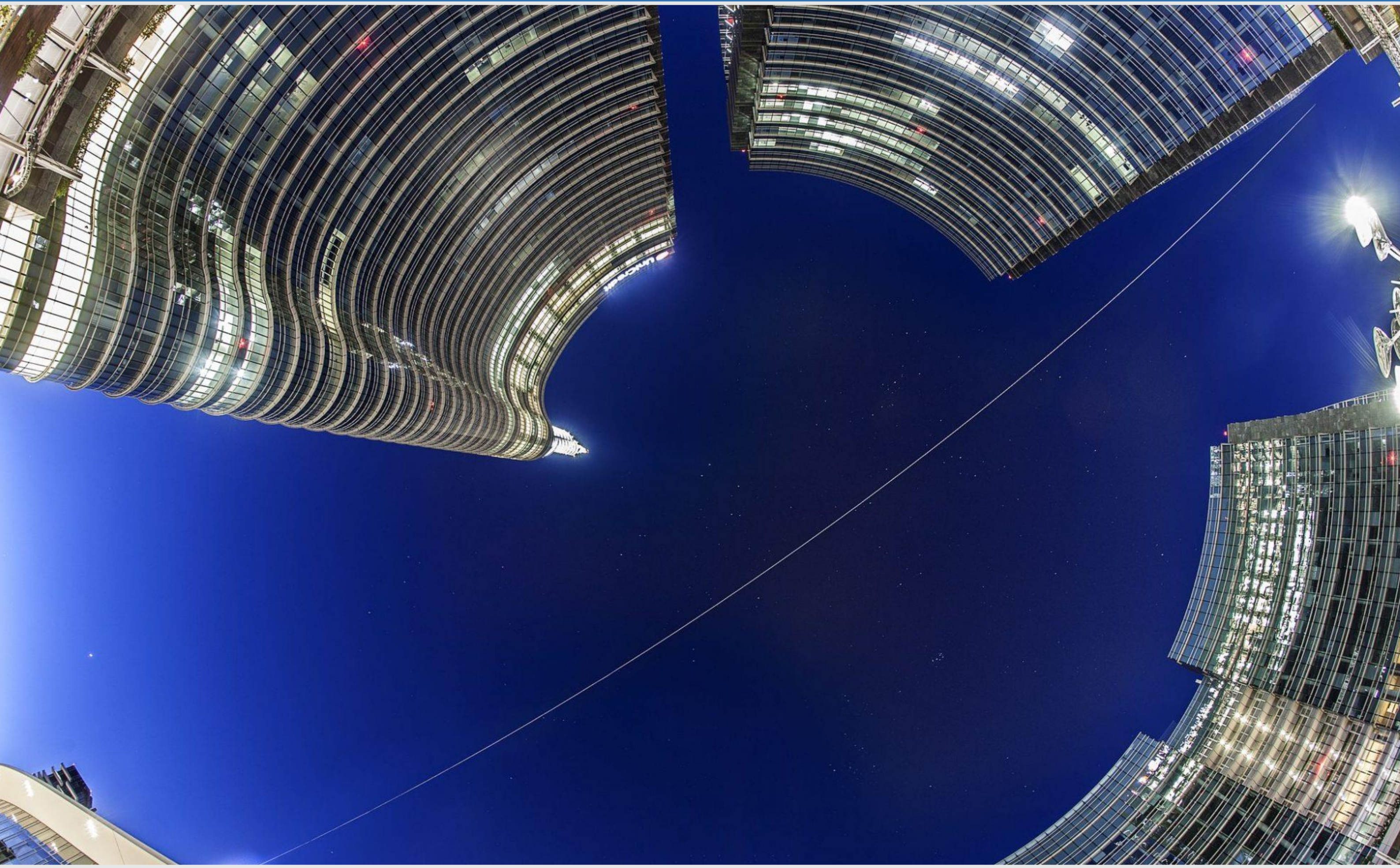
ISSN 2732-5687

Vol. 6 (2021)



Arbitration in Italy

News on international and domestic arbitration in Italy

Vol. 6 (2021)

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Published in December 2022 by
Arbitration in Italy Ltd
61 Bridge Street
HR5 3DJ Kington
United Kingdom

Judicial and arbitral decisions referred to in this journal, which were published in 2021, are available on the journal's website: https://www.arbitratoinitalia.it/en/

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Public Policy

by Roberto Oliva

A recent decision issued by the Italian Supreme Court (decision No. 1788 of 28 January 2021) deals with the issue of public policy and its relevance in arbitration matters.

The usual definition of public policy is that of the set of principles of the political and economic structure of a given society, inherent in the legal system and essential for its purposes and its very existence.

It is – clearly – an open, if not vague definition, granting the practitioners (and mainly the Courts) with considerable room in its actual construction and discretion in identifying which principles fall within the scope of public policy and which are not.

In fact, almost two centuries ago an English Court used a vivid metaphor to define public policy: that of a very unruly horse, once you get astride it you never know where it will carry you (Court of Common Pleas, 2 July 1824, Richardson v. Mellish, 130 ER 294).

On the one hand, public policy represents a limit to freedom of contract a contract in breach of public policy is null and void: Article 1343 of Italian Civil Code); on the other hand, it constitutes an obstacle to circulation or stability of decisions issued by entities other than State judiciary (such as arbitral tribunals and oversea Courts). That meaning of public policy is obviously relevant to arbitration matters.

In other words, a breach to public policy constitutes a ground for setting a domestic award; and a ground of great relevance, given that the parties cannot waive it in advance. As a consequence, public policy represents a limit to stability of domestic arbitration awards.

Public policy also constitutes a ground for refusing the recognition of a foreign award (Article 840, para. 5, no. 1 of Italian Code of Civil Procedure; Article V, para. 2, b of New York Convention). Once again, it constitutes a ground of particular importance, in that the parties are not requested to plead it and the

Court is entitled to find it upon its own motion. As a consequence, public policy represents a limit to circulation of foreign arbitral awards.

Scholars distinguish domestic public policy (which applies to parties' relationships that are completely domestic) from international public policy, applying to cases having an international element. In addition, some scholars also postulate a transnational public policy.

These concepts, which are perhaps primarily descriptive, can be imagined as three concentric sets. The broader set is that of domestic public policy, containing both fundamental and technical principles (such as that preventing the parties to define property rights other than those provided for by the law of the land). Subsequently, the set of international public policy is more restricted and it only contains fundamental principles whose application is essential for the legal system. Finally, the set of transnational public policy is the narrowest, as it contains, depending on the opinions, the principles of lex mercatoria or those principles of jus cogens upheld by all legal systems pertaining to the same civilization perspectives.

This said, it is worth noting that Italian jurisdiction, as well as many other jurisdictions, over the decades have significantly mitigated the restrictions and constraints arising out of public policy, originally intended as a relief valve aimed at preventing the application of oversea legal principles. Indeed, it has evolved into an extreme defence to prevent legal effects that are radically unacceptable for the legal system.

This line of cases was followed by the Italian Supreme Court in its above-mentioned decision. In fact, the Court declared that the parties are not allowed to seek a re-evalution of the facts already ascertained by an Arbitral Tribunal, alleging a breach to public policy in the reasoning of the award. The Court also added that recourse for setting aside an award on the ground of breach of public policy is only allowed if the interested party is able to satisfy the Court that the effects of the award are in breach to public policy, and that public policy has to be construed as the fundamental principles of the legal system, whose application are crucial for its very existence and the achievement of its essential purposes.

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Arbitration and consortia
by Riccardo Robuschi

The recent publication of two rulings issued by different national courts of first instance (Court of Civitavecchia, decision No. 2 of 7 January 2021, and Court of Brindisi, decision No. 22 of 5 January 2021) offers the opportunity to examine the 'state of the art' regarding the applicability of the corporate arbitration law to consortia (*consorzi*).

Bearing in mind that art. 34, legislative decree No. 5 of 17 January 2003 indicates in the 'companies' the entities which are governed by the corporate arbitration law, the following question then arises: does the scope of application of the said law encompass certain entrepreneurial collective entities, such as the consortia?

In its decision No. 2/2021, the Court of Civitavecchia ruled on an arbitration objection raised by a 'urbanisation consortium' (*consorzio di urbanizzazione*), in proceedings initiated against the latter by some of its members. The claimants argued that the arbitration clause contained in the articles of association of the consortium was unenforceable, since it provided that each party of the dispute (that is, one or more members of the consortium) had the right to appoint one arbitrator. According to the claimants' position, the said arbitration clause was in breach of Article 34, para. 2, legislative decree No. 5/2003, under which the appointment of all the arbitral tribunal's members shall be made by third parties unrelated to the entity. The Court of Civitavecchia granted the arbitration objection and declared the enforceability of the arbitration clause, since the latter was not deemed to be subject to the corporate arbitration law. As briefly explained by the Court, the urbanisation consortia are not governed by the laws applicable to incorporated companies, but by the rules applicable to associations (*associazioni*) and communion of properties (*comunione*).

In another shortly motivated decision, the decision No. 22/2021 of the Court of Brindisi seemed to adopt a different perspective towards the applicability of the corporate arbitration law to consortia. In the said decision, the Court dismissed the arbitration objection raised by a member of a consortium, in proceedings initiated against the said member and against the consortium by other members of the latter. The Court has declared the unenforceability of the arbitration clause contained in the articles of association of the consortium for violation of Article 34, para. 2, legislative decree No. 5/2003, since such clause did not granted third parties unrelated to the consortium with the power to appoint the arbitral tribunal. The Court grounded its decision on the assumption that the consortium at hand (which had not a corporate structure) fell within the

scope of application of legislative decree No. 5/2003. However, such theory is at odds with the case law.

In order correctly to construe the mentioned decisions in the wake of the judicial precedents on the subject, it is worth pointing out the types of consortium taken into consideration in this comment, as well as the applicability to such entities of the corporate arbitration law.

First, the 'consortium with internal activity' is governed by Articles 2602-2611 of Italian civil code and represents an association of two or more entrepreneurs, based on a multilateral agreement, with the aim of participating in a common activity or pooling the resources to achieve a common goal. Such type of contractual consortium is subject to the laws governing the association and, therefore, it is excluded from the scope of application of the corporate arbitration law. Since the nature of the relationship among the entrepreneurs is similar to a multilateral agreement, this type of consortium is subject to the arbitration law set forth in the code of civil procedure under Article 806 and ff. of Italian Code of Civil Procedure.

Second, the 'consortium with external activity' is governed by Articles 2612-2615-*bis* of Italian Civil Code. The distinctive feature of the association at stake consists in the establishment of an office specifically designed for the management of the commercial relationships with third parties. There is no consensus among scholars on the thesis that legislative decree No. 5/2003 does not apply to consortia with external activity. In this regard, a scholar argued that there are no significant differences between an entity with a corporate structure (undoubtedly subject to corporate arbitration law) and an organisation which carries out a commercial activity with third parties (see Cerrato, *Dalle «società» alle «organizzazioni collettive»: una possibile traiettoria evolutiva dell'«arbitrato societario»?*, in *Riv. arb.*, p. 329 ss.). However, in recent rulings, the Italian Supreme Court excluded consortia with external activity from the scope of application of legislative decree No. 5/2003 (see decision No. 20462 of 28 September 2020).

Third, the so-called consortium companies (*società consortili*) are governed by Article 2615-*ter* of Italian Civil Code. Such entities consist in companies, which pursue the purpose of the consortia under Article 2602 of Italian Civil Code, through the adoption of any corporate structure. In this regard, suffice it to say that there is a unanimous consensus among scholars and in case-law on the applicability of legislative decree No. 5/2003 to the arbitration clauses included in the articles of association of consortium companies (Italian Supreme Court, decision No. 27736 of 31 October 2018; Dalmotto, *L'arbitrato nelle società*, Bologna, 2017, p. 75).

Lastly, the 'atypical consortium' is defined by contractual autonomy and governed by the will of its members. This type of entity includes the urbanisation consortium, which is a group of real estate owners (not necessarily qualified as entrepreneurs), aiming at performing certain works or at providing certain services in favour of their real estate properties located in a specific area. The Italian Supreme Court (decision No. 9568 of 13 April 2017) has recently clarified the legal nature of such entity, stating that the latter is subject to the rules applicable to the non-recognised associations (*associazioni non riconosciute*). Consequently, it is undisputed that the corporate arbitration law does not govern this atypical type of consortium.

Having said all the above, the reasoning underlining the decisions of the courts of first instance at stake can now be construed more properly.

The Court of Civitavecchia ruled in line with the majority opinion according to which the urbanisation consortia (in absence of any different agreement among its members) shall be governed by the rules applicable to the non-recognised associations. As an indisputable consequence of such thesis, the urbanisation consortia are not subject to the strict provisions set forth under Article 34, para. 2, of legislative decree No. 5/2003, with regard to the appointment of the arbitral tribunal. Bearing this in mind, the ruling of the Court of Civitavecchia appears to be coherent with the recalled precedents, by declaring the validity of the arbitration clause and declining its jurisdiction in favour of the arbitral tribunal.

On the other hand, the correctness of the decision rendered by the Court of Brindisi might be questioned. The said Court apparently disregarded the consensus view, which denies the applicability of the corporate arbitration law to the consortia without corporate structure. The Court applied Article 34 of legislative decree No. 5/2003 to the arbitration clause contained in the articles of association of the consortium and declared the invalidity of the arbitration clause for breach of the provision set forth in the said article. Moreover, the reference made by the Court to a recent ruling of the Italian Supreme Court (decision No. 23485 of 9 October 2017) seems to be contradictory and misleading. It is true that, in the mentioned decision, the Italian Supreme Court declared the unenforceability of an arbitration clause for violation of Article 34 of legislative decree No. 5/2003, but its ruling was based on the assumption (which is not the case in the dispute arose before the Court of Brindisi) that the said arbitration clause was contained in the articles of association of a limited liability company (*società a responsabilità limitata*).

The contrast between the ruling of the Court of Brindisi and the majority opinion described above, together with the briefness of the Court's motivation, raises doubt about the fact that such decision will represent the milestone of a new wake of case law.

In conclusion, the analysis carried out about the applicability of the corporate arbitration rule to the consortia may be summarized as follows. The corporate arbitration law under legislative decree No. 5/2003 is applicable to the consortium companies, but not to the consortia with internal or external activities. The urbanisation consortia are organisations, which may be construed as non-recognised associations; therefore, they are not subject to the corporate arbitration law, but to the arbitration rules set forth under art. 806 and ff. if Italian Code of Civil Procedure.

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Extended effects or separability doctrine?
by Roberto Oliva

1. Foreword

Italian Parliament has enacted in the past few years a number of reforms concerning regulatory competence of Italian Supreme Court, as well as the doctrine of judicial precedents. There reforms finally led to a scholarly interesting debate ([1]).

In particular, two law rules have to be carefully considered.

The first rule is that contained in Article 118, para. 1, of the Implementing Provisions of Italian Code of Civil Procedure, as it was amended by Italian law No. 69 of 18 June 2009. That Article sets forth that "*the grounds of the decision (…) consiste of the brief description of the relevant facts of the case and of the legal reasons of the decision, also with reference to judicial precedents*". This rule (firstly enacted by the now repealed Article 16, para. 5, of Italian legislative decree No. 5 of 17 January 2003, concerning the rules of procedure in corporate matters), in a nutshell, provides for that a mere "*reference to judicial precedents*" is a good 'replacement' for the legal reasons of the decision.

Supreme Court's case law further clarified the content of the rule enacted in 2009. In fact, it stated that the legal reasons of the decisions might consist in reference only made to lower Courts case law (Italian Supreme Court, Labour Chamber, 6 September 2016, No. 17640), and even previous decisions issued by the very same Court (Italian Supreme Court, Labour Chamber, 22 May 2012, No. 8053).

In the opinion of the Supreme Court, the decision drafting technique at hand would be "*inevitable also in the light of the constitutional principle of reasonable duration of judicial proceedings*" (Italian Supreme Court sitting *en banc*, 16 January 2015, No. 642 ([2])). It also leads to standardization of legal reasons, which is "*completely*

([1]) See on that topic the bright observations by M. TARUFFO, *Addio alla motivazoine?*, on *Riv. trim. dir. proc. civ.*, 2014, p. 375, as well as those of A. SCARPA, *Nomofilachia codificata e supremazia dei precedenti*, in *Giustizia Insieme*, 23 febbraio 2021; the issue was debated prior to the mentioned reforms: in that respect, see S. MONACI, *L'esperienza della motivazione nelle sentenze civili*, on *Riv. trim. dir. proc. civ.*, 1999, p. 253.

([2]) That decision was issued with respect to a particular case: the lower Court had copied in its decision grounds the content of a party's submission; the decision was

understandable, and indeed appropriate" (Italian Supreme Court, II Civil Chamber, 12 May 2020, No. 8782).

The second relevant law rule is that concerning the appeals.

Under Article 348-*bis* of Italian Code of Civil Procedure, the Court of appeal declares that the appeal is not allowed, if it does not have a reasonable probability of being upheld; and the relative prognostic judgment must be carried out – as stated by Article 348-*ter* of Italian Code of Civil Procedure – "*also with reference to judicial precedents*" ([3]).

In addition, under Article 360-*bis* of Italian Code of Civil Procedure, an appeal before the Supreme Court is not allowed "*if the appealed decision addressed the relevant issues of law in compliance with the Supreme Court case law and the grounds for the appeal does not offer elements to confirm or change the said case law*" ([4]).

In other words, if the appealed decision is in compliance with judicial precedents (any judicial precedents as regards the appeals before the Court of appeal; only Supreme Court precedents with respect to appeals before the same), that mere compliance (only subject to some limitations arising out of the Supreme Court's regulatory competence) entails that the appeal is not allowed.

That mechanism, although it does not constitute a proper application of *stare decisis* doctrine, in any case appears a hybrid mechanism, whereby judicial precedents no longer has (only) persuasive effects. Judicial precedents are not binding on the Court, as they are in common law systems. Nonetheless, on the one hand the precedents influence the Court's decision-making process (as the decisions may be merely grounded by reference to judicial precedents). On the other hand, they appears to constitute a limit to the parties' right to have their case heard, since the parties' appeals are not allowed if they are in contrast with judicial precedents.

However, Italian practitioners (both judges and lawyers) are not accustomed to the logical tools that make it possible to make good use of judicial precedents, to determine and weigh their relevance with respect to a practical case.

2. The conflicting decisions issued by the Court of Catania and Milan

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commented by G. GRASSO, *La mera riproduzione di un atto di parte nella sentenza civile: diritto senza letteratura?*, on *Foro it.*, 2015, V, c. 1610; and by E. BERTILLO, *Sulla motivazione riproduttiva degli atti di parte*, on *Riv. dir. proc.*, 2015, p. 1292.

([3]) See on that matter I. GAMBIOLI, *Il filtro di cui agli artt. 348 bis e 348 ter c.p.c.*, on *Giur. it.*, 2019, p. 241; E. TICCHI, *Considerazioni sugli ultimi orientamenti in tema d'inammissibilità dell'appello*, on *Riv. trim. dir. proc. civ.*, 2015, p. 1067; A. TEDOLDI, *Il maleficio del filtro in appello*, on *Riv. dir. proc.*, 2015, p. 751; and A. PANZAROLA, *Le prime applicazioni del c.d. filtro in appello*, on *Riv. dir. proc.*, 2013, p. 715.

([4]) See on that matter V. CAPASSO, *Il ricorso per cassazione avverso… la giurisprudenza. Contro uno stare decisis all'italiana*, on *Riv. dir. proc.*, 2019, p. 627; A. MARTINUZZI, *Le conseguenze giuridiche dell'inosservanza del precedente giudiziario in ambito processuale*, on *Riv. trim. dir. proc. civ.*, 2016, p. 1345; R. DONZELLI, *Il filtro in cassazione e la violazione dei principi regolatori del giusto processo*, on *Riv. dir. proc.*, 2012, p. 1087.

Two virtually simultaneous decisions, issued by two different lower Courts, reached opposite conclusions. And the legal grounds of both these decisions are indicated under Article 118, para. 1, of the Implementing Provisions of Italian Code of Civil Procedure. In other words, they merely refer to judicial precedents.

In its decision of 11 March 2020, the Court of Milan held that an arbitration clause contained in a company's articles of association may be enforced towards a former shareholder, provided that the relevant dispute refers to the corporate relationship, regardless of when it has been brought.

In its decision of 13 March 2020, the Court of Catania reached the opposite conclusion: the arbitration clause cannot be enforced towards a former shareholder.

The case heard by the Court of Milan concerned the member's obligation to contribute to a consortium company, while the case heard by the Court of Catania concerned the repayment of a shareholder loan ([5]), but the opposite outcomes of the decisions do not arise of these details.

The Court of Catania refers to the authority of Italian Supreme Court, VI Civil Chamber, decision No. 21036 of 11 September 2017. In that case, the Supreme Court held that the arbitration clause contained in the articles of association of the company, which in the meantime had transformed into a limited liability company, was not enforceable against the member who had withdrawn from the company, when it was a general partnership. The reason is clear: given that the withdrawal immediately produces its effects, the former member "*is (...) no longer part of the corporate relationship that continues in the different form resulting from the transformation. Therefore, the clauses of the articles of association, governing the company in its new form, cannot be enforced against her*".

The case heard by the Court of Catania was completely different. As far as it can be understood in the light of the content of the decision, the arbitration clause was included in the articles of association also before the shareholder dismissed her shares.

As a consequence, the mere reference to the said judicial precedent amounts to a proper lack of grounds of decision: not only in the light of the fact that the precedent referred to a different situation, but because it is precisely based on the peculiarities of that different situation.

The decision of the Court of Milan appears more grounded, in that it is more appropriate in relation to the specific case the Court heard.

([5]) Under a well-established principle, disputes concerning shareholders loans are referred to arbitration if the company's articles of association contain an arbitration clause: see on that point Court of Rome, 17 September 2015, on this *Journal*, 2015, p. 18; Court of Rome, 3 May 2017, on this *Journal*, 2017, p. 9; and Court of Milan, 30 October 2012, on *Giurisprudenza delle Imprese*.

The Court of Milan first of all refers to the authority of another decision issued by Italian Supreme Court: Italian Supreme Court, I Civil Chamber, decision No. 565 of 22 January 1999. That decision concerned a quite different case, concerning a contractual dispute. However, a principle laid down by the Supreme Court is also relevant in the case heard by the Court of Milan: "*all disputes concerning the contract are referred to arbitration, under the relevant clause, including the disputes concerning the contract very existence, its validity, termination, and fulfilment, even if they arise after the termination of the contractual relationship between the parties, as long as they concern the contractual relationship*".

Previous decisions issued by the same Court of Milan (issued on 15 July 2017 and 23 January 2017) upheld this principle, laid down with respect to contractual disputes, taking account of the peculiarities of corporate disputes.

Both these decisions underline a crucial aspect: also in corporate matters, "*arbitral agreements (…) concerning certain disputes have to be construed in accordance with separability doctrine, so that they will survive the termination of the relevant contract (...) and are not affected by the unenforceability of (other) contractual provisions*"(2014 decision) . In other words, "the issue of enforceability of the clause (...) has to be addressed in the light of separability doctrine, which is now expressly provided for by the law in force" (2017 decision).

3. Conclusions

Separability doctrine means that the arbitration clause is enforceable even though the relevant contract is unenforceable or terminated ([6]). There is no reason, on a logical or legal basis, why the separability doctrine should not apply to arbitration clauses contained in companies' articles of association. As a consequence, in the event of termination of the said articles – complete termination (as in the case heard by the Court of Milan in 2017) or limited to a sole shareholder (as in the other cases) – the arbitration clause is enforceable. This is not a consequence of the clause having extended effects, but a correct application of separability doctrine.

It should be noted that the above only applies with respect to 'regular' ('*rituale*') arbitration. In fact, well-established case law holds that separability doctrine does not apply in case of 'contractual' ('*irrituale*') arbitration ([7]). As a consequence – in want of judicial precedents and scholarly opinion on that very point – it appears that the arbitration clause contained in a company's articles of association, providing for 'contractual' arbitration, is not binding and

([6]) See R. OLIVA, *Principio di autonomia*, on this *Journal*, 2020, p. 45, and L. SALVANESCHI, *Arbitrato*, Bologna, 2014, p. 98.

([7]) 'Regular' ('rituale') arbitration is arbitration leading to the issuance of an award having the same effects of a decision issued by State Court, while 'contractual' ('*irrituale*') arbitration is a particular kind of arbitration provided for by Italian law, leading to the issuance of an award having the effects of a contract between the parties.
On that matter, see Italian Supreme Court, I Civil Chamber, decision No. 5105 of 29 March 2012; Italian Supreme Court, decision No. 9230 of 9 April 2008; and E. OCCHIPINTI, *Ancora sull'esclusione del principio dell'autonomia della clausola d'arbitrato irrituale*, on *Riv. arb.*, 2012, p. 568.

enforceable on the former shareholders (or directors). This is a harsh conclusion, but difficult to avoid in the light of the law in force.

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Multi-party arbitration
by Roberto Oliva

Both from a historical point of view and in a number of its actual implementations, arbitration is a bilateral dispute resolution mechanism: in other words, it concerns disputes between two parties, a claimant and a respondent.

It is not by chance that, taking account of the above binary structure, the default rule on the appointment of the arbitral tribunal, contained in Article 810 of Italian Code of Civil Procedure provides that each party appoints an arbitrator and that the chair is jointly appointed by the party-appointed arbitrators.

However, disputes submitted to arbitration (in particular, to international arbitration) might have a more complex structure, either because there are more than two parties to the relevant relationship, or because after the execution of the arbitration agreement the parties increase in number: for instance, in case of succession or inheritance when two or more successors or heirs succeed a single party.

The rules concerning multiparty arbitration are set forth by Article 816-quater of Italian Code of Civil Procedure. It was introduced with the 2006 reform, which on the subject matter partly enacted the principles laid down by scholars and case law, aimed at safeguarding the parties' intention to have their multiparty disputes referred to arbitration.

In a few words, the said provision allows multiparty arbitration proceedings, provided that: (i) all arbitrators are appointed by a third party; or (ii) all arbitrators are jointly appointed by all parties; or (iii) after a party has appointed one or more arbitrators, the other parties appoint the same number of arbitrators (or entrust a third party with the appointment). Otherwise, the proceedings are split into as many proceedings as there are respondents. Nonetheless, the proceedings cannot be split in the case of mandatory joinder ("litisconsorzio necessario"), that is to say, if the law requires that all parties are involved in the very same proceedings (for example, in case of a claim for termination of a multiparty agreement, or concerning the fact that a multiparty agreement is null and void). As a consequence, in that case the jurisdiction would lay with State Courts.

The above-mentioned provision entails several doubts over its proper construction. In addition, very few precedents dealt with its application. Therefore, two recent decisions on the point deserve to be commented on. They were issued, almost at the same time, by an arbitral tribunal (award of 15 January 2021) and by the Court of Appeal of Milan (Court of Appeal of Milan, decision 29 January 2021, No. 286).

It is worth starting with the latter.

The Court of Appeal was seised in proceedings aimed at having an award set aside.

The arbitration proceedings were commenced by some claimants against several respondents. The claimants appointed an arbitrator, two of the respondents, in turn, appointed another arbitrator, while the third respondents appointed a further arbitrator. The chair in the proceedings between the claimants and the two respondents that appointed an arbitrator was finally appointed by the Chairperson of the Court of First Instance. At this stage, the respondent that appointed a further joined in the proceedings and pointed out, amongst other things, that the arbitral tribunal was not properly appointed and that the proceedings cannot continue, due to the mandatory joinder set forth by the law.

The claimants were claiming compensation under Articles 1337 and 1440 of Italian Civil Code (which in a nutshell establish a particular kind of tortious liability connected to a contract and/or its negotiation). In turn, the respondents were counterclaiming that another agreement, entered into before the contract connected to the liability claimed by the claimants, was null and void. The second contract (the contract in connection with which the respondents' alleged liability arose) only contained an arbitration clause, while no arbitration clause was contained in the first contract.

The Arbitral Tribunal held that the claimants' claim under Articles 1337 and 1440 of Italian Civil Code did not result in a mandatory joinder and that the counterclaim, concerning a matter subject to State Courts' jurisdiction, did not entail that arbitration proceedings cannot continue. As a consequence of these findings, the Arbitral Tribunal rejected the preliminary objections and examined the merits of the case.

The respondents lose the case and requested the Court of Appeal to set aside the award. The Court of Appeal dismissed their request.

On the one hand, the Court confirmed that, in the case of claims under Article 1337 and 1440 of Italian Civil Code, there is no mandatory joinder.

On the other hand, the Court noted, concerning the respondents' counterclaim, that the mere fact that it was raised did not imply that the arbitration proceedings cannot continue. Indeed, although that counterclaim resulted in mandatory joinder of all the parties of the agreement allegedly null and void, the Arbitral Tribunal could (as in the case did) render a decision capable of res judicata effects with respect to the claimants' claim and an incidental decision ("decisione

incidentale"), which is not capable of res judicata effects, with respect to the respondents' counterclaim, as this course of action is expressly allowed by Article 819 of Italian Code of Civil Procedure.

The decision issued by the Court of Appeal seems correct in the present case, as the decision issued by the Arbitral Tribunal, both from a strictly legal point of view, concerning the application of Articles 1337 and 1440 of Italian Civil Code and Articles 816-quater and 819 of Italian Code of Civil Procedure, and from the point of view of its possible consequences. As a matter of fact, that decision deters filibustering tactics, consisting in defending against a claim that does not imply mandatory joinder by raising a counterclaim that causes it, solely for the purpose of creating a procedural objection, so as to prevent the issuance of a decision on the merits. However, further elaboration might be required on the point, and on the application of Article 819 of Italian Code of Civil Procedure, in particular with respect to cases involving a more tight connection between the claim not involving mandatory joinder and the counterclaim involving it.

The above-mentioned award is also interesting and somewhat untypical.

In that case, a claimant commenced arbitration proceedings against two respondents, which were the heirs of her original contractual partner (the situation was more complex, but its complexity is not relevant), claiming in essence that the commitments entered into had not been fulfilled.

Only one of the respondents appointed an arbitrator, and the claimant requested the Chairperson of the Court of First Instance to appoint an arbitrator in lieu of the other respondent. The Chairperson appointed the same person already appointed by the first respondent.

The respondents objected that the arbitration proceedings cannot continue, because the claim raised by the claimant involved a mandatory joinder.

On the contrary, the Arbitral Tribunal held that the proceedings were to be split, under Article 816-quater of Italian Code of Civil Procedure, taking into account that the claimant's claim did not entail a mandatory joinder.

In other words, the award is amongst the rare decisions – Italian scholars even doubted they were possible, although appropriate – issued by an Arbitral Tribunal on the nature of the joinder (whether mandatory or not), and the split of arbitration proceedings.

However, apparently, an issue was not carefully examined by the Arbitral Tribunal: both the respondents – one by her choice and the other as a result of the decision of the Chairperson of the Court – appointed the same arbitrator. As a consequence, it could be maintained that this case fulfilled the conditions set forth by Art. 816-quater of Italian Code of Civil Procedure to have single arbitration proceedings. The cautious approach taken by the Arbitral Tribunal is

obviously admirable; nonetheless, further elaboration on the very topic would have been appropriate, as well as particularly interesting.

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Arbitration award and "long" term to commence setting aside proceedings

by Marco Sposini

A recent decision rendered by Italian Supreme Court sitting en banc (decision No. 8776 of 30 March 2021) has clarified – based on hermeneutical criteria, systematic reasons, and constitutional provisions – when the term for commencing setting aside proceedings under Article 828, para. 2, of Italian Code of Civil Procedure starts to run.

The ruling is fascinating since – in interpreting the legislative provision within the procedural system – it poses some "firm points", which are also relevant in terms of appeals against State Courts' decisions.

The Supreme Court's decision stems from a ruling rendered by the Court of Appeal of Bologna. The latter had ex officio declared not admissible the recourse a party filed for setting aside an arbitration award. The Appellate Court based its decision on the fact that the proceedings commenced after the so-called "long" term period of one year, starting from the date of the last signature by the arbitrators, pursuant to Article 828, para. 2 of Italian Code of Civil Procedure (in its formulation before the 2006 reform).

The same party lodged an appeal with the Italian Supreme Court, claiming violation of Articles 3, 24 and 111 of Italian Constitution and Article 183, para. 4, of Italian Code of Civil Procedure. In this respect, it stated that:

on the basis of a "constitutionally oriented interpretation", the rule should be understood in the sense that the time limit for commencing setting aside proceedings begins to run only from the moment when the award becomes known to the parties;
the Court of Appeal could not have ruled, ex officio, on a decisive question, not even if submitted to the parties.
The First President of the Supreme Court deemed that the matter was of particular importance. Consequently, at her request, the case was heard by the Supreme Court sitting en banc.

The Supreme Court rejected the appeal based on the following grounds.

In interpreting the provision of Article 828, para. 2 of Italian Code of Civil Procedure, the Court followed the standard criteria of hermeneutics provided for in Article 12, para. 1 of preliminary rules to Italian Civil Code, under the principle – enunciated by the Constitutional Court in numerous rulings – according to which it is necessary, primarily, to take into account the "canons of literal and historical-teleological interpretation" of the regulations and, in particular, it noted that:

"the letter of Article 828, para. 2 of Italian Code of Civil Procedure does not in itself give rise to doubts or perplexities of interpretation, since it establishes the starting point for appealing, within the so-called long term, from the time of the last signature of the arbitrators";
"in fact, the rationale of the provision in question stems from the attribution of effectiveness to the award as of such a time, whereby the filing with the registry of the court where the arbitration takes place, pursuant to Article 825 of the Italian Code of Civil Procedure, is understood as a mere fulfilment that is required of the party intending to enforce the award";
"the award – except for the provision of Article 825 of Italian Code of Civil Procedure for the purposes of its enforceability – produces the effects of the ruling rendered by the judicial authority from the date of its last signature", with the consequence that "the publication of the judgement – with which the measure comes into existence and begins to produce its effects – corresponds to the act of affixing the last signature of the arbitrators";
considering the equivalence of the award to the ruling rendered by the judicial authority, the signature by the arbitrators determines further and important effects, including "the non-modifiability of the award", pursuant to Article 824-bis of Italian Code of Civil Procedure (see Italian Supreme Court, VI Civ. Chamber, 16 March 2018, No. 6666, Italian Supreme Court,VI Civ. Chamber, 12 November 2015, No. 23176, Italian Supreme Court, III Civ. Chamber, 26 May 2014, No. 11634).
Therefore, the Court has established that the term referred to in Article 828, para. 2, of Italian Code of Civil Procedure necessarily starts from the arbitrators' signature date and not from the communication of the award to the parties or its filing date, and that this provision is consistent with the procedural system and does not violate Articles 3, 24 and 111 of Italian Constitution.

In fact, the one-year term for challenging the award gives the involved party a broad opportunity to exercise the right of defence and is in line with the provision under Article 327, para. 1, of Italian Code of Civil Procedure for appealing a ruling rendered by an ordinary judicial authority, for which the six-month term starts from its publication, rather than the communication by the registry clerk of the Court.

In this regard, the Constitutional Court, with rulings No. 584 of 28 December 1990 and No. 129 of 26 March 1991, has already declared inadmissible the question of the constitutional legitimacy of art. 327, paragraph 1, of the Italian Civil Procedure Code, being the provision "a corollary of the principle (…) according to which, after a certain lapse of time, the "res judicata" is deemed independently of the notification of the ruling".

If there is a delay by the arbitrators in communicating the award, the right of defence is, in any event, guaranteed by the possibility of exercising a remedy consisting in the relief from the time limit, provided for by Article 153 of Italian Code of Civil Procedure, which is also applicable to the challenge of arbitration awards (see Italian Supreme Court sitting en banc, 12 February 2019, No. 4135).

In this specific case, the appellant – despite the fact that the award was signed on 15 April 2005 and communicated on 6 May 2005 – had lodged an appeal with the Court of Appeal only on 13 June 2006 and, therefore, well beyond the term provided for in Article 828, para. 2 of Italian Code of Civil Procedure.

Moreover, the appellant has merely formulated a different interpretation of the provision, but has not given the reasons for its inaction, nor – even less so – has attached reasons that could determine the relief from the time limit.

Finally, the Court found that the declaration by the Court of Appeal of the non-admissibility ex officio of the appeal was correct.

According to established case law (see Italian Supreme Court, III Civ. Chamber, 27 November 2018, No. 30716 and Italian Supreme Court, III Civ. Chamber, 7 November 2013, No. 25054), the forfeiture of the time limit to appeal can be identified autonomously by the Judge, without it being necessary to submit the matter to the parties in advance, pursuant to Article 101, para. 2 of Italian Code of Civil Procedure.

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Parallel proceedings

by Roberto Oliva

A recent decision issued by the Court of Appeal of Milan (No. 1946 of 23 June 2021) deals with a topic of great interest and practical relevance. This topic concerns the relationship between arbitration proceedings and parallel proceedings in a Court of law (which in that particular case were criminal proceedings).

The facts of the case heard by the Court can be summarized as follows.

In July 2014, two overseas companies entered into a contract for the sale of some special purpose vehicles in the photovoltaic business.

Profits in that business primarily derive from the contribution (s.c. feed-in tariff or FIT) granted by the State through GSE S.p.A., a private company owned by the Italian Treasury.

Shortly after the conclusion of said contract, and following investigations conducted by Italian financial police ("Guardia di Finanza"), GSE S.p.A. stayed the payment of the just purchased companies' contribution, and even requested the return of the previously paid amounts.

The facts discovered by Italian financial police led to the indictment of certain officers of the seller.

The purchaser brought a civil claim towards these officers and the seller in the criminal proceedings. It is worth noting that the claim towards the seller concerned its vicarious liability under Article 2049 of Italian Civil Code for the wrongs committed by its officers.

The criminal Court granted the purchaser's claim and ordered the defendants to pay a provisional sum of Euro 5,000,000.

In the meantime, the purchaser also commenced the arbitration proceedings provided for by the contract it entered into with the seller. In these proceedings, it requested the Arbitral Tribunal to cancel the contract for willful misconduct, declare that some clauses of the contract are null and void, terminate the contract

for the seller's breach, order the seller to return the (part of the) price already paid, and compensation for damage.

The Arbitral Tribunal partially granted the said claims: it did not cancel the contract, terminated it, nor declared its clauses null and void, but ordered the seller to pay compensation for damage within limits set by a specific contractual clause.

In addition, the Arbitral Tribunal pointed out that it had no jurisdiction over the claims (or part thereof) raised by the claimant in the arbitration proceedings corresponding to identical claims it raised in the criminal proceedings.

The purchaser challenged the award based on twelve grounds, all of which were rejected. The Court of Appeal held that they constituted a surreptitious attempt to request a (non-admissible) new assessment of the merits, or in any case, they were ungrounded.

In particular, the Court of Appeal stated that the delimitation mentioned above of the Arbitral Tribunal's jurisdiction would consist in a mere selection of the factual elements to be examined for issuing the decision on the merits and that the Court is not allowed to review such an activity carried out by an Arbitral Tribunal.

Although the conclusion reached by the Court of Appeal appears to be appropriate (the award cannot be set aside), the underlying reasoning does not seem entirely correct.

The reasoning of the Arbitral Tribunal concerning the relationship between arbitral and criminal proceedings is contained in a procedural order, which was recently reported (on Giur. it., 2020, p. 1453 ff.).

In this order, the Arbitral Tribunal noted that "in order to assess the identity of the questions simultaneously pending in different courts, it is necessary to consider the material facts underlying these questions; when the material facts are the same in both proceedings and are pleaded by the claimant to ground its specific claims for damages against the same person, the claimant's claims must be considered the same; this, regardless of whether the material facts underlying the claims are legally attributable to direct or vicarious liability since the claims in question pursue the same result of obtaining a specific Lebensvorgang (good of life)".

In the light of the above, the Arbitral Tribunal concluded that "when (i) an Arbitral Tribunal is requested to assess a claim that is the same (in the above-specified meaning) as the claim brought before a different judicial authority and (ii) the conditions provided for by Articles 817 and 819-ter of the Italian Code of Civil Procedure are met (in the sense that no reservations have been made before the judicial authority in favour of the arbitral jurisdiction), the Tribunal,

on its own initiative, has to refrain from deciding since it is in the public interest to avoid conflicts between decisions".

The Tribunal also held that Article 75, para. 3, of Italian Code of Criminal Procedure did not apply (since the same claim was not raised towards the same person, but towards two different entities), and therefore it did not stay the arbitration proceedings. Eventually, it stated that it had jurisdiction "over all the claims raised by the claimant (…), where and to the extent that such claims are not based on the same facts pleaded in the criminal proceedings in connection with the vicarious liability" of the seller.

The issue could be simplified as follows: what happens if a claim, subject to arbitral jurisdiction, is raised in State Courts, the respondent does not object to the Court's jurisdiction, and after that, the claimant raises the same claim in arbitration proceedings?

This issue could be examined from three different points of view, namely those concerning: the identity of claims; the consequences of the failure to object to State Court's jurisdiction; the possible objection to the Tribunal's jurisdiction raised by the same Tribunal of its own motion.

The Arbitral Tribunal clearly and explicitly addressed the first question: two claims are the same when, on the basis of the same facts, they aim to achieve the same tangible purpose (e.g., a sum of money). Consequently, different legal constructions cannot differentiate claims that are the same concerning the points mentioned above.

The Arbitral Tribunal only implicitly dealt with the second question, or at least it so appears in the reported extract of its order. However, it seems that the conclusion reached by the Tribunal is the same reached by Italian case law: if a party commences litigation in Court and the other party does not object to the Court's jurisdiction, they waive the arbitral jurisdiction.

Concerning the last question, it appears that the respondent in the arbitration proceedings did not object to the Tribunal's jurisdiction based on the claimant's claims in the criminal proceedings.

This is "a truly anomalous hypothesis, in which both authorities [State Court and Arbitral Tribunal] would have jurisdiction based on the failure of the concerned party to object to it". In this regard, Italian scholars have held that, in such cases, "the Court's jurisdiction should prevail", adding that "the Tribunal could not of its own motion find that it does not have jurisdiction; as a consequence, the two authorities are in a situation of coexistence of jurisdiction. Despite the peculiarity of the case, however, once again, the solution would be that of later coordination, probably to be made on the light of which decision would firstly become final".

Notwithstanding the opinion of the learned author quoted above, the solution reached by the Arbitral Tribunal appears more persuasive.

First of all, under Article 819-ter, para. 1, last sentence, of Italian Code of Civil Procedure, "If such objection [to the Court's jurisdiction] is not raised, arbitral jurisdiction shall be excluded in respect of the dispute decided in that proceedings".

The proper construction of this provision is quite debated, but it seems that the preferable option is to construe it as a coordination mechanism between arbitration proceedings and proceedings in a Court of law. Other possible constructions have the effect of practically repealing the said provision and thus betray their purpose, which is to give meaning to the text enacted by the Parliament and not to deprive it of any practical scope.

As a consequence of the above, and based on the preferable interpretative option, failure to object to State Court's jurisdiction would lead on the one hand to the (partial) unenforceability of the arbitration clause and, on the other hand, on the Tribunal's duty not to issue its decision on the merits.

That Tribunal's duty is connected to fundamental principles of Italian procedural system. As noted by the Arbitral Tribunal in its order, "it is in the public interest to avoid conflicts between decisions". Indeed, several law provisions enacted by the Parliament are aimed at avoiding this risk, and the Italian procedural system shall be construed in light of this purpose.

As a matter of fact, if the Arbitral Tribunal would be prevented from objecting to its own jurisdiction in such cases, undesirable results and procedural complications would arise. As the State Court's decision is not final, the award cannot be set aside under Article 829, para. 1, No. 8, of Italian Code of Civil Procedure. Simultaneously, the proceedings in the State Court cannot be stopped due to the issuance of the award, as this is precluded by Article 819-ter of Italian Code of Civil Procedure. Possible conflicts and/or overlaps between payment orders may be solved in the enforcement phase, while a solution appears more complex with respect to other possible contents of the decisions on the merits (e.g., concerning the termination of the contract). In this respect, the second decision should prevail (according to the principles laid down by the Italian Supreme Court in its decision No. 13804 of 31 May 2018, which upheld the same principles previously laid down by the Italian Supreme Court in its decision No. 5311 of 26 August 1986). Such an unpredictable solution is poorly coordinated with the said Article 819-ter of Italian Code of Civil Procedure.

In the light of the above, it could be concluded that the Arbitral Tribunal's reasoning, where it appears less secure because it lacks the support of specific precedents, actually proves to be more solid on the basis of crucial principles of civil procedural law.

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Default arbitration proceedings
by Roberto Oliva

1. Foreword

Default arbitration proceedings, or – under a more accurate wording – arbitration proceedings in which a situation occurs corresponding to the situation giving rise to default proceedings in State Courts, is a topic of relevant practical interest.

Italian scholars dealt with that topic, developing three theses ([1]). The first thesis holds that the above situation may occur in arbitration proceedings ([2]). The second thesis, on the contrary, is that this situation cannot occur ([3]). The third thesis, which is the more persuasive, is that it is necessary to identify the law rules concerning default proceedings before State Courts, which are compatible with arbitration proceedings ([4]).

On the other hand, Italian case law tends to repeat the doctrine that default proceedings rules do not apply in arbitration proceedings.

In this framework, two recent decisions, both issued in proceedings for the setting aside of Italian domestic awards, are fascinating, as the awards were issued in 'default' arbitration proceedings.

2. The decisions

([1]) Concerning overseas scholars, see J. BUTCHERS, P. KIMBROUGH, *The Arbitral Tribunal's role in Default Proceedings*, on *Arb. int.*, 2006, p. 233, and further references therein.

([2]) FRANCHI, *Sulla contumacia arbitrale e il riesame nel merito della sentenza arbitrale straniera*, on *Giur. it.*, 1978, 1008; TRISORIO LIUZZI, *Contumacia nel giudizio arbitrale e riesame del merito di lodo straniero*, on *Riv. arb.*, 1993, p. 446; SASSANI, *L'opposizione di terzo al loro arbitrale*, in *Riv. arb.*, 1995, p. 202; ZUCCONI GALLI FONSECA, *Mezzi di impugnazione*, on CARPI (ed.), *Arbitrato*, Bologna, 2001, p. 555.

([3]) CARNACINI, *Arbitrato rituale*, in *Noviss. dig. it.*, Torino, 1958; SATTA, *Commentario al codice di procedura civile*, Milano, 1971, p. 273; LA CHINA, *Perché nell'arbitrato non si ha contumacia?*, on *Dir. maritt.*, 1985, p. 302; BERNINI, *L'arbitrato. Diritto interno. Convenzioni internazionali*, Bologna, 1993, p. 374; LA CHINA, *L'arbitrato. Il sistema e l'esperienza*, Milano, 1999, p. 89; PUNZI, *Disegno sistematico dell'arbitrato*, Padova, 2000, p. 578.

([4]) VECCHIONE, *L'arbitrato nel sistema del processo civile*, Milano, 1971, p. 519; SCHIZZEROTTO, *Dell'arbitrato*, Milano, 1988, p. 449; VILLA, *Arbitrato e contumacia*, on *Riv. arb.*, 2003, p. 375.

The first mentioned decision was issued by the Italian Supreme Court (Italian Supreme Court, I Civil Chamber, decision No. 24008 of 6 September 2021, Italian text available here). The case may be summarized as follows.

In multi-party arbitration proceedings, one of the respondents has not carried out any defensive activity: in other words, it has not 'made contact' with the Arbitral Tribunal, thus giving rise to a situation that, from a practical point of view, is quite similar to default proceedings in State Courts.

After the issuance of the award, the party 'in default' requested the Court of appeal to set it aside. Its request was dismissed.

That party then appealed to the decision of the Court of Appeal before the Supreme Court. It noted that it had not received the written submissions exchanged during the arbitration proceedings and claimed that this would involve that the award was invalid for two reasons. First of all, the formalities established by the parties were not complied with, as it was provided in the minutes of the hearing of constitution of the Arbitral Tribunal that the written submissions had to be directly exchanged between the parties. In addition, the lack of knowledge of the defences of the other parties would have precluded it from presenting its case.

In the proceedings before the Supreme Court, another defendant, who had 'appeared' in the arbitration proceedings, also claimed that the award was invalid. The reason was that the party 'in default' was precluded from presenting its case during the proceedings, as it did not receive the other parties' submissions.

The Supreme Court rejected all the above grounds.

As for the ground raised by the party who 'appeared' in the arbitration proceedings, the Supreme Court rejected it, noting that only the party (allegedly) prevented from presenting its case would be entitled to raise such a claim. In reaching that conclusion, the Supreme Court upheld its case law on default proceedings in State Courts.

The reasoning leading to the rejection of the grounds raised by the party 'in default' is more interesting.

First of all, the Supreme Court observed that formalities concerning the proceedings, if not complied, may lead to the setting aside of the award only provided that these formalities have been established under pain of invalidity. That was not the case, and the ground was rejected.

The Supreme Court then examined the most significant ground concerning the alleged preclusion for the party to present the case. In this regard, the Supreme Court noted that in proceedings before State Courts, Article 292 of Italian Code of Civil Procedure governs the matter. The said provision has the purpose of allowing the party in default to have knowledge of some specific procedural acts: those extending the subject matter of the proceedings (new claims or counterclaims) or leading to severe consequences against the party in default (formal questioning or oath). Therefore, in the light of the content, and the rationale, of Article 292 of Italian Code of Civil procedure, the Supreme Court

concluded that the party 'in default' in arbitration proceedings should not be granted greater protections than those recognized to party in default before State Couts. In other words, there is no reason why the issuance of the award should require more significant guarantees, as far as the right to present the parties' case is concerned, than those granted in State Courts. In so ruling, the Supreme Court countered – maybe unknowingly – the scholars' opinion whereby all the written submissions have to be at least communicated to the party 'in default', although a service, that is to say, a formal communication under Articles 137 ff. of Italian Code of Civil Procedure, is not required. Under the mentioned scholars' opinion, this communication would follow the fact that in arbitration proceedings Article 170, para. 4, of Italian Code of Civil Procedure does not apply (the said Article setting forth that written submissions are usually communicated by lodging them with the Registry of the Court) ([5]).

Concerning the matter of this contribution, the reasoning of the second decision is definitely more concise (Court of Appeal of Rome, 20 September 2021, No. 6093, Italian text available here).

The case heard by the Court concerned other multi-party arbitration proceedings. In that caser, the Arbitral Tribunal issued the award after the expiry of the term set forth by Article 820 of Italian Code of Civil Procedure (240 days of the constitution of the Arbitral Tribunal), and the award-debtor requested the Court to set it aside based on this ground.

The issue of 'default' arbitration is grafted onto this ground of appeal. Indeed, Article 821 of Italian Code of Civil Procedure provides that the expiry of the term referred to in Article 820 of the same Code may constitute a ground to set aside an award only if the interested party, after the expiry of the term and before the issuance of the award, has served on the arbitrators and other parties a communication indicating its intention not to accept a 'late' award. In the case at hand, the interested party has so communicated to the arbitrators and to the 'appeared' party, albeit without complying with the formalities required by Articles 137 ff. of Italian Code of Civil Procedure (in other words, it communicated to the arbitrators and the other party, but did not serve on them), and omitted any communication to the party 'in default'.

The omission of both the above formalities and of any communication to the party 'in default' led the Court of Appeal to dismiss the request to set aside the award. In particular, the Court of Appeal noted that Article 292 of Italian Code of Civil Procedure does not apply in arbitration proceedings. In any case, the Court added that Article 821 of Italian Code of Civil Procedure requires service on all the parties, including parties possibly 'in default'.

3. Conclusions

It seems that both decisions elected to upheld the arbitration awards. This election led the Courts to conflicting statements on the application of Article 292 of Italian Code of Civil Procedure in arbitration proceedings.

In this regard, a renewed in-depth scholarly discussion seems appropriate to identify the guarantees for the party 'in default' in arbitration proceedings and the relevant procedural measures.

([5]) VILLA, *op. cit.*, p. 381; see also PUNZI, *op. cit.*, p. 583.

In a few words, the statement of the Supreme Court seems correct. The party 'in default' in arbitration proceedings should be granted the same guarantees as the party in default in State Courts. Not less, but not more. In this context, reliable guidance is given by Article 292 of Italian Code of Civil Procedure. However, this guidance does not suffice since there are clear divergences between proceedings in a Court of law and arbitration proceedings.

Consequently, some acts other than those indicated by Article 292 of Italian Code of Civil Procedure have to be served on the party 'in default'. These acts include, for instance, the communication referred to in Article 821 of Italian Code of Civil Procedure (as noted by the Court of Appeal of Rome) and any act possibly affecting the composition of the Arbitral Tribunal or the extent of its powers ([6]). Regarding other written submissions (and related documents), there is no lodging with the Registry of the Court in arbitration proceedings. Nevertheless, there is a corresponding activity. The lodging with the registry is indeed instrumental in allowing the Court and the other parties to have knowledge of the submissions. The very same purpose is reached in arbitration proceedings by communicating the submissions to the Arbitral Tribunal and the other parties, observing the formalities established by the arbitration agreement, the parties or the Tribunal, as the case may be. As a consequence, this communication, which takes the place of lodging with the Registry of the Court, should have the same effects as the said lodging.

([6]) SALVANESCHI, *Arbitrato*, Bologna, 2014, p. 563, and further references therein.

Law journal published by
Arbitration in Italy Ltd