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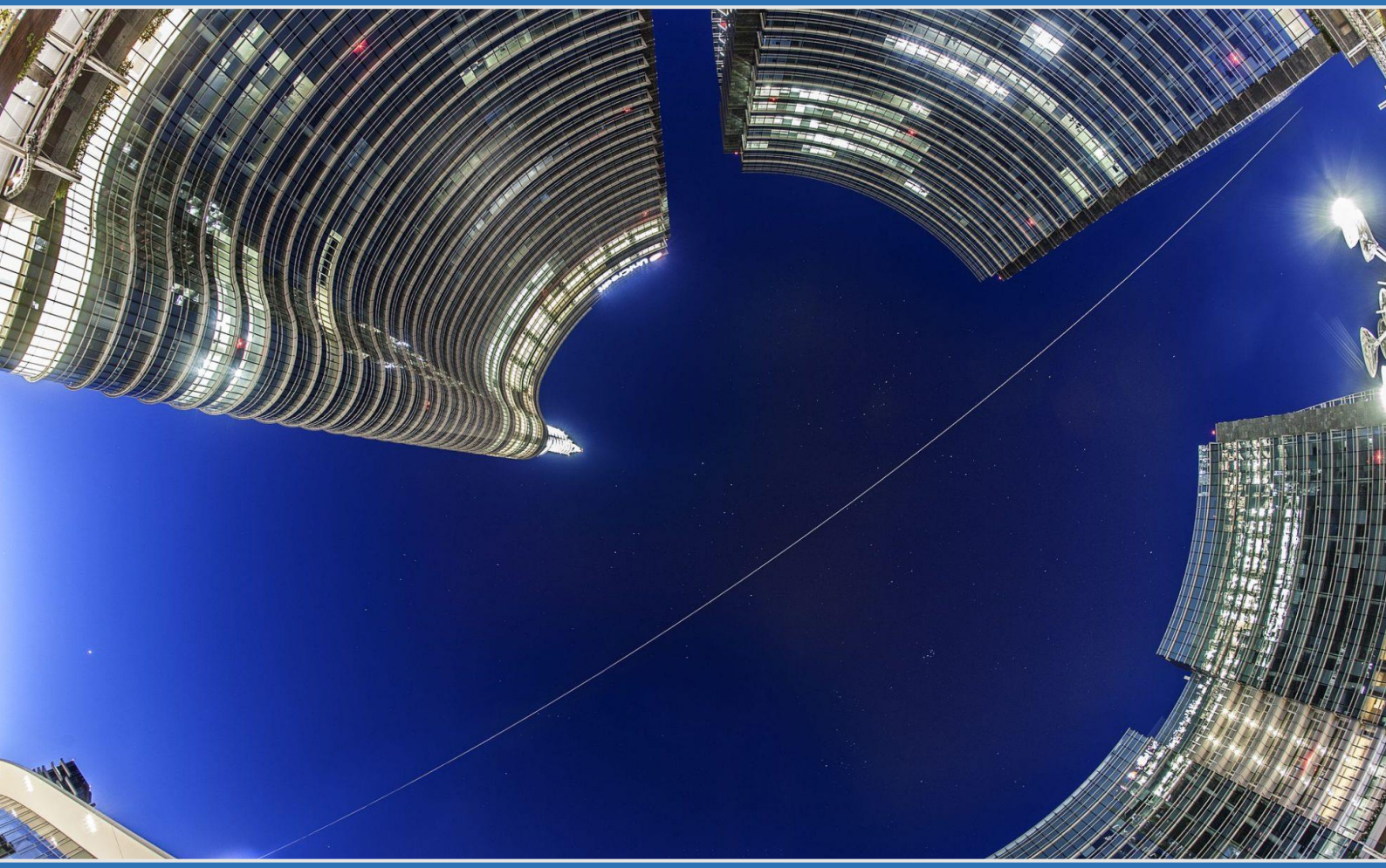

Arbitration in Italy

News on international and domestic arbitration in Italy

Vol. 5 (2020)

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Editorial
by Roberto Oliva

Mountains of papers have been written, countless rhetorical statements and a handful of enlightening and careful considerations were spent to describe 2020 and how tragic and particular that year was.

I don't intend to add my voice to that chorus. However, I would like to focus on two aspects, which in my opinion deserve the attention of the readers of this law journal.

First of all, in the course of 2020 Arbitration in Italy, established in 2015 as a blog, has been transformed into law journal. This transformation, which implies participatory management and editing of editorial content, is the arrival point of the previous path, and the starting point of a new path.

In the five years since it was founded, Arbitration in Italy has been noticed by several niche practitioners. Its visitors were among the hundreds in 2015; among the tens of thousands in 2019 and 2020. The readers of Arbitration in Italy were able to be informed about the most recent doctrines on arbitration, as well as upheld well-established doctrines, on a range of topics including, for instance, relationship between arbitration and order for payment or abroad-seated corporate arbitration proceedings.

The path ahead of us is that leading to the ambitious goal of turning Arbitration in Italy into the point of reference for domestic and international arbitration in Italy.

This is the reason why the transformation into a law journal did not have an impact on a point of crucial relevance: Arbitration in Italy is an open-access law journal.

This said concerning the journal, during this tragic year we have witnessed in several jurisdictions – and among these in Italy – a slowdown, if not an almost complete lockdown of judicial systems. In the face of the pandemic, and in consideration of the social distancing measures adopted to contain it, States have no longer been able to guarantee the regular functioning of judicial systems.

Arbitration, on the other hand, has not stopped, arbitration proceedings are continuing, the arbitration community, in Italy and abroad, has been able to identify procedural mechanisms to guarantee both due process and procedural efficiency.

On the subject, I recommend reading the beautiful volume edited by Maxi Scherer, Niuscha Bassiri and Mohamed S. Abdel Wahab: International Arbitration and the COVID-19 Revolution, published by Wolters Kluwer.

Even in these difficult times, arbitration has proven its ability to suit the parties' interests and to do so even better than State Courts can.

This is a perhaps bold statement that we have been making since 2015. And we will continue to repeat it.

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Pre-contractual liability and arbitration

by Roberto Oliva

Pre-contractual liability, under Italian law, is a form of tort liability. In a nutshell (and with some degree of approximation), it concerns cases similar to those provided for by English Misrepresentation Act 1967, as well as other cases falling outside the scope of the said Act involving a breach of the duty to act in good faith during the negotiations aimed at entering into a contract.

In this respect, a topic of great interest is that of the enforceability of the arbitration agreement possibly contained in the contract in case of pre-contractual claims (or tort claims related to the negotiation, the execution and the fulfilment of the contract).

A recent decision issued by the Court of first instance of Milan (No. 58 of 8 January 2020) addressed this topic. Such decision appears really impressive, both for its detailed and thorough grounds and for the conclusions it reached.

In short, the case heard by the Court of Milan concerned a post-acquisition claim raised by the purchaser of a going concern (transferred to a newco) against the sellers (and the professional who had estimated the value of the transferred going concern).

In particular, the purchaser claimed the sellers' fraud / bad faith, both before and after the execution of the SPA and, as a consequence, the fraudulent misrepresentation ('*dolo incidentale*') and the sellers' tort liability (as well as their liability for breach of certain representations and warranties contained in the SPA).

As far as we are concerned, the sellers objected to the Court's jurisdiction, on the basis of the arbitration clause contained in the SPA.

The crucial issue was, therefore, the enforceability of such clause with respect to the claims raised by the purchaser.

The Court of Milan considered that the said clause was enforceable based, as mentioned, on detailed and thorough grounds.

First of all, the Court found that the clause had a particularly broad content. In hindsight, it did not even mention the contract, so that it could refer to all the disputes concerning the relationship that resulted in the execution of the contract.

This interpretation is also confirmed by the construction rule provided for by Article 808-*quater* of the Italian Code of Civil Procedure, whereby "*in case of doubt, the arbitration agreement shall be construed in the sense that the arbitral jurisdiction extends to all disputes arising from the contract or from the relationship to which the agreement refers*."

This interpretation is further confirmed by the otherwise paradoxical State Courts and Arbitral Tribunals distributed jurisdiction over closely related matters (in this respect, the Court of Milan referred to the decision of the Italian Supreme Court, VI Civil Chamber, No. 26553 of 22 October 2018).

The Milan Court added that the said construction of the arbitration clause cannot be contrasted by the fact that a subsequent clause of the same contract provided for the exclusive jurisdiction of the Court of Milan over disputes that cannot be referred to arbitration: in fact, tort claims may be referred to arbitration pursuant to Article 808-*bis* of the Italian Code of Civil Procedure.

The Court further observed that, in a case such as that it heard, the contract represents a crucial element of the claim and not a mere chronological antecedent of it: in doing so, the Court essentially excluded the application of the restrictive principles laid down by the Italian Supreme Court's case-law.

Finally, the Court of Milan concluded its reasoning noting that Article 808-*bis* of the Italian Code of Civil Procedure (that is to say, the Article providing for arbitration of tort claims) does not require (as maintained by the referred case-law of the Italian Supreme Court) that the arbitration clause expressly mention non-contractual disputes in order to have it heard by an Arbitral Tribunal. In fact, the said law rule is only intended to dissolve the doubts arisen under the old law on the enforceability of an arbitration agreement concerning tort claims.

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Liquidated damages, termination and arbitration

by Roberto Oliva

Arbitrability of disputes arising out of the termination of a contract: a very interesting topic, both for its theoretical and practical consequences. A recent decision issued by the Court of first instance of Rome (No. 1695 of 27 January 2020) gives the chance to examine that topic.

The case heard by the Court of Rome concerned a franchising agreement.

The contract provided that upon its termination, and as a result of the same, certain obligations arose on the franchisee, to be fulfilled within a certain term. The stipulation was assisted by a liquidated damages clause: for each day of delay, the franchisee would have had to pay a certain sum to the franchisor.

The franchising agreement also contained an arbitration clause concerning "*Any dispute (…) between the parties regarding the interpretation, validity, fulfilment or termination of the Contract*", also providing for that "*the jurisdiction of the State Courts for the issuance of precautionary measures and orders for payment or delivery pursuant to articles 633 and following of the Italian Code of Civil Procedure, in relation to which the Court of Rome will be the exclusive proper venue*."

The franchisor claimed the failure of some franchisees to fulfil their contractual obligations resulting from the termination of the contract and requested the Court to issue orders for payment with respect to the allegedly due liquidated damages.

The franchisees appealed to these orders and, amongst other things, they objected to the Court's jurisdiction on the basis of the said arbitration clause.

In two cases, the Court of Rome rejected this objection, due to the fact that the dispute related to events occurred after the termination of the contracts (Court of Rome, ord. 27 August 2016, and Court of Rome, ord. 17 May 2017). In a third case, the Court of Rome granted the objection.

The last decision appears to be correct.

The arbitration clause has its own specific construction rule, the rule established by Article 808-*quater* of Italian Code of Civil Procedure, whereby "*In case of doubt, the arbitration agreement shall be in the sense that the arbitration jurisdiction extends to all disputes arising from the contract or from the relationship to which the agreement refers.*"

In the light of this specific interpretative rule, the Supreme Court recently stated that the arbitration clause "*unless otherwise provided, shall be construed in the sense that the arbitral tribunal has jurisdiction over all the claims having the contract containing the clause as their cause of action*" (Italian Supreme Court, I Civil Chamber, decision No. 3795 of February 2019, n. 3795).

All the cases heard by the Court of Rome concerned alleged breaches of contractual obligations and liquidated damages consequently due under specific contractual clauses. It is therefore clear that the cause of action was the relevant contract and, as a consequence, it is also clear that the jurisdiction lied with the arbitral tribunals.

This said, it is worth examining the part of the arbitration clause whereby the arbitral agreement does not affect the State Courts' jurisdiction to issue interim orders and orders for payment.

Under Italian law, State Courts already have jurisdiction to issue the said orders, without the need for a specific stipulation.

Nonetheless, Italian law also requires to construe contractual stipulations giving them a meaning and an effect, rather than no meaning and no effect: in a nutshell, this is the principle laid down by Article 1367 of Italian Civil Code.

It could be possible to construe the said arbitration clause as meaning that State Courts would have jurisdiction not only to issue orders for payment (jurisdiction they already have) but also over the appeals to such orders (jurisdiction they would have on the basis of the clause)?

This is an interesting question that apparently was not examined by the Court of Rome. The Supreme Court could perhaps investigate the topic in case of appeal to the decision of the Court of Rome.

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Arbitration and tort claims

by Roberto Oliva

A recent decision issued by the Court of Milan (No. 1684 of 24 February 2020) concerns a very interesting topic, that of Arbitral Tribunals jurisdiction over non-contractual claims related to a contract.

Early in 2016, an article appeared in this Journal commenting a decision by the Italian Supreme Court (VI Civil Chamber, decision No. 20673 of 13 October 2016, n. 20673, Italian text available here). The Supreme Court stated that, in that case, the jurisdiction over a pre-contractual claim related to a contract lied with the State Courts due to the fact, in a nutshell, that Arbitral Tribunals' jurisdiction over such cases has to be expressly provided for by the arbitration agreement.

It seems that, in light of the said case law of the Italian Supreme Court, Milan Arbitration Chamber modified its model arbitration clause in 2019, when it published its new arbitration rules.

In August 2019, the Court of first instance of Milan applied the principles laid down by the Italian Supreme Court with respect to the contractual restitutions arising out of the contract termination.

In September 2019, the topic was addressed by some decisions issued by the Courts of Appeal of Bologna and Catania that stated that Arbitral Tribunals do have jurisdiction over a particular tort claim: that raised under Article 1669 of Italian Civil Code.

In January 2020, the Court of Milan issued another decision on the Arbitral Tribunals jurisdiction over tort claims and ruled that Arbitral Tribunals do have jurisdiction.

The case recently heard by the same Court of Milan is very similar.

Indeed, on the one hand, the Court of Milan highlighted the wide scope of the arbitration agreement, whereby all the disputes arising out of the contract and its fulfilment are devolved to arbitration. On the other hand, the Court

(correctly, it appears) minimized the scope and consequences of the reserve clause whereby the parties agreed on the proper venue of the disputes before State Courts, stressing that this proper venue only applies if State Courts have mandatory jurisdiction over the relevant disputes (such as, for instance, in case precautionary and/or interim relief is sought).

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Arbitration in the time of CoViD-19

by Roberto Oliva

CoViD-19 pandemic also has an impact on arbitration proceedings.

The relevant issues were addressed by Italian lawmaker, that enacted provisions which require careful thought for their construction.

In the beginning were the Law Decrees Nos. 11/2020 and 18/2020, which provided for two different phases: a first phase (from 9 to 22 March 2020 under Law Decree No. 11/2020, until 15 April 2020 pursuant to Law Decree No. 18/2020), and a second phase (until 31 May 2020 according to Law Decree No. 11/2020, until 30 June 2020 pursuant to Law Decree No. 18/2020). During the first phase procedural terms in civil proceedings were stayed and the hearings postponed, except for certain proceedings distinguished by particular reasons of urgency. During the second phase, each Court would take the most appropriate measures to deal with the pandemic.

Law Decree No. 18/2020 shyly mentioned dispute resolution tools alternative to proceedings in State Courts, providing for the stay of terms for some of these tools, the ADR procedures that under Italian law the parties are required to initiate before filing a claim in Court.

No provision was enacted with reference to arbitration.

In the meantime, arbitral institutions in Italy and overseas provided guidance to Arbitral Tribunals and parties, adopted guidelines or identified specific solutions.

For instance, Milan Arbitration Chamber stayed the terms for filing any submission in its arbitration proceedings and the terms for the issuance of arbitral awards; similar measures were also taken by the Bologna Arbitration Chamber.

On 16 April 2020, sixteen leading arbitration centres issued a joint statement, also inviting Arbitral Tribunals and parties to identify the most appropriate measures to ensure the efficiency of arbitration proceedings despite the pandemic.

Here comes Italian lawmaker. Under Italian Constitution, in cases of extraordinary necessity and urgency, Government is entitled to issue provisional measures, having the force of law, subject to subsequent transposition into law by the Parliament. Law Decrees Nos. 11/2020 and 18/2020 were issued on the basis of this constitutional provision. Law Decree No. 18/2020 was transposed into law by the Italian Parliament, which enacted Law No. 27 of 24 April 2020, and that law sets forth that the provisions of Law Decree No. 18/2020 also apply to arbitration proceedings, as far as compatible.

While the Parliament was examining the bill for the transposition into law of Law Decree No. 18/2020, the Government issued Law Decrees Nos. 23/2020 and 28/2020: under Law Decree No. 23/2020 the first phase provided for by Law Decree No. 18/2020 was extended until 11 May 2020, and under Law Decree No. 28/2020 the second phase was extended until 31 July 2020.

How to make sense of all these provisions?

It could be reasonably argued that the provisions concerning the stay of procedural terms and the adjournment of hearings apply to arbitration proceedings from 30 April 2020 (date of entry into force of the law whereby Italian Parliament transposed Law Decree No. 18/2020) until 11 May 2020 (final term of the first phase as extended by Law Decree No. 23/2020).

The activities carried out from 9 March to 30 April 2020 should be valid, on the basis of *tempus regit actum* principle, whereby the validity of procedural activities is assessed on the basis of the law in force when they were carried out. Nonetheless, cautious Arbitral Tribunals would consult the parties to understand if it is appropriate to adopt some specific measure.

In addition, even though the said Italian provisions only apply to arbitration proceedings seated in Italy, very cautious Arbitral Tribunals seated abroad in arbitration proceedings involving Italian parties would also consult the parties to assess whether to adopt specific measures, in order to minimise the risk that in the future a party could, with or without merit, argue that the award cannot be enforced in Italy since that party was prevented from presenting its case.

However, in this respect, it is worth noting that, according to the principles laid down by Italian case law, the party claiming that it was prevented from presenting its case has to satisfy the Court that specific defensive activities were actually precluded (Italian Supreme Court, I Civil Chamber, decision No. 2984 of 16 February 2016, and Court of Appeal of Genoa, decision No. 1215 of 27 August 2019).

What would happen during the second phase (from 12 May to 31 July 2020)? As regards proceedings in State Courts, the Chairperson of each Court would take the most appropriate measures. Arbitration proceedings do not have Court's Chairpersons. As a consequence, it could be maintained that arbitral

institutions and tribunals would exercise, during the second phase, the powers they already had before the enactment of the said law provisions, and that in some cases they had already exercised.

Flexibility is a major feature of arbitration proceedings under Italian law: also because of this flexibility, Italian Arbitral Tribunal would be able to face the challenges posed by CoViD pandemic.

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CAM simplified arbitration

by Roberto Oliva

The Arbitration Rules of Milan Arbitration Chamber, which came into force a year ago, has recently been integrated. The new provisions, applying from 1st July 2020, establish a simplified arbitration procedure.

The said new provisions are contained in Annex D to the arbitration rules.

The new simplified arbitration procedure applies to arbitration proceedings, commenced after 1st July 2020, involving claims up to EUR 250,000, unless a party opposes to the application of these rules.

In other words, also parties that entered into an arbitration clause before 1st July 2020 are allowed to make use of the simplified arbitration procedure, however provided they (even implicitly) agree to that effect.

There is no specific provision in the event of an arbitration clause entered into after 1st July 2020, so that it seems reasonable to conclude that also in this case it is required that at the beginning of the proceedings the parties agree (also implicitly) on the application of simplified arbitration rules.

Furthermore, the rules at hand also apply in all proceedings, without limit of value, if the parties explicitly referred to them in the arbitration agreement or if the parties explicitly agreed on their application at any time prior to the filing of their request for arbitration and reply.

It is clear that the criterion underlying the said provisions is that of valuing the parties' intentions. However, this is not unlimited: CAM's council is indeed allowed to prevent the application of simplified arbitration rules, in the light of the dispute complexity, at the request of the appointed arbitrator or even ex officio.

Pursuant to the said provisions, the parties' are supposed to file since the outset comprehensive submissions: in this perspective, the request for arbitration and the reply should indicate, inter alia, the proposed means of proof and, on pain of rejection, the facts that they intend to prove through the said means.

The Arbitral Tribunal, notwithstanding any contrary provision in the arbitration clause, would be composed of a sole arbitrator appointed by CAM and constituted by a specific instrument, whose content is not indicated by the new rules, but which would likely be similar to that of the terms of reference provided for by the rules of other arbitration centres.

As regards the conduct of the proceedings, it is characterised by the greatest efficiency.

The Arbitral Tribunal may, after hearing the parties, limit the length or subject matter of written submissions (which, unless otherwise determined by the Arbitral Tribunal, consist of only one submission per party following the request for arbitration/reply), as well as the number of documents and witnesses to be possibly heard. The parties are also precluded from raising new claims after the constitution of the Arbitral Tribunal, unless authorised by the sole arbitrator. In addition, all procedural terms are mandatory and non-extendable (in that reversing the general rule applying in arbitration proceedings seated in Italy). The Arbitral Tribunal is not expected anyway to hold an arbitral hearing and in any case a sole hearing would take place for the taking of evidence and parties' pleadings, also via audio conference, video conference or other suitable means. The award, eventually, would be filed within three months of the constitution of the Arbitral Tribunal, in the absence of any extension granted by CAM.

In other words, the parties' wishes, highly valued as regards the choice of simplified arbitration, are constricted during the proceedings, in pursuit of the main purpose of these new rules: to issue an enforceable award as soon as possible.

The parties to the proceedings also enjoy another advantage: CAM and arbitrators' fees are significantly reduced in case of simplified arbitration.

These new rules, which were perhaps introduced in the light of the effects of CoViD-19 pandemic and taking account of the disputes that would derive from it, are drawn to interesting oversea practices, such as the Expedited Arbitration under the ICC Arbitration Rules or the, more radical, Business Arbitration Scheme of the Chartered Institute of Arbitrators, and they are of great relevance, also in view of increased use of arbitration in domestic Italian disputes or international disputes involving Italian parties or otherwise connected to Italian jurisdiction.

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International corporate arbitration

by Roberto Oliva

International corporate arbitration under Italian law is a very interesting topic that nonetheless is virtually neglected by Italian scholars. Besides, to date there are no reported decisions.

First of all, a clarification of terminology is due: in this context, 'international corporate arbitration' means an abroad seated arbitration concerning a dispute falling within the scope of Article 34 of Italian Legislative Decree No. 5 of 17 January 2003, n. 5, which sets forth particular rules concerning arbitration in corporate matters.

In practice, possible cases of international commercial arbitration are not uncommon. For instance, an Italian incorporated company could represent the investment vehicle of a foreign entity. And that foreign entity could wish that corporate disputes (against an Italian co-investor, or the company's directors) are referred to an abroad seated arbitration.

A few scholars addressed the relevant issue, which is also addressed by a recent decision issued by the Court of Appeal of Genoa (decision No. 649 of 9 July 2020).

The case heard by the said Court of Appeal concerned the recognition in Italy of an award issued abroad, by virtue of an arbitration clause included in the articles of association of an Italian company, providing for ICC arbitration seated in Switzerland.

The dispute heard by the arbitral tribunal, in turn, concerned a claim for damages raised by the company against its director. The latter appeared in the arbitration proceedings, raised objections on the merits and, before that, objected to the jurisdiction of the arbitral tribunal, alleging that the arbitration clause was null and void.

The arbitral tribunal partly granted the claims of the claimant, which subsequently seised the Court of Appeal of Genoa to have the award recognised in Italy.

The defendant resisted to the said recognition.

The defendant objected that the recognition of the award was prevented under Article V(1)(a) of New York Convention, as the arbitration clause for international corporate arbitration is null and void, in that it contrasts with the mandatory rules of Articles 34-36 of Italian Legislative Decree No. 5/2003. This objection focuses on the fact that applicable Swiss procedural law prevents the review on the merits of the award, while the said review in corporate matters is allowed by Articles 35 and 36 of the said Italian Legislative Decree.

From another point of view, the defendant also objected that the award should not circulate under Article V(2)(b) of New York Convention, since the relevant arbitration clause was not but a device to circumvent Italian mandatory rules (once again, those on the review on the merits).

The last objection raised by the defendant concerned Article V(1)(a) or V(1)(c) of New York Convention, on the basis of an alleged waiver to the arbitration clause by the company that brought proceedings against the director before Italian State Courts.

That objection was rejected: first of all, because the company had never brought proceedings against the director before Italian State Court (it only filed, but did not follow up, a request for joinder). Also, the said request for joinder was filed when the arbitration proceedings were already pending and, as a consequence thereof, cannot be construed as a waiver to the arbitration clause.

The Court also rejected the second objection, since a possible conflict with public policy is only relevant under Article V(2)(b) of New York Convention if it concerns the operative part of the award (see on the point Italian Supreme Court, I Civil Chamber, decision No. 6947 of 8 April 2004, Italian text available here). In other words, substantial public order is only at stake. And no violation of that public policy had ever been claimed.

The most interesting reasoning of the Court concerns the first objection raised by the defendant. In this respect, the Court of Appeal held that validity requirements of corporate arbitration clauses are only set forth by Article 34 of Italian Legislative No. Decree 5/2003, whereby the arbitration clause is null and void if it does not provide that all the arbitrators are appointed by a third party. On the contrary, Articles 35 and 36 of the said Italian Legislative Decree are procedural rules that only apply in arbitration proceedings seated in Italy.

In this respect (this is an issue that the Court did not examine), it is worth noting that, while the said Articles 35 and 36 do mention 'international arbitration', they actually refer to the repealed rules on international arbitration contained in the Italian Code of Civil Procedure (concerning Italian-seated arbitration proceedings having transnational aspects).

Some questions remained in the background. In particular, that of the law governing the arbitration clause, which the Court of Appeal apparently identified regardless of the law conflict rule provided for by Article V(1)(a) of New York Convention (although it seemingly reached a conclusion in line with this conflict rule and its construction).

Another issue in the background is that of the possible invalidity grounds relevant under Art. V(1)(a) of New York Convention, whether Country-specific grounds are allowed or only internationally neutral grounds should be considered.

Likewise, a practical question also remained in the background. Italian law provides that requests for arbitration by the company or against it have to be filed with the Companies' House and the question is whether the filing of foreign-language documents is allowed.

Despite these issues in the background, the decision issued by the Court of Appeal of Genoa represents the first reported decision on international corporate arbitration and, hopefully, the starting point of a line of cases.

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A never signed arbitration clause
by Roberto Oliva

An Arbitral Tribunal seated in Padua recently dealt with some issues concerning its jurisdiction. The award was delivered on 21 January 2020.

The dispute heard by the Tribunal referred to an alleged relationship between a bank and a limited company evidenced by a framework agreement and an interest rate swap contract.

The claimant's case was that the said contractual documents were never signed by its legal representative and that the signature on them was forged. As a consequence, the claimant requested the respondent to return the amounts the latter received under the terms of the said contracts.

An interesting point is that the claimant commenced the arbitration proceedings provided for by the arbitration clause contained in the contracts that, in its own case, it never entered into.

Another interesting point is that, on the basis of the opinion of a Tribunal-appointed expert, the claimant's signature on the contracts actually proved to be forged. The respondent did not raise any objection after the filing of the expert opinion. Nonetheless, when the Tribunal requested the parties to express their views on the matter, the respondent objected to the Tribunal's jurisdiction, lacking an enforceable (and even existing) arbitration clause.

The Arbitral Tribunal reached a conclusion that seems correct, in that it rejected the objection to its jurisdiction. Nonetheless, the reasoning that led to the correct conclusion is quite peculiar. It is a clear sign of the cautious – excessively cautious, perhaps – attitude of the Tribunal, and a clear attempt to prevent possible recourse for setting aside the award on the ground of lack of Tribunal's jurisdiction.

First of all and rather surprisingly, the Tribunal found that it was entitled to deal with the issue of its own jurisdiction, even though the relevant objection was not timely raised under Article 817 of Italian Code of Civil Procedure (whereby the said objection shall be raised by the respondent in its first defence).

In this respect, the Tribunal referred to a decision of Italian Supreme Court (No. 21215 of 8 October 2014), however concerning a different case. As a matter of fact, in the case heard by the Supreme Court the respondent did not appear before the Arbitral Tribunal and subsequently filed a petition to have the award set aside on the basis of the lack of jurisdiction of the Tribunal. The Supreme Court found that the respondent that did not appear before the Tribunal and therefore did not object to the Tribunal's jurisdiction during the arbitration proceedings is nonetheless allowed to object to that jurisdiction in subsequent proceedings for the setting aside of the award.

The Arbitral Tribunal also held that Article 817 of Italian Code of Civil Procedure does not concern the objections to be raised during the arbitration proceedings, but the possible grounds for setting aside the award. The said distinction is not clearly drawn by the Tribunal and at the end of the day it is even ill-founded under Italian law.

In fact, Italian scholars' opinion is that the Arbitral Tribunal has jurisdiction, on the basis or a void or voidable or even non-existent arbitration clause, if the interested party does not timely raise the relevant objection.

Italian scholars contend whether this mechanisms amounts to a substantial tool (whereby the arbitration clause is entered into by the parties' behaviour) or a procedural one (whereby the party that did not timely object to the Tribunal's jurisdiction is prevented from tardivamente raising that objection). In any case, the opposite scholarly opinions mainly take into account the case of the respondent that did not appear before the Tribunal. Therefore, they might be disregarded if the respondent appears, as it did in the proceedings that led to the award.

The Tribunal of these proceedings, as said, took a very cautious approach and held that it was entitled to deal with the issue of its jurisdiction, even though the respondent failed to timely raise the relevant objection.

The Tribunal found that it has jurisdiction. Notwithstanding the arbitration clause was void (or even non existent, in that it was never signed by the claimant), it held that the relevant objection was subject to the rules set forth by Article 23 TUF (whereby objections concerning the formal validity of contracts between banks and their costumers may only be raised by the customers). The bank's customer did not raise the objection and as a consequence thereof the Tribunal was prevented from declaring that the arbitration clause was void/non-existent. It is clear that these findings are not consistent with the arbitration clause autonomy, which is a well-established doctrine under Italian law.

The Tribunal also followed a different reasoning leading to the same result, which appears more persuasive. It referred to the authority of a handful of Italian Supreme Court decisions (No. 105 of 15 January 1953, No. 720 of 23 March 1963, No. 4075 of 24 December 1968, and No. 1168 of 12 February 1985) that

laid down an interesting principle. In case Italian law requires that a contract is made in writing (as it requires with respect to arbitration agreements), the signature of a party to the contract suffices if the other party (which did not sign the contract) files the contractual document with the Court and declares its intention to avail itself of the rights arising out of the contract. In other words, the contract signed by a party is characterised as an offer that is accepted by the offeree by filing it with the Court and declaring the intention to enforce the terms of the contract. In that perspective, the arbitration clause only signed by the bank in the case heard by the Tribunal was enforceable since the other party filed it with the Tribunal and declared its intention to avail itself of the rights arising out thereof.

As already indicated, the conclusion is right (the Tribunal has jurisdiction) on the basis of a peculiar reasoning. The Tribunal, in fact, has jurisdiction since the respondent failed to timely raise the relevant objection. The findings of the Tribunal gave however the chance to refer to some decisions issued by the Italian Supreme Court that laid down interesting principles. In fact, these decisions would be worth being analysed in details, also in the lights of arbitration law reforms enacted in the meantime.

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A proposal for Italian arbitration

by Roberto Oliva

In order to access the Recovery Fund, EU member States are required to draft a "National Recovery and Resilience Plan", consistent with the specific recommendations the Europen Commission addressed them.

In that perspective, Italian government recently made available a preliminary document, headed "Guidelines for the definition of the national recovery and resilience plan". A short, forty-page document, with two pages only on Italian judicial system.

In fact, the said guidelines contain vague indications with respect to Italian judicial system and Italian justice: they only claim a number of nebulous, undefined proposed goals (shortening the duration of Court proceedings; reforming codes of civil, criminal and tax proceedings; planning interventions on the Italian judiciary organisation). Nothing else.

Following the publication of these guidelines, Unione Nazionale delle Camere Civili, that is to say, the association representing Italian civil lawyers, published its proposal for an extraordinary plan for civil justice (Italian text available here). It took an admirable initiative, as it triggers (or it could be able to trigger) a broad debate on possible specific, practical measures.

Unione Nazionale delle Camere Civili submitted two proposals with respect to arbitration in Italy.

The first proposal is to "introduce mandatory arbitration (possibly in the form of the sole arbitrator), in some matters and with value limits, (…) providing (in order to avoid possible violations of art. 102 of Italian Constitution) that the award would be capable to be enforced, without having res judicata effect (as it is currently the case of proceedings under Article 700 of Italian Code of Civil Procedure)".

The second proposal is that of "providing arbitrators, at least in some matters, with the powers to issue precautionary and/or urgent measures".

At first sight, the purpose of both proposals seems that of employing arbitration as a tool to deflate litigation proceedings in Courts.

It is not the question if this purpose brings justice to the potential of arbitration. However, it is necessary to question whether these proposals serve to their seeming purpose.

First of all, the issue of mandatory arbitration. This kind of arbitration is not allowed in Italy and, in this respect, Italian Constitutional Court laid down clear principles in its decision No. 127 of 14 July 1977, later upheld in decision No. 221 of 8 June 2005. The reason is simple: arbitration is a dispute resolution mechanism based on consent. And this consent cannot be replaced by an obligation arising out of an act of Parliament.

The drafters of the said proposal are aware of the above issue and they suggest to overcome it by transforming the award into a decision capable of being enforced, but not capable to have res judicata effect.

It is not clear how this mechanism could actually operate; in any case, it is obvious that, if the award does not have res judicata effect, that mandatory arbitration would not be able to deflate litigation proceedings in Courts (as the so-called deflationary arbitration was unable to reach that purpose under Law Decree No. 132 of 12 September 2014).

The second proposal made by Unione Nazionale delle Camere Civili is that of granting Italian Arbitral Tribunals with powers to issue interim orders, as they are allowed to do in corporate matters (under Article 34 of Legislative Decree No. 5 of 17 January 2003) or could essentially do by using particular mechanisms (as those provided for by the Arbitration Rules of the Arbitration Chamber of Milan, which entered into force in March 2019; it is however worth noting that until now the mechanism provided for by the said Arbitration Rules has not been applied).

This reform was widely requested and it could finally align Italian arbitration law to the laws enacted in other similar jurisdictions, thus abandoning the restricted club of jurisdictions reserving interim powers to State Courts.

However, a third proposal, which should be the main proposal, is missing. A proposal aimed at encouraging the use of arbitration.

There are two issues that severely limit the spread of arbitration in Italy.

The first issue, thoroughly analysed in a recent study (available here), is that of the lack of trust in arbitration. This is a matter of considerable importance and, in order to properly address it, many efforts are required on the part of Italian practitioners.

The second issue concerns the costs of arbitration. Costs of State Courts are almost exclusively borne by Italian taxpayers, while costs of Arbitral Tribunals are entirely borne by the parties. It is clear that effective action should be taken to address this issue. First of all, that issue could be addressed by exempting from stamp duty all written submissions filed in arbitration proceedings (they are now taxed at the rate of Euro 16 every four pages). In addition, that issue could also be addressed by exempting the award from registration tax (it is now subject at the same rate as decisions issued by State Court). Lastly, if arbitration has to be deemed as a positive externality, in that it could be used as a tool to deflate proceedings in Courts, proper incentives have to be provided. In that perspective, a suitable incentive could be that of granting the parties with a tax credit, proportionate to the costs they incurred in the arbitration proceedings (excluding attorneys' fees).

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Separability presumption
by Roberto Oliva

Separability presumption is universally applied, as the relevant doctrine spread all over the world during the first half of XX century.

In the words of Italian lawmakers, "The validity of the arbitration clause must be evaluated independently of the underlying contract" (Article 808, para. 2, of the Italian Code of Civil Procedure).

The oldest decisions laying down the doctrine of separability were issued by German Courts at the turn of XIX century: for example, German Supreme Court, in its decision 30 April 1890, stated that invalidity of the underlying contract does not entail, as an inevitable consequence, invalidity of the arbitration clause; applying this principle, Nuremberg Court of Appeal affirmed the jurisdiction of an Arbitral Tribunal to assess the validity of a contract (decision of 24 May 1909), and a similar decision was issued by Dresden Court of Appeal (decision of 11 January 1912). German Courts were nevertheless reluctant to apply separability presumption in cases of invalidity of the underlying contract due to its illegality (as in the case of some gambling contracts: see German Supreme Court, decision of 18 May 1904).

Meanwhile, separability presumption was also gaining ground in Switzerland and the relevant doctrine was affirmed by Swiss Federal Court in its decisions of 22 October 1881, 3 October 1913 and 5 March 1915. That doctrine is clearly stated as early as 1933: "The invalidity of the main contract does not render immediately the arbitration clause contained therein invalid; the clause according to which disputes arising under the main contract shall be submitted to arbitration encompasses, in cases of doubt, also disputes relating to the validity and the objection of simulation" (Swiss Federal Court, decision of 7 October 1933).

After Second World War and more recently, separability doctrine became widespread. For example, it was recognised by 1958 New York Convention, 1976 UNCITRAL Model Law, 1980 reform of French Code of Civil Procedure (although the said reform enacted principles already laid down by French case law) and 1996 English Arbitration Act.

As far as Italian jurisdiction is concerned, at the beginning of XX century preponderant scholars' opinion and case law was that Arbitral Tribunals did not have jurisdiction over disputes concerning the validity of the underlying contract, since the invalidity of that contract would also lead to the invalidity of the arbitration clause: "questioning the existence or validity of the contract that includes the clause, the very jurisdiction of arbitrators is questioned" (Codovilla, Del compromesso e del giudizio arbitrale, Torino, 1915, p. 344; also see Mattirolo, Trattato di diritto giudiziario civile, V ed., Torino, 1932, p. 761 and Amar, Dei giudizi arbitrali, Torino, 1868, p. 157). In the same years, similar arguments were used, for example, under English law (see the decision of the House of Lords of 20 February 1942, Heyman v. Darwins Ltd).

Amongst Italian scholars, a dissenting voice was raised by Carnelutti (Clausola compromissoria e competenza degli arbitri, critical note to Court of Venice, 4 August 1920, on Riv. Dir. Comm., 1921, II, p. 327 ss.).

The learned author, first of all, underlined the ambiguity of the term "clause" contained in the phrase "arbitration clause".

In the most common sense, a clause is a part of an agreement, which follows its fate, as the part follows the fate of the whole. The arbitration clause, on the other hand, is a clause in the sense that it is an agreement that is formed at the same time as another and on the occasion of another (the underlying contract), of which, however, it is not a mere part.

In some cases, the invalidity of the underlying contract also entails the invalidity of the arbitration clause: for example in the case, referred to by Carnelutti (Clausola compromissoria, cit., p. 331), of the underlying contract and arbitration clause entered into by an incapacitated person; or in the case, more frequent, of a contract whose signature is forged. In these cases, the invalidity of the contract also entails the invalidity of the arbitration clause. In all other cases, however, the invalidity of the contract cannot also constitute a ground for invalidity of the autonomous stipulation contained in the arbitration clause. The latter is therefore valid and enforceable and jurisdiction lies with the arbitral tribunal.

Post-WW2 Italian case law upheld the separability doctrine and therefore stated that the invalidity of the underlying contract does not entail the invalidity of the arbitration clause and vice versa. In this respect, earlier decisions issued in the 50s of XX century were upheld by the Italian Supreme Court in its decisions No. 2161 of 29 July 1964, No. 221 of 27 January 1967, and No. 3003 of 11 October 1972, no. 3003. In its decision No. 4279 of 2 July 1981 Italian Supreme Court drew a distinction, by specifying that separability doctrine does not apply in case of contractual arbitration (that is to say, a particular ADR mechanism provided for by Italian law, resulting in an award that has the same effects as a contract entered into by the parties) and that principle is currently upheld by Italian case

law (see for example Italian Supreme Court, First Civil Chamber, decisions No. 9230 of 9 April 2008 and No. 5105 of 29 March 2012).

Scholars' opinion agrees (see for example Rescigno, Arbitrato e autonomia contrattuale, on Riv. arb., 1991, p. 13 ss).

Finally, Italian Parliament, by passing 1994 reform of Italian arbitration law, enacted separability presumption and the relevant doctrine as already laid down by Italian scholars' opinion and case law.

At the end of this long process, there are two recent decisions of Italian lower Courts, issued by the Court of Appeal of Ancona (decision No.916 of 15 September 2020) and by the Court of first instance of Catania (decision No. 3016 of 21 September 2020).

The claimant in Ancona requested the Court to set aside an arbitration award issued in contractual arbitration proceedings. In these proceedings, it acted as respondent, while the claimant claimed its breach to the underlying contract and, as a consequence, the termination of the same contract. In the opinion of the claimant in the Court proceedings, separability presumption does not apply in the case at hand, since it does not apply in cases of contractual arbitration. As a consequence, the arbitral tribunal did not have jurisdiction over the dispute concerning the termination of the underlying contract.

The Court of Appeal rejected the claim, noting that in cases of disputes concerning the termination of a contract, the contract is not regarded as a contractual instrument, but as a contractual relationship. Indeed, termination concerns the contractual relationship, not the contractual instrument. While the contractual instrument remains valid and enforceable, the contractual relationship is terminated. In the light of these principles, there is no room to question on the separability (or non-separability) of the arbitration clause with respect to the underlying contract: the validity of the latter is not in dispute so that the validity of the former cannot be denied.

The decision correctly applies the relevant principles of Italian law; unfortunately, the Court of Appeal did not take the chance to examine the issue of the application of separability presumption in cases of contractual arbitration, as a revision of the principles applyd by Italian case law on the matter would be needed.

In turn, the Court of first instance of Catania heard a complex case, in which the incorporation of a company was simulated, while the parties wished to jointly buy an interest in land. The company's articles of association, which the Court found to be a simulated contract, contained an arbitration clause. A dispute between the parties arose, and the Court rejected the objection to its jurisdiction raised by the defendant on the basis of the said arbitration clause. In the Court's opinion, the simulation of the underlying contract affected the enforceability of the arbitration clause contained therein. In particular, the Court stated that, since

the apparently incorporated company did not exist, also the arbitration clause contained in its articles of association did not exist.

The conclusion reached by the Court of Catania seems extreme and disproportionate, inconsistent with separability presumption as enacted by Article 808 of Italian Code of Civil Procedure and with the evolution of the relevant doctrine that was also laid down with specific reference to cases of simulation of the underlying contract (as in the mentioned decision of the Swiss Federal Court of 7 October 1933).

A different issue, which the Court did not address, is that of the application of Article 34 of Italian Legislative Decree No. 5 of 17 January 2003. In other words, the question is whether the arbitration clause contained in the simulated articles of association of a simulated company has to comply with the requirements set forth by Italian law on corporate arbitration, and therefore, for instance, if the said clause has to provide for the appointment of the whole arbitral tribunal by a third party.

There are no reported decisions on that very issue, nor scholars' opinions. It could be maintained that specific rules on corporate arbitration should anyway apply since, if they do not, the arbitration clause would be valid or invalid depending on the decision on the merits (valid if company's incorporation is actually simulated, otherwise invalid). However, that argument could be flawed: in fact, even in the case of a contract bearing an allegedly forged signature, arbitral jurisdiction is established (or denied) depending on the decision on the merits. In addition, different conclusions could be reached if the contract simulation is not a disputed issue and therefore the validity of the arbitration clause does not depend on the decision on that issue.

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Corporate arbitration

by Roberto Oliva

Italian law provisions on corporate arbitration (enacted by legislative decree no. 5 of 17 January 2003) entails a number of interpretative issues, possibly the reason for the limited recourse to arbitration in corporate matters.

At first, doubts were cast on the relationship between corporate arbitration and 'ordinary' arbitration. Some Courts and scholars maintained that Italian companies' articles of association may contain an arbitration clause providing for 'ordinary' arbitration, while other authorities suggested that only corporate arbitration could be provided for. That issue does not amount to a purely nominal matter, since in 'ordinary' arbitration the parties to the proceedings are allowed to appoint the arbitrators, while in corporate arbitration they are required to entrust a third-party appointing authority. Eventually, the issue was settled by Italian Supreme Court, clearly stating that arbitration clauses contained in Italian companies' articles of association may only provide for corporate arbitration, while arbitration clause otherwise providing are null and void (Italian Supreme Court, III Civil Chamber, decision No. 15892 of 20 July 2011). Even after Italian Supreme Court laid down the said doctrine, some authorities took a different stance (for example, in 2016 the Court of first instance of Naples held that 'ordinary' arbitration could be allowed in corporate matters: decision No. 4874 of 19 April 2016), but this mostly happens in rare decisions issued with respect to peculiar cases, from which it is difficult to draw principles applicable to cases other than those heard by the Court.

Other doubts concern the jurisdiction to issue interim measures in case of corporate arbitration since Italian law grants corporate arbitrators (unlike 'ordinary' arbitrators) with the power to issue such measures. Several lower Courts maintain they have the said jurisdiction, notably before the constitution of the arbitral tribunal (the decisions issued by the Court of Milan are particularly clear on this point: see for example Court of Milan, order 22 December 2015). Nonetheless, a handful of lower Courts holds that, in case of corporate arbitration, State Courts do not have jurisdiction to issue interim measures, the relevant power being in any case vested in the arbitral tribunal (see for instance Court of Catania, decision No. 4041 of 19 July 2016).

Moreover, further doubts were cast with respect to the scope of arbitral tribunal jurisdiction in corporate matters. Italian law (legislative decree No. 5/2003) expressly provides that arbitral tribunals may hear disputes concerning resolutions passed by the company and, as a general rule, all disputes concerning negotiable rights relating to the corporate relationship.

However, Italian law does not define the disputes concerning negotiable rights relating to the corporate relationship. As a consequence, a number of interpretive hypotheses have been proposed.

The main doctrine laid down by Italian Courts on the matter is that whereby non-negotiable rights – that is, the rights in relation to which arbitral tribunals do not have jurisdiction – are only the rights arising out of mandatory law rules, whose violation triggers a reaction regardless any party initiative.

The said doctrine partly confuses non-negotiable rights and mandatory law rules (a negotiable right may indeed arise out of a mandatory law rule); nonetheless, it provides for a useful test to be applied: arbitral tribunals do not have jurisdiction over disputes concerning rights whose violation triggers a reaction regardless any initiative by the interested parties.

However, that doctrine is forcibly used to hold that arbitral tribunals do not have jurisdiction over disputes where the claimant claims that the company's financial statements are not true or accurate, while those specific claims are subject to a specific (and tight) limitation period. In other words, the violation of the relevant rights does not trigger a reaction regardless of the parties' initiative; on the contrary, that initiative is required, and it has to be expeditious.

The said construction is contrasted by another, applied by the Court of first instance of Catania in a recent decision (Court of Catania, decision No. 3598 of 30 October 2020).

First of all, the Court of Catania points out that non-negotiable rights and mandatory rules are different legal notions. In fact, in the case of non-negotiable rights, the law restricts private autonomy, while mandatory law rules in root preclude private autonomy.

Non-disposable rights are therefore those rights that can be claimed without any limitation period: inaction would otherwise allow disposing of those non-disposable rights, and that would be self-contradictory.

The decision of the Court of Catania was not issued per incuriam of the decisions of Italian Supreme Court; on the contrary, the Court is conscious of those decisions, but it prefers to rely on other decisions issued by the same Italian Supreme Court, holding that the legal notion of non-negotiable rights overlaps that of cases of legal instruments that are irretrievably null and void (Italian Supreme Court, decisions Nos. 15890/2012 and 3975/2004).

The Court concludes its detailed and thorough reasoning holding that arbitral tribunals do have jurisdiction over claims concerning alleged untruthfulness or inaccuracy of Italian companies' financial statements.

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Arbitration and choice of forum clauses

by Luca Giusquiami

The Court of first instance of Milan addressed in its decision No. 7692 of 26 November 2020 the issue arising out of the coexistence, within the same contract, of an arbitration clause and a choice of forum clause.

This is a partly risky phenomenon, capable of delaying from the outset any procedural initiatives taken by the parties to uphold their respective rights. It is sufficient to consider the objection of lack of jurisdiction or the so-called 'objection of arbitration' that a party might raise with the consequence of requesting, on the one hand, a preliminary ruling on jurisdiction and, on the other hand, postponing the decision on the merits. The issue at hand, besides being of considerable practical relevance, conflicts with one of the cornerstones of the subject matter, i.e. the principle of celerity and expeditiousness of arbitration. In fact, an ambiguous contract, which is unclear as to which forum (arbitral tribunal or state court) is competent to settle disputes connected with it, may cause delays that can extend the length of the process. This is a particularly harsh effect, especially for those parties who, by choosing arbitration, have relied on a speedy procedure to settle disputes. On the contrary, where the contract is well drafted, at least with respect to the choice between arbitration and state court, the aggrieved party will have the possibility to seek remedy through the instrument agreed upon.

The case heard by the Court, as far as we are concerned, can be summarised as follows. A company and an ONLUS foundation entered into a contract of sale of a business unit for a particularly high consideration, to be paid in instalments according to the agreed terms. The company, however, paid only a portion of the agreed price to the ONLUS foundation, forcing the latter to file a summary judgment's motion to obtain payment of the balance. The company promptly opposed the summary judgment, preliminarily arguing that the court of Milan lacked of jurisdiction because of the arbitration clause contained in the inter partes agreement. The ONLUS foundation sought the rejection of this objection, invoking a further contractual provision qualifying the court of Milan as the competent court.

The problem at hand is as follows: an arbitration clause which, within the same contract, competes with a clause granting jurisdiction to the state court. For the sake of clarity, the competing provisions are set out below:

- art. XI of the contract: "any dispute arising between the parties concerning the validity, effectiveness, construction and performance of this contract and subsequent agreements and in any case connected to it, shall be settled by arbitration under the Milan Chamber of Arbitration (…)";

- art. XII of the contract: «the court of Milan shall have jurisdiction».

The court of Milan held that the company's arbitration objection was prima facie valid, and declared its lack of jurisdiction. In particular, the court held that the arbitral body as regulated by art. XI of the contract has jurisdiction on the decision at hand by virtue of the arbitration clause. Such a statement has been broadly justified in the following terms.

Firstly, the court of Milan took the opportunity to highlight the similarity between arbitration and state proceedings. In fact, with Legislative Decree No. 40/2006, the Italian lawmaker introduced a series of provisions aimed at conferring to the arbitration system the same function as that of state justice. On this point, the court specifically referred to a notorious judgment rendered by the Italian Constitutional Court which, in making a comparison between arbitration and state proceedings, confirmed the jurisdictional nature of arbitration (Italian Constitutional Court, 16 July 2013, no. 223). It was stated, in such a judgment, that arbitration constitutes, to all effects and purposes, a judicial process governed by the Code of Civil Procedure aimed at applying the law in order to settle disputes. For this reason, fundamental principles of adversarial process and impartiality shall be fulfilled in state processes as well as in arbitration proceedings. Moreover, in a key passage of the same leading judgment was highlighted the assignment «to arbitral judicial system of a substitute function to state justice». From this last assumption, i.e. the fungibility of the arbitral instrument with the state process, the court of Milan set the basis of its decision.

Secondly, the court of Milan noted that the principle of state jurisdiction's primacy invoked by the ONLUS foundation to ask the rejection of the company's arbitration objection has been overruled. More specifically, the defendant referred to the principle of the natural primacy of state jurisdiction over arbitration, which has been affirmed in the past by the Italian Supreme Court (Italian Supreme Court decision, 28 May 1979, no. 3099; Italian Supreme Court decision, 23 August 1990, no. 8608). Such a principle, developed at the beginning of the 1980s, provided that in our court system the activity relating to judicial protection was an essential function of the State. This implied – in cases of uncertainty – that the jurisdiction of the state courts prevailed over that of the arbitrators. However, there has been a gradual overruling of this principle in favour of a new approach developed by the Italian Supreme Court's judges,

precisely referred by the court of Milan in the decision at issue (Italian Supreme Court decision, 14 October 2016, no. 20880). In particular, the Italian Supreme Court has held that arbitral justice: (i) is no longer an exception or derogation from state jurisdiction, (ii) is a fungible and perfectly alternative remedy to state proceedings and (iii) is a constitutionally protected faculty of the parties. From these relevant principles, the court of Milan derived a key statement as basis for its decision: in the event of uncertainty as to the parties' agreement on the choice between arbitration and state proceedings, the disputes governed by arbitration clause shall not be referred to state courts. For this purpose, it is necessary to determine the real intention of the parties regarding the scope of application of the arbitration clause. This has been the effort made by the court of Milan in its decision, implemented by seeking the parties' real intention in the content of the competing jurisdiction clauses.

In doing so, the court of Milan relied on the interpretation criteria set out in Articles 1362 et seq. of the Italian Civil Code. The wording of the arbitration clause, given its scope of wide application «any dispute arising» out of the contract of sale, or out of «subsequent agreements and in any event connected therewith», led to the conclusion that the intention of the parties was to refer all disputes relating to the contract to arbitration. The parties have also regulated in a very detailed manner, as the court of Milan pointed out, (i) how the arbitration procedure is to be conducted, (ii) how the arbitral tribunal shall be appointed and how it shall function, (iii) the seat of the arbitration, (iv) the rules to be applied for the decision and (v) the effectiveness of the arbitral award.

Moreover, pursuant to the principle of the overall interpretation of the contractual clauses as provided for in art. 1363 of the Italian Civil Code, the court of Milan considered an additional provision of the contract to be relevant in determining arbitral jurisdiction. In particular, art. IX.3 provided that the parties were entitled to refer to arbitration disputes arising out of their failure to agree, within the agreed time, on the compensation mechanism referred to in art. IX.3. Thus, a further reference to arbitration made by the parties with respect to disputes connected with the contract.

In the reasoning, a clarification was also made with regard to the principle of preservation of the contract and its clauses, as governed by art. 1367 of the Italian Civil Code. In view of the contractual provisions recalled above, conferring jurisdiction on the court of Milan for disputes relating to the contract would deprive the arbitration clause set out in art. XI of its effect and meaning. This would lead to a result which is entirely incompatible with the real intention of the parties arising out from the interpretation, literal or not, of the contractual provisions.

The court of Milan also noted that the scope of application of the choice of forum clause, in cases such as these, is entirely residual. The parties'agreement, as determined by the construction of the contractual provisions, was clear and unambiguous: choice of arbitration for all disputes relating to the contract (which includes the one at issue in this decision). Thus, the scope of application

of the choice of forum clause is limited to those matters which by law are not subject to arbitration, i.e. inalienable rights (art. 806 Italian Code of Civil Procedure) and interim measures (arts. 818 and 669 quinquies Italian Code of Civil Procedure). According to the court of Milan, this is how contractual provisions on jurisdiction as provided by the parties should be interpreted.

It may come as a surprise, but only at first glance, that the court did not use the provision in art. 808 quater of the Italian Code of Civil Procedure to support its decision. This rule allows, in case of doubt, to construe the arbitration clause broadly so as to extend its scope to all disputes arising from the contract or relationship to which the clause refers. However, the caselaw has been prompt in observing that article 808 quater of the Italian Code of Civil Procedure, concerning the "favor" for the arbitral jurisdiction, applies only to cases in which the interpretative doubt regards the quantification of the disputes submitted to arbitrators in light of the arbitration clause (Italian Supreme Court, 24 September 2018, no. 22490). The doubt shall therefore only relate to the scope of application of the arbitration clause. Differently, this rule does not apply to the choice between arbitration and state proceedings made by the parties, which shall be construed solely in the light of their will, in relation to which art. 808 quater Italian Code of Civil Procedure does not apply. Most likely, these are the grounds that induced the court of Milan not to invoke this rule.

Even in a situation of partial ambiguity, this decision upheld the favor arbitrati principle. This is a finding reached by (i) noting the well-known fungibility between arbitration and state proceedings and (ii) respecting the parties' intention as expressed in the provisions of the contract of sale. As we all know, parties' intention finds in the arbitration field its widest recognition. This assumption, as derived from the decision at hand, acted as a guide for the court of Milan in the use of the interpretation criteria set out in the Italian Civil Code.

In other decisions, Italian courts, including the Supreme court, have disregarded the favor arbitrati principle in favour of state courts' jurisdiction (Italian Supreme court, 13 October 2016, no. 20673). This happened, precisely, under competing provisions (arbitration and choice of forum) formulated differently from those contained in the contract of sale taken into consideration. However, the criterion used to determine the truly competent judicial body has always been the same: the construction of the parties' intention in view of (i) the literal content of the provisions, (ii) their meaning as derived from the overall sense of the contract and (iii) the conduct of the parties at the time of the conclusion of the agreement and during its performance.

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