concerning the merits of the dispute. Since the arbitration was commenced on the basis of an arbitration clause entered into before the 2006 reform of Italian arbitration law (see, with respect to this issue, this post), the said ground of appeal would be in theory allowed. However, the Court of Appeal held that it was not. In fact, it considered (and in my opinion it was right) that the parties waived their right to any form of recourse they can validly waive – therefore to claim that the Arbitral Tribunal misapplied the law rules concerning the merits – as in the arbitration clause they referred to the ICC Rules, which set forth that "*Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*" (Article 34(6) of the 2012 ICC Rules, which applied to the arbitration proceedings). The same provision was contained in the ICC Rules in force at the time of the stipulation of the arbitration clause (article 28(6) of the 1998 ICC Rules): as a consequence, the Court of Appeal did not dwell on the issue of the nature of the relationship between the arbitral institution, its rules and the parties.

Another interesting issue addressed by the Court of Appeal was that concerning the recharacterisation by the Arbitral Tribunal of Clouditalia's claims. The award was challenged also because of this recharacterisation, which allegedly amounted, inter alia, to a violation of due process. The Court of Appeal took a different approach, and upheld its own case-law, according to which the award may be challenged if the Arbitral Tribunal based its decision on not pleaded facts, while it cannot be challenged if the Arbitral Tribunal only re-characterised pleaded facts from a legal point of view (a similar decision was issued by the Court of Appeal of Milan a year ago, on 16 August 2018, and it is published on Giurisprudenza Arbitrale, with a comment of Prof. Villa).

The Court of Appeal, in any case, indicated that the issue of the relationship between Interoute's breach of its obligation to renegotiate the O&M contract and Clouditalia's refusal to fulfil its payment obligation had been dealt with during the arbitration proceedings: this circumstance excluded a violation of due process. In other words: the case heard by the Court of Appeal of Milan is very different from the recent English case P v D [2019] EWHC 1277 (Comm), where the English High Court set aside an arbitral award on the basis, among other things, that the Arbitral Tribunal had based its decision on a case not properly argued by the parties. It is therefore clear that Italian case-law does not deviate from foreign case-law and practice concerning due process and the parties' right to present their case.

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Arbitration clause and general terms and conditions

by Roberto Oliva

A recent decision issued by the Italian Supreme Court (decision No. 20078 of 24 July 2019) addresses the issue of the wording of an arbitration clause contained in general terms and conditions.

The case heard by the Supreme Court concerned a leasing contract, and the claimant claimed that this contract was null and void. The Court of First Instance of Siena granted the claimant's claim and, in order to do so, it also rejected the defendant's objection to its jurisdiction, based on the arbitration clause contained in the leasing contract.

The defendant challenged the first instance decision and the Court of Appeal of Florence held that the jurisdiction lies with the arbitral tribunal provided for in the arbitration clause.

This decision was appealed before the Supreme Court, which held that the arbitration clause is unenforceable.

The Supreme Court noted that the text of the contract had been drafted by a party (that is to say, the case falls within the scope of application of Article 1342 of the Italian Civil Code).

As a consequence of the above, under Article 1341, par. 2, of the Italian Civil Code, the arbitration clause had to be specifically approved in writing.

As a matter of fact, there was a specific approval in writing. However, this specific approval referred to an article of the contract (Article 8) containing the arbitration clause, and also a number of diverse provisions, under the heading 'various clauses'.

In the light of the above, the Supreme Court held that there was no specific approval in writing, due to the fact that the approval of Article 8 of the contract, considering its content, could not be 'specific'.

At the end of the day, the Supreme Court upheld a well-established doctrine, whereby the law requires that contractual clauses are drafted in a manner that attracts the attention of the weaker contractual (see, for instance, Italian Supreme Court, VI Civil Chamber, decision No. 20606 of 12 October 2016). This doctrine also applies to arbitration clauses.

⁂

Contractual restitutions and arbitration

by Roberto Oliva

A recent decision issued by the Court of first instance of Milan (decision No. 7884 of 22 August 2019) concerns the relationship between contractual restitutions and arbitration.

In a nutshell, the case heard by the Court of Milan concerned a business lease. The relevant contract contained an arbitration clause. When serious faults emerged, hindering the carrying out of the business, the lessee commenced the arbitration proceedings provided for by the said clause, and the proceedings resulted in the termination of the contract.

In the meantime, the lessor called on a bank guarantee and cashed some promissory notes, which were issued to secure the rent payment.

The lessee, as a consequence, commenced proceedings in State Court, claiming the restitution of the amounts unduly cashed by the lessor.

The lessor objected to the jurisdiction of State Court, on the basis of the said arbitration clause.

This exception was rejected by the Court of Milan, based on the following reasoning.

In the opinion of the Court, the restitution claim is not based on the contract, but on the termination of the contract. Therefore, considering that the restitution claim is a non-contractual claim and given that, in the arbitration clause, there was no reference to non-contractual claims, the Court of Milan stated that it has jurisdiction over the restitution claim.

In this regard, the Court applied the principles laid down by the Italian Supreme Court with respect to the arbitrability of disputes concerning pre-contractual liability. Indeed, the Court considered that a broad interpretation of the arbitration clause, so as to also include in its scope of application restitution claims, is prevented by the fact that the clause does not mention disputes of non-contractual nature.

In my opinion, the conclusion reached by the Court of Milan could be questioned. Indeed, the arbitration clause expressly referred to arbitration under the rules of Milan Chamber of Arbitration the disputes "*concerning (…) the termination of the (…) contract*." I consider that these disputes also include those concerning the restitution due as a consequence of the termination.

However, the decision issued by the Court of Milan confirms that Milan Chamber of Arbitration appropriately modified its model clause, inserting an express reference to non-contractual disputes, on the occasion of the entry into force of its new rules.

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Arbitration and non-contractual claims

by Roberto Oliva

In the previous article, I examined a decision, regarding arbitration and contractual restitutions, that in my opinion is not correct. On the basis of theoretical principles and in accordance with the case-law of the Supreme Court, this decision is in contrast with the *favor arbitrati* of Italian law.

I have therefore researched Italian State Courts decision on a very narrow (but interesting) issue: that concerning arbitration of claims under Article 1669 of the Italian Civil Code; that is to say, non-contractual claims connected to a contractual relationship. At the end of my research, I found that some State Courts maintain that Arbitral tribunals have jurisdiction over these claims (Court of Appeal of Catania, decision No. 820 of 10 April 2019; and Court of Appeal of Bologna, decision No. 2453 of 5 October 2018) . And they do so even though the Italian Supreme Court laid down principles leading to the opposite conclusion (Italian Supreme Court, II Civil Chamber, decision No. 1674 of 3 February 2012; and Italian Supreme Court, II Civil Chamber, decision No. 4035 of 15 February 2017).

Article 1669 of the Italian Civil Code provides for a particular claim that can be raised against a contractor that has built a building, in the ten years from the construction, to claim its liability, in case of ruin of the building or serious defects thereof. This claim can be raised by the employer and its assignees, and the majority case-law maintains that this claim is a non-contractual one even when raised by the employer.

Also with reference to claims under Article 1669 of the Italian Civil Code, the Italian Supreme Court applies the principles it laid down with respect to the relationship between arbitration and non-contractual claims: in a nutshell, if the arbitration clause contained in the contract does not expressly mention the possible non-contractual claims connected with the contractual ones, the Arbitral tribunal only has jurisdiction over the contractual claims.

A number of lower Courts apply the principles laid down by the Supreme Court (in this respect, see a recent article: Di Girolamo, La potestas iudicandi degli

arbitri in materia non contrattuale (anche, ma non solo, con riferimento all'azione del compratore ex art. 1669 c.c.), on Riv. Arb., 2019, p. 31 ff.).

However, a handful of lower Courts maintain that (*amicus Plato, sed magis amica veritas*) Arbitral tribunals may have jurisdiction over claims under Article 1669 of the Italian Civil Code even though the relevant arbitration clause does not expressly mention non-contractual claims. The most recent decisions on this point are those issued by the Court of Appeal of Catania in April 2019 and the Court of Appeal of Bologna in October 2018.

The Court of Appeal of Bologna was seised in proceedings for the setting aside of an award. Among the grounds of appeal, the appellant claimed that the Arbitral tribunal did not have jurisdiction over a claim under Article 1669 of the Italian Civil Code, it being a non-contractual claim. The Court of Appeal rejected the claim, noting that the issues that are material under Article 1669 of the Italian Civil Code are included amongst the contractual issues. As a consequence, there was no reason to exclude the Arbitral tribunal jurisdiction over the claim under Article 1669 of the Italian Civil Code. The reasoning of the Court seems correct, although laconic, as laconic that I wonder whether the topic was properly examined.

More extensive reasoning is contained in the decision of the Court of Appeal of Catania. That case also concerned proceedings for the setting aside of an arbitration award: the claimant, amongst other things, claimed that the Arbitral tribunal did not have jurisdiction over a claim under Article 1669 of the Italian Civil Code.

The arbitration clause was very concise. It only provided that: "*in the event of a dispute, it shall be submitted by the parties to the non-appealable decision of an Arbitral tribunal.*"

On the basis of this clause, which did not refer to contractual nor to non-contractual claims, the Court of Appeal of Catania considered that the Arbitral tribunal had jurisdiction over all the disputes having the contract and its stipulation as their logic and chronologic premise. On the basis of this reasoning, the Court of Catania knowingly disregarded the principles laid down by the Italian Supreme Court in its said decision No. 4035 of 2017.

I hope that these decisions, issued by the Courts of Appeal of Bologna and Catania, would be the first indication of a new line of cases in Italian case law.

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Iura novit Arbiter

by Roberto Oliva

A recent decision issued by the Court of Appeal of Genoa (decision No. 1215 of 27 August 2019) addresses a topic of great interest: the application of *iura novit Curia* principle in arbitration proceedings.

The case heard by the Court can be summarised as follows.

The claimant, an individual, had entered into an agreement with the respondent, a local health authority, providing for the payment to the respondent of the amount of (then) ITL 1,500,000,000, to be used to build a hospital dedicated to the memory of the claimant's father.

At a later time, the claimant sued the local health authority claiming the return of the paid amount under the said agreement.

The dispute was referred to an arbitral tribunal.

In the claimant's case, the payment of ITL 1,500,000,000 to the local health authority would be a donation, which was null and void since under Italian law a donation has to be made by notarial deed in the presence of two witnesses and the agreement at hand was a private contract.

The respondent objected that the donation was valid, as it was of low value having regard to the claimant's assets and income (under Italian law, the formal requirements are lifted in case of low-value donations).

The Arbitral Tribunal did not accept either of these arguments. In fact, it considered that the contract was not a donation (under Article 769 of the Italian Civil Code). In the Tribunal's opinion, the contract was an indirect donation under Article 809 of the Italian Civil Code, since the donor's intent concerned the realisation of the hospital (and not the giving of a sum of money).

The formal requirements required for a donation are not required for an indirect donation; as a consequence, the characterisation of the contract made by the Arbitral Tribunal resulted in the rejection of the claimant's claims.

The claimant requested the Court of appeal of Genoa to set aside the award, in particular claiming that the characterisation of the contract, made by the Arbitral Tribunal without accepting any of the parties' views, would constitute a decision outside the scope of the arbitration agreement, a violation of Article 112 of Italian Code of Civil Procedure and a failure to issue a decision on the parties' requests.

The Court of Appeal rejected this claim.

The appellate judges referred to the principles laid down by the Italian Supreme Court with reference to proceedings in Courts, which they considered also applicable to arbitration proceedings. According to these principles, the Court is allowed to freely characterise the case facts and the relevant relationship, seek the applicable law rules and apply rules different from those indicated by the parties. On the contrary, the Court cannot issue a decision on requests, issues and objections not raised by the parties nor examine non-pleaded facts (see for instance Italian Supreme Court, VI Civil Chamber, decision No. 8647 of 9 April 2018, No. 8647).

Since in the case at hand the Arbitral Tribunal did not examine non-pleaded facts and only characterised the contract, the Court of Appeal considered that it had correctly applied the *iura novit Curia* principle, and therefore rejected the ground of appeal.

The Court also rejected another ground of appeal, whereby the claimant claimed a violation of due process, alleging arising out of the fact that the Tribunal chose a characterisation of the contract different from those indicated by the parties, without hearing them on the point.

First of all, the Court of Appeal found that the parties were well aware of the fact that the Tribunal would have addressed the characterisation issue in order to issue its decision on the merits. In addition, the Court referred to the Italian Supreme Court case law, whereby a so-called 'third way' decision can only be challenged: (i) if the Judge misapplied the law (if the decision only concerns matter of law); or (ii) if the parties were prevented from presenting their case (if the decision concerns matter of facts and law): for instance, if a party was prevented from raising objections or bringing evidence to counter the characterisation chosen by the Court (see for instance Italian Supreme Court, I Civil Chamber, decision No. 2984 of 16 February 2016). In the case at hand, the claimant did not even indicate how and why he was prevented from presenting his case: therefore, the appeal was rejected.

In my opinion, the decision of the Court of Appeal represents a good balance between the application of *iura novit Curia* principle, on the one hand, and due process and parties' right to present their case, on the other hand. In effect, not surprisingly similar principles are also followed in other civil law jurisdictions: for instance, in Switzerland, where Arbitral Tribunals may rely on legal

arguments or characterisations the parties did not plead, as long as the parties are not 'caught by surprise'; otherwise, they shall inform the parties and hear them (in this regard, the leading case is the Tvornica decision of 30 September 2003 of the Swiss Federal Court).

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Objection to State Court's jurisdiction

by Roberto Oliva

A contract contains an arbitration clause whereby the parties' disputes are referred to arbitration. Notwithstanding the said clause, a party sues the other party in State Court. The respondent objects to the Court's jurisdiction, on the basis of the arbitration clause, but the Court issues a wrong decision, rejects the objection and upholds its jurisdiction. In such a case, what is the appellate Court that the respondent should seize to have the first decision overturned?

Two recent decisions, issued a day apart by two different Courts of Appeal (decision of the Court of Appeal of Catanzaro No. 1782 of 19 September 2019, and decision of the Court of Appeal of Potenza No. 636 of 20 September 2019), offer two different answers to the above question: the Court of Appeal of Catanzaro holds that the appeal has to be submitted to the Court of Appeal, while the Court of Appeal of Potenza states that it has to be filed with the Italian Supreme Court. Both decisions are correct because they concern two different kinds of arbitration proceedings.

Italian law provides for two arbitration procedures: the 'regular' arbitration ('*arbitrato rituale*') that results in an award that has the same effects as the decision issued by State Courts (Article 824-*bis* of the Italian Code of Civil Procedure), and another kind of arbitration: the '*irrituale*' arbitration that results in an award that has the value of contractual determination (Article 808-*ter* of the Italian Code of Civil Procedure).

The nature and effects of the award are the main difference between '*rituale'* and '*irrituale*' arbitration, but they are not the only one. Other differences concern the appeal to the award. The award issued in '*rituale*' proceedings can be set aside by the Court of Appeal under Article 829 of the Italian Code of Civil Procedure on the basis of the mandatory grounds provided for therein (quite similar to the grounds for setting aside an award under Article 34 of UNCITRAL Model Law). On the contrary, the award issued in '*irrituale'* proceedings can be challenged for the reasons indicated by Italian law (Article 808-*ter* of the Italian Code of Civil Procedure) and the proper venue is the Court of First Instance (or the Justice of the Peace).

Another material difference is that concerning the relationship between State Courts and Arbitral Tribunals.

The objection to the Court's jurisdiction, if the clause provides for a '*rituale*' arbitration, involves an issue of jurisdiction in the strict sense: the Court's decision states that the Court or the Arbitral Tribunal has jurisdiction. As a consequence, "*The decision whereby the Court upholds or denies its own jurisdiction with regard to an arbitration agreement may be challenged according to Articles 42 and 43*" (Article 819-*ter* of the Italian Code of Civil Procedure), that is to say: before the Supreme Court.

On the other hand, if the arbitration clause provides for '*irrituale'* proceedings, the situation is quite different: the objection to the Court's jurisdiction does not involve an issue of jurisdiction in the strict sense. On the contrary, it involves an issue of the merits, leading the Court to possibly declare that the claim is not admissible, without any decision on the jurisdiction (on this point, see Italian Supreme Court sitting *en banc*, decision No. 19473 of 30 September 2016). Therefore, the decision issued by the Court of first instance may be challenged before the Court of Appeal.

The above explains the reasons why the Courts of Appeal of Catanzaro and Potenza reached two different conclusions as far as the proper venue of the appeal is concerned. Indeed, the Court of Appeal of Catanzaro issued its decision on a case where the parties entered into an arbitration clause providing for '*irrituale*' proceedings, while the case heard by the Court of Appeal of Cosenza concerned a contract containing a clause providing for '*rituale*' arbitration.

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Bankruptcy receiver's claims

by Roberto Oliva

A recent decision issued by the Italian Supreme Court (Italian Supreme Court, I Civil Chamber, decision No. 24444 of 30 September 2019) concerns the Arbitral Tribunals' jurisdiction over claims raised by the bankruptcy receiver.

I consider this topic of great interest.

The said decision is also interesting because it summarised the general principles of the matter and applied them to a very peculiar case that had not been heard in previous reported judgments. This peculiar case is the claim that the bankruptcy receiver may raise under Article 150 of Italian bankruptcy law currently in force: the receiver is entitled to request the Court to issue an order for payment (under Italian law, an *ex parte* order) towards the shareholders of the bankrupt company with respect to the overdue capital contribution.

The case heard by the Supreme Court concerned the order for payment under Article 150 of Italian bankruptcy law issued by the Court with respect to a sum due on the basis of a capital increase resolution passed by the shareholders' meeting of the bankrupt company (of course, before the declaration of bankruptcy).

The debtor appealed to the payment order and, first of all, it objected to the State Court's jurisdiction, based on the arbitration clause contained in the company's articles of association.

The Court rejected the said objection and the debtor appealed the decision to the Italian Supreme Court.

The Italian Supreme Court, in the decision at hand, summarised the rules concerning arbitral jurisdiction over disputes brought by the bankruptcy receiver.

In a nutshell, the arbitration clause always follows the fate of the contract in which it is inserted: if the receiver uses the opt-out (as she is entitled to do) and terminate the contract, she is not bound by the arbitration clause; but if she does

not terminate the contract, or exercises rights arising out of the contract, she is bound by the arbitration clause. It is a clear derogation from the separability doctrine that usually applies under Italian law.

The Supreme Court held that the said rules also apply to articles of association. Therefore, if the bankruptcy receiver brings a claim to obtain a sum due under the company's articles of association, she is bound by the arbitration clause possibly contained therein. An order for payment under Article 150 of Italian bankruptcy law may be issued since the stipulation of an arbitration clause does not prevent the issuance of such order. However, the debtor is entitled to appeal to the order and to have it set aside based on the arbitration clause.

In this respect, it should be noted a peculiarity of the decision at hand. Indeed, the Supreme Court did not set aside the order for payment, as it does in similar cases (see for instance Italian Supreme Court sitting *en banc*, decision No. 22433 of 21 September 2018, or Italian Supreme Court, II Civil Chamber, decision No. 8960 of 3 May 2016), nor did it order the return of any sums possibly paid under the said order. This omission would likely create considerable practical issues that would arguably be addressed by the Arbitral Tribunal appointed pursuant to the arbitration clause contained in the articles of association of the bankrupt company.

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***Stare decisis*?**

by Roberto Oliva

Italian legal system is a civil law system: as a consequence, *stare decisis* doctrine does not apply in Italy.

However, it is well known that civil and common law systems have become closer to each other during the last decades. On the one hand, from the point of view of common law systems, due to the increasing body of statutory law; on the other hand, from the point of view of civil law systems, because of the increasingly important role played by jurisprudential precedents (on this topic, see the interesting book edited by MacCormick and Summers, Interpreting precedents: a comparative study, also containing papers by the Italian learned scholar Michele Taruffo).

In this perspective, it is worth reading a recent decision of the Italian Supreme Court (Third Civil Chamber, decision No. 24649 of 3 October 2019). Despite this decision does not concern arbitration matters, I found it very interesting and for this reason, I would like to briefly comment it.

The case heard by the Supreme Court, at the end of the day, is of little interest.

On the contrary, the doctrine laid down (as far as I know, for the first time) by the Supreme Court is very interesting. Under this doctrine, pleading a case contrary to the settled case-law of the Supreme Court constitutes gross negligence.

It could be maintained that the extreme consequence of this doctrine is that the settled case-law of the Supreme Court is binding.

Several questions arise.

First of all, is this doctrine in compliance with the principles of our legal system and Italian procedural rules? For instance, under Article 360-*bis* No. 1 of the Italian Code of Civil Procedure, the Supreme Court declares that an appeal is not admissible if it does not offer elements to change (or confirm) the Supreme Court's case-law. In other words, this procedural rule implicitly admits that it is

possible to file an appeal before the Supreme Court, pleading a case contrary to the Supreme Court's settled case-law, provided that there are suitable legal arguments supporting this case.

In addition, in this framework, how could the case-law evolve?

However, the real question is whether the decision at hand would be the cornerstone of a new doctrine. In the affirmative, I would definitely comment it again.

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Separability of the arbitration clause

by Roberto Oliva

The arbitration clause, in Italian jurisdiction as well as in a number of other jurisdictions, does not constitute an ancillary clause of the underlying contract. On the contrary, it constitutes a separate contract with procedural effects. This principle is usually referred to as separability doctrine.

Under Italian law, this doctrine, based on Article 808 of the Italian Code of Civil Procedure (whereby "*The validity of the arbitration clause must be evaluated independently of the underlying contract*"), is only derogated in bankruptcy matters (under Article 83-*bis* of Italian bankruptcy law).

This doctrine must also be taken into account if an agreement to agree (which is valid and enforceable under Italian law, and it is quite common in construction and conveyancing) is entered into, containing an arbitration clause, and the subsequent agreement does not contain the arbitration clause. The opportunity to examine again the said doctrine is offered by a recent decision issued by the Court of Appeal of Brescia (decision No. 1474 of 10 October 2019).

The case concerned a dispute on a building under construction. The claimant (buyer) and the respondent (seller) entered into an agreement to agree that set forth that the building had to be completed and delivered by a certain date and that the seller had to pay liquidated damages in case of delay. The agreement to agree contained an arbitration clause. The building was delivered late and the final agreement did not contain an arbitration clause.

The claimant commenced the arbitration proceeding provided for by the arbitration clause contained in the agreement to agree, and his claim was only partially granted.

The award was challenged by both the claimant and the respondent: the claimant alleged some violations of due process (which the Court of Appeal rejected); the respondent objected to the jurisdiction of the Arbitral Tribunal, due to the fact that the arbitration clause was contained in the agreement to agree but was not included in the final contract.

The decision of the Court of Appeal does not specify if the respondent contested the jurisdiction of the Arbitral Tribunal during the arbitration proceedings. This is the duty of the parties, pursuant to Article 817 of the Italian Code of Civil Procedure, whereby "*The party that does not object in the first statement of defence 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 it. Therefore, I assume that the objection was timely raised during the arbitration proceedings.

As said, the Court of Appeal of Brescia rejected the challenge. The Court upheld the principle laid down by the Italian Supreme Court, whereby "*the validity and enforceability of an arbitration clause must be evaluated separately from the underlying agreement. Consequently, the clause is valid, despite not being included in the final contract. The reason is that the agreement to agree is other than the final contract and has different purposes*" (decision No. 8868 of 16 April 2014 of I Civil Chamber of the Supreme Court, and decision No. 22608 of 31 October 2011 of I Civil Chamber of the Supreme Court).

The Court of Appeal also added that, in the case it heard, the final contract did not concern all the obligations the parties undertook under the agreement to agree. Indeed, the parties also stipulated a liquidated damages clause that was the subject matter of the dispute heard by the Arbitral Tribunal.

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'*Irrituale*' arbitration in corporate matters

by Roberto Oliva

The Court of first instance of Salerno recently heard a complex corporate case and its decision (No. 3296 of 21 October 2019), together with the decision issued by the Court of Appeal of Salerno with reference to the same dispute (No. 1311 of 14 September 2018), provides the perfect opportunity to carry out a brief analysis of the issues concerning '*irrituale*' arbitration in corporate matters, that is to say the relationship between the '*irrituale*' arbitration as governed by Italian Code of Civil Procedure and arbitration in corporate matters under Italian Legislative Decree No. 5 of 17 January 2003 .

As a matter of fact, Italian law provides for two different kinds of arbitration proceedings: on the one hand, 'regular' ('*rituale*') arbitration, resulting in an enforceable award; on the other hand, '*irrituale*' arbitration, whose award has the effect of a binding contract.

In addition, '*irrituale*' arbitration has certain other peculiarities: concerning, for instance, the recourse for its setting aside.

The case heard by the Court of first instance and the Court of Appeal of Salerno concerned certain resolutions passed by a simple partnership ('*società semplice*'). Indeed, a dispute arose between two groups of members; and each group had excluded the other from the partnership by the said resolutions.

The articles of association of the partnership provided that "*Any dispute concerning or consequent to these articles and to the relations arising out of them will be referred to a sole 'irrituale' arbitrator who will decide the dispute according to the law, hearing the Partnership and the relevant Member, without any procedural formality – except those that she will set forth – and without appeal. The arbitrator will be appointed by mutual agreement of the parties; failing this agreement, the arbitrator will be appointed by the Chairperson of the Court of first instance of Salerno (…).*"

It should be noted that, despite the provision of the clause, the arbitration did not involve the partnership, but only its members.

In addition, the said clause does not comply with the requirements set forth by Article 34 of Italian legislative decree No. 5/2003 (whereby the arbitrators in corporate matters have to be appointed by a third party unrelated to the company). Is it enforceable or not?

The issue of the enforceability of the clause was addressed by the Arbitral Tribunal during the arbitration proceedings, and the Tribunal held that the said clause is enforceable.

I assume that the Arbitral Tribunal decision was (also) based on the argument that Legislative Decree No. 5/2003 does not apply in that particular arbitration, which as said concerned a simple partnership ('*società semplice*').

In fact, Legislative Decree No. 5/2003 is a piece of legislation enacted by the Italian Government on the basis of a delegating law ('*legge delega*') of the Parliament. While the said Legislative Decree concerns arbitration in case of disputes related to partnerships and companies, without any distinction, the delegating law (Article 12, para. 3, law No. 366 of 3 October 2001) only empowered the Government to enact legislation on arbitration of "*commercial partnerships and companies*".

Taking into account that the simple partnership is not a commercial partnership (it is forbidden from carrying out commercial activities: Article 2249 of the Italian Civil Code), it can be argued that corporate arbitration rules set forth by Legislative Decree No. 5/2003 do not apply to disputes concerning simple partnership (as indeed was actually argued by several learned authors).

The award, on the merits, rejected the arguments of a group of members and accepted those of the other group. The losing group seised the Court of Appeal of Salerno (in the proceedings leading to the decision No. 1311/2018) and the Court of first instance of Salerno (in the proceedings leading to the recent decision No. 3269/2019), requesting both Courts to set the award aside.

The Court of Appeal rejected the request, noting that it concerned an award issued in '*irrituale*' proceedings, which cannot be challenged before the Court of Appeal pursuant to Article 829 of the Italian Code of Civil Procedure.

The request brought before the Court of Salerno was also rejected since the alleged grounds for the setting aside were other than the grounds provided for by Italian law with respect to an award issued in '*irrituale*' proceedings (having this award the effects of a contract, the said grounds, in a nutshell, are those concerning alleged defects of contractual consent, in addition to those arising out of a violation of due process).

As a matter of fact, the grounds rejected by the Court of first instance of Salerno were reasons in law. That circumstance, irrespective of the possible application in the case at hand of the rules concerning corporate arbitration, raises the question whether '*irrituale*' arbitration and corporate arbitration might coexist. A

question of great relevance, taking into account that, according to a statistical analysis carried out by Assonime, about a quarter of arbitration clauses in Italian companies' articles of association provide for '*irrituale'* arbitration.

The law apparently maintains that '*irrituale'* and corporate arbitration might coexist (as a matter of fact, Article 35, para. 5, of Legislative Decree No. 5/2003 expressly refers to '*irrituale'* arbitration); but certain law provisions lead to the opposite conclusion.

For instance, Article 36 of Legislative Decree No. 5/2003 provides that, in case of dispute concerning a resolution passed by the partnership/company, the review on the merits of the award is always allowed if a violation of the law rules concerning the merits is claimed. However, this ground (violation of the rules of law concerning the merits) is never allowed in the case of an '*irrituale'* award.

In the light of the above, I consider that there are two possibilities: in the case of disputes concerning company's resolutions, the '*irrituale'* award is also subject to recourse for violation of the rules of law concerning the merit (although this conclusion is ill-founded on the basis of Italian law); as a more likely alternative, these disputes cannot be referred to an '*irrituale'* Arbitral Tribunal. In this latter case, another question arises: that concerning the scope of an arbitration clause only providing for '*irrituale'* arbitration. Is that clause unenforceable in the case of dispute concerning company resolutions (and, as a consequence, the jurisdiction over these disputes lies with the State Courts)? Or is it possible to maintain that the Arbitral Tribunal has jurisdiction over these disputes and it shall act as a '*rituale'* Tribunal, despite the provision of the arbitration clause? Further, what could happen in case of related actions (only some of them allowing '*irrituale'* arbitration)?

I maintain that the issues arising out of the relationship between '*irrituale'* arbitration and corporate arbitration are quite serious and should discourage the provision of '*irrituale'* arbitration in companies' articles of association. Except, maybe, in the articles of association of simple partnerships, as in the case heard by the Courts of Salerno.

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Joinder and arbitration

by Roberto Oliva

In certain cases, Italian law requires the joinder of certain parties to the proceedings. For instance, as a general rule, the action aimed at setting aside a contract requires the joinder of all parties thereof.

The topic of such compulsory joinder in arbitration proceedings is partly governed by statutory law (Articles 816-*quater* and 816-*quinquies* of the Italian Code of Civil Procedure); nonetheless, its implementation gives rise to several turmoils (as it was noted by a learned author).

What happens if the party whose joinder is required by law is not joined to the proceedings? A possible answer to that question is provided by the Court of Appeal of Campobasso, in its recent ruling (No. 367 of 7 November 2019).

The Court of Appeal heard a case of corporate arbitration.

A shareholder of a limited liability company sued the liquidator of the company claiming its liability under Article 2476 of the Italian Civil Code in the arbitration proceedings provided for by the company's articles of association.

The action brought by a shareholder under the said Article 2476 of the Italian Civil Code is a derivative action (in some respects, it is quite similar to Part 11 procedure under English Companies Act 2006), requiring the joinder of the company.

In the case at hand, the company was not joined to the arbitration proceedings.

As a consequence, the liquidator seised the Court of Appeal of Campobasso, requesting to set aside the award, due to a violation of due process, consisting in the fact that the company was not joined to the proceedings.

The Court of Appeal rejected the said request. Its reasoning appears wrong in many respect; nonetheless, it could be maintained that the Court reached a conclusion in line with principles recently laid down by the Italian Supreme Court.

First of all, the Court of Appeal noted that the company was a party to the proceedings since the liquidator was sued "*in his capacity as liquidator*" of the company. At most, this fact could give rise to a conflict of interest; nonetheless, since the said conflict was not pleaded by the parties, the Court was prevented to set aside the award based on it.

In my opinion, the Court was wrong: the liquidator was a party to the proceedings, while the company was not, as it is clearly demonstrated by the fact that the Arbitral Tribunal ascertained the liquidator's liability and ordered the liquidator to pay damages.

The Court of Appeal also added that the failure to join a party whose joinder is required by law does not constitute a ground for setting aside an arbitration award under Article 829 of the Italian Code of Civil Procedure. In particular, the said failure is not relevant under Article 829 No. 9 ("*if the parties were prevented from presenting their case during the arbitration proceedings*"), nor under Article 829 No. ("*if the award […] has decided the merit of the dispute in all other cases in which the merits could not be decided*").

Once again, in my opinion the Court of Campobasso was wrong. Indeed, I maintain that the Court of Appeal of Milan was right in its decision of 1st July 2014 (published on Riv. Arb., 2015, p. 83 ff.), whereby it laid down the principle that "*failure to join to the proceedings a party whose joinder is required by the law […] shall be considered as included in the ground – provided for by the second part of No. 4 of Article 829, paragraph 1, of the Italian Code of Civil Procedure – concerning the case in which the Arbitral Tribunal decided the merits despite the failure of a procedural requirement other than those considered in the list of paragraph 1 of Article 829 of the Italian Code of Civil Procedure*". Scholars' opinion agrees.

The Milan Court of Appeal held that in the case it heard, there was no party whose joinder was requested by the law and its decision was later upheld by the Italian Supreme Court in its decision No. 3481 of 23 February 2016.

Another argument put forth by the Court of Appeal of Campobasso is that the liquidator's claim was precluded under Article 829, para. 2, of the Italian Code of Civil Procedure, whereby "*the party who […] has not objected to the violation of a rule regulating the course of the arbitral proceedings in the first statement or statement in reply subsequent to the violation, cannot challenge the award on this ground*".

Nonetheless, as noted by learned authors, the violation at hand (the failure to join to the proceedings a party whose joinder is requested by the law) is committed when the award is issued; as a consequence, Article 829, para. 2, of the Italian Code of Civil Procedure does not apply.

Notwithstanding the above, it could be argued that the decision of the Court of Appeal of Campobasso reached a conclusion in line with the latest case law of the Italian Supreme Court.

In fact, the Italian Supreme Court recently ruled (in a case where a party whose joinder is required by the law was not joined), that a violation of procedural rules only is relevant (and leads to the setting aside of the judgment under appeal) if it amounts to a violation of due process (Italian Supreme Court, VI Civil Chamber, decision No. 20152 of 25 July 2019), that is to say, if a party was actually prevented from presenting its case. As a consequence, the appellant has the burden of satisfying the Court that the violation of procedural rules actually prevented a party from presenting its case.

In the case heard by the Court of Appeal of Campobasso, the fact that the company was not joined to the arbitration proceedings apparently did not jeopardise its right to present its case (that was actually presented by its shareholder). As a consequence, in the light of the mentioned recent case law of the Italian Supreme Court, it could be maintained that the Court of Appeal was right in rejecting the request to set aside the award.

In any event, it is highly likely that the decision of the appellate Court would be appealed to the Supreme Court, and we could have the chance to further discuss the matter.

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Counterclaims and objection to Court's jurisdiction

by Roberto Oliva

The Court of first instance of Milan issued an interesting decision addressing the relationship between counterclaims and objection to the Court's jurisdiction raised by the counter-claimant (decision No. 10728 of 21 November 2019).

The case heard by the Court of Milan concerned a company owning a property located in Milan city centre.

Following the death of the previous partners and the takeover of their heirs, the social relations worsened and the company, which that used to be a partnership, was transformed into a limited liability company.

As a consequence of the said transformation, a partner withdrew from the company (as she is entitled to do under Italian law in case of transformation). However, she did not receive the amounts due by the company due to her withdrawal (except for a down payment). Therefore, she sued the company and its director before the State Court.

The company appeared in Court, objected to the Court's jurisdiction (due to the fact that the company's articles of association used to contain an arbitration clause), and raised a counterclaim against the claimant. This counter-claim was not expressly conditional upon the rejection of the objection to the Court's jurisdiction.

The Court of Milan upheld the said objection and considered that it precluded the examination of the merits, both as regards the claimant's claim, and the respondent's counter-claim.

With reference to the claimant's claim, the Court of Milan, also referring to its previous decision No. 12539 of 9 November 2015, upheld the principle that the arbitration clause contained in the company's articles of association is also binding upon the withdrawing shareholder/partner.

With respect to the respondent's counter-claim, the Court of Milan noted that the said counter-claim was not conditional upon the rejection of the respondent's objection to the Court's jurisdiction, and also noticed that the claimant did not object to the Court's jurisdiction with respect to the counter-claim. Nevertheless, the Court considered that it cannot examine the merits of the counter-claim, in the light of the Supreme Court case law, whereby raising a counter-claim does not involve a waiver of an objection to the Court's jurisdiction (Italian Supreme Court, I Civil Chamber, decision No. 12684 of 30 May 2007, n. 12684).

It seems to me that the principle laid down by the Supreme Court, examining cases concerning the jurisdiction over the claim and not over the counter-claim, would require further elaboration. In fact, two issues should be carefully examined: the nature of the objection to the Court's jurisdiction, on the one hand, and the duty of procedural fairness, on the other hand. The conclusions could be the same, but they could be possibly reached following different paths.

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