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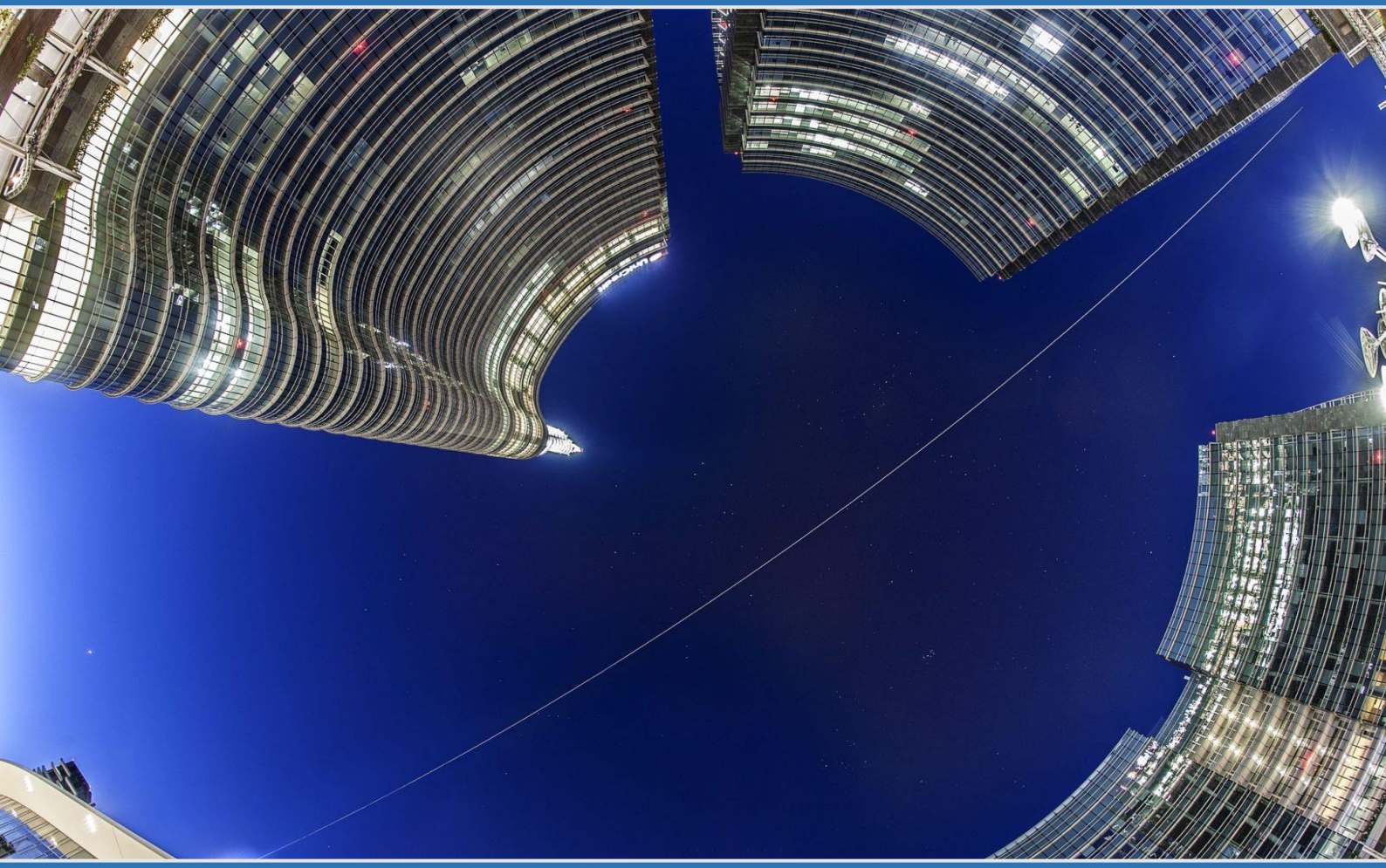

Arbitration in Italy

News on international and domestic arbitration in Italy

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Editorial

By Roberto Oliva

2022 has been an exciting year for Italian arbitration practitioners.

First, in 2022 was enacted the reform of Italian arbitration law, which will enter into force on 1 March 2023. It is the first significant reform since that passed in 2006. It is worth immediately noting that:

Italian arbitration law will impose specific disclosure duties on the appointed arbitrators. The influence of international best practices is evident, and the fulfilment of the said duties will likely avoid the occurrence of events such as those discussed in BEG v. Italy, and

Italy finally leaves the restricted club of jurisdictions not allowing arbitrators to issue interim measures.

Second, Italian practitioners had to brush up on seasoned precedents on the arbitrability of disputes involving a party affected by trade sanctions. Italian Courts dealt with this matter concerning the sanctions against certain Iraqi entities; the same principles will likely apply to the sanctioned Russian entities.

Third and eventually, Italian institutional arbitration is in sharp expansion. The time is still far when Italian administered arbitrations will outnumber ad hoc proceedings. Nonetheless, Italian arbitral institutions, particularly the leading institution (Milan Chamber of Arbitration), significantly contributed to shaping the landscape for domestic and international cases:

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Arbitration and payment order

by Roberto Oliva

A recent decision issued by the Court of first instance of Vicenza (Court of first instance of Vicenza, decision No. 1102 of 27 June 2022) is of great interest for the unprecedented conclusion reached by the Court.

The matter was quite simple.

A party, alleging that the other party owed it a sum of money, requested and obtained an order for payment.

However, the claim was based upon a contract containing an arbitration clause.

Therefore, the alleged debtor appealed the order for payment and objected to the jurisdiction of the State Court on the grounds of the said arbitration clause.

According to settled case-law, an arbitration clause does not prevent State Courts from issuing an order for payment. However, if the alleged debtor appeals to the order and objects to the Court's jurisdiction, as the dispute has to be referred to an arbitral tribunal, the Court must repeal the order.

Taking this settled case-law as a starting point, the Court of Vicenza takes a step forward. It notes that an order for payment may be repealed, as the parties entered into an arbitration agreement, only if there is an actual dispute between the parties. Otherwise, repealing the payment order would put into practice (with the Court's assistance) a delaying tactic.

In the case at hand, the defendant contested the claimant's claim only in highly general terms. Consequently, the Court rejected the objection: in other words, it held that there was no dispute and that, therefore, no dispute could (and therefore should) be referred to arbitration.

This approach appears to be unprecedented in Italian jurisdiction. Indeed, if a party objects to their jurisdiction and the objection is grounded, State Courts repeal the orders for payment. At most, it can be debated whether the claimant must bear the Court's costs and fees or whether it is possible (and in some cases

even reasonable) to offset them, despite the strict wording of article 92 of the Italian Code of Civil Procedure.

However, the principles laid down by the decision of the Court of Vicenza are not unknown to the arbitration community, at least overseas.

For example, in Singapore. The Arbitration Act 2001 (which applies to domestic arbitrations only) provides, in short, that the State Court may stay the proceedings, in case its jurisdiction is contested, only if there are insufficient grounds to hold that the matter should not be referred to arbitration. Singapore Courts use the power they are granted and reject applications for stay if they consider that there is no genuine dispute, as the applicant has no defence on the merits, and therefore the said application amounts to a delaying tactic.

Under Italian law, as it currently stands, State Courts cannot reject an objection to their jurisdiction based on an arbitral agreement if the objecting party did not indicate its defences on the merits. In many cases, such defences will be pleaded, but if they are not, as the objecting party solely relied on its objection, the latter if indeed grounded, must be upheld.

Nor does it seem appropriate to introduce in the Italian jurisdiction principles which are indeed applied elsewhere, but only in some instances, and which in any case create unpleasant uncertainties (when can a dispute actually be said to exist?).

Although moved by a laudable intent (that of preventing delaying tactics), the decision of the Court of Vicenza seems erroneous, and it is hoped that it will be challenged and repealed.

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Court's costs and fees

by Roberto Oliva

The Court of Appeal of Milan and the Court of first instance of Milan recently issued two decisions on the issue of Court's and attorney's fees in case an objection to the Court's jurisdiction is granted, as the parties entered into an arbitration agreement.

The decision of the Court of first instance (decision No. 5606 of 23 June 2022) is a simpler and more straightforward ruling.

The case heard by the Court may be summarised as follows. The alleged creditor requested and obtained an order for payment against the alleged debtor, which under Italian law is an ex parte order. The latter appealed to the order and objected to the jurisdiction of the Court, as the parties entered into an arbitration clause. The Court referred to the settle case law of the Italian Supreme Court, whereby "the existence of an arbitration clause does not prevent the jurisdiction of a State Court requested to issue an order for payment (as arbitrators are not allowed to issue ex parte orders). Nonetheless, if the debtor appeals the order on the ground that the State Court does not have jurisdiction, the Court shall set aside the order and instruct the parties to submit their disputes to the arbitrators". Therefore, the Court set aside the order in the case at hand.

Concerning Court's and attorney's fees, the Court correctly held that there was no reason not to apply the 'cost follows the event' principle. As the debtor's appeal was upheld, the creditor was the losing party. As such, it was ordered to pay Court's and attorney's fees under Article 91 of the Italian Code of Civil Procedure. Indeed, the alleged creditor decided to commence litigation in Court at its own risk despite the agreed arbitration clause. In other words, such a case does not entail any of the exceptional cases provided for by Article 92 of the Italian Code of Civil Procedure, as construed by the Italian Constitutional Court in its decision No. 77 of 7 March/19 April 2018. Under the said Article, indeed, the Court is allowed not to apply the above-mentioned 'cost follows the event' principle in case of unforeseen events beyond the control of the parties or situations capable of constituting an "unjustified obstacle" to asserting the parties' rights.

In this respect, it should be noted that some lower Courts reach opposite conclusions, which does not appear to be right.

For instance, the Court of first instance of Cuneo (decision No. 262 of 15 March 2022) stated that 'cost follows the event' does not apply as the creditor accepted the objection to the Court's jurisdiction. The same Court (decision No. 261 of 15 March 2022) also held that the conclusion of the proceedings by a procedural ruling and the acceptance of the objection to the Court's jurisdiction by the claimant constitute a just reason not to award Court's and attorney's fees under Article 92 of the Italian Code of Civil Procedure.

Furthermore, it is difficult to understand why costs are not awarded as the decision only concerns procedural matters (as stated by the Court of first instance of Parma in its decision No. 675 of 21 April 2021).

The case the Court of Appeal of Milan heard is quite more complex (decision No. 2230 of 24 June 2022).

The case was as follows. A party (A) had assigned to another party (B) a receivable it had towards a third party (C). B requested and obtained by the Court of first instance a payment order against C. C appealed the order, objecting to the Court's jurisdiction, as B's credit arose from a contract containing an arbitration clause. The Court upheld that objection and set aside the order, ordering B to pay Court's and attorney's fees. B only appealed the Court's decision on costs.

In the decision at hand, the Court of Appeal upheld the principles laid down by the Italian Supreme Court, based on Article 808 of the Italian Code of Civil Procedure and separability doctrine. In particular, the Supreme Court held that, as the arbitration clause constitutes a separate agreement, the assignment of the underlying contract does not automatically imply also the assignment of the arbitration clause. As a consequence, if only a receivable arising out of a contract is assigned, such an assignment does not imply the assignment of the arbitration clause. Nonetheless, the debtor is entitled to object to the Court's jurisdiction if the assignee brings litigation proceedings to State Courts. The reason is that it would be otherwise deprived of its right to have its disputes referred to arbitrators as a consequence of an agreement he did not enter into (that between assignor and assignee).

In other words, the assignee is not entitled to enforce the arbitration agreement against the debtor, while the latter is entitled to enforce the same agreement against the assignee.

However, in the light of the principles above, the Court held that the creditor brings proceedings in Court at its own risk in the case of assignment of receivables arising out of a contract containing an arbitration clause. As a consequence, there is no reason not to apply the 'cost follows the event' principle under Article 91 of the Italian Code of Civil Procedure.

As a result, the debtor may paralyse all the creditor's actions. The debtor may object to their jurisdiction if the creditor brings proceedings in State Courts. Moreover, if the creditor commences arbitration proceedings, the debtor may

object to the tribunal's jurisdiction. In any event, the assignee is ordered to pay costs.

This construction is disappointing, as learned scholars pointed out.

It is undoubtedly correct that the debtor should be entitled to object to the State Court's jurisdiction, as the assignment cannot preclude any objection it might raise against the assignor (Article 1260, para. 1, of the Italian Civil Code).

If the assignee instead commences arbitration proceedings against the debtor, there is no reason why it could be entitled to object to the tribunal's jurisdiction. The argument that it entered into the arbitration clause with the assignor and cannot be forced to take part in arbitration proceedings with the assignee only allows delaying tactics.

Therefore, it appears more reasonable (and in line with the need for certainty in commercial transactions) that both the assignee and the debtor may enforce the arbitration clause as it concerns the disputed receivable. Such a conclusion could be based on Article 1263 of Italian Civil Code, as suggested by learned scholars. In addition, it is in line with the principle that agreements closely related to a receivable (such as a security agreement) are assigned as a consequence of the assignment of the said receivable.

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Parallel paths

by Roberto Oliva

As far as the relationship between arbitration and Court proceedings is concerned, Italian law applies the s.c. parallel paths doctrine. This doctrine is laid down by Article 819-ter of the Italian Code of Civil Procedure, whereby "the jurisdiction of arbitrators is not excluded by the fact that the same case is pending before the State Courts, nor by the fact that a related case is pending before the State Courts".

This principle applies in several cases, some of which relate to corporate matters. For this reason, a recent decision of the Court of Milan is of particular interest (Court of first instance of Milan, 12 July 2022, No. 6095), as the judge failed to apply the said principle.

Before examining the decision at hand, it is worth making some preliminary remarks.

At least since the entry into force of Legislative Decree No. 5 of 17 January 2003, Italian Procedural law allows resolutions passed by an unlisted company's general meeting to be challenged before arbitrators. This is because the law enacted in 2003 dispelled the doubts, advanced in particular by the Courts, concerning the arbitrability of such disputes.

Nevertheless, the prevailing case law deems a distinction has to be drawn. Indeed, it states that disputes relating to corporate resolutions may be submitted to arbitration, but only if such disputes concern disposable rights. If these disputes concern non-disposable rights, State Courts have jurisdiction. This principle mainly applies to resolutions approving the company's accounts. If the claimant claims procedural issues (e.g., the general meeting was not properly called or conducted), the dispute concerns disposable rights and may be submitted to arbitration. If the claimant claims issues on the merits of the accounts (i.e., claims that the financial statements approved by such resolution do not clearly, truthfully and fairly represent the company's situation), the dispute concerns non-disposable rights, and State Courts have jurisdiction.

This doctrine does not appear correct, and several scholars object to it. Nonetheless, it can be assumed as a given fact in this context.

It should be noted that in far from rare cases, the claimant claims both procedural issues and issues on the merits.

The Court of first instance of Milan already heard such a case and correctly applied the parallel paths doctrine: the Court heard the case concerning the alleged issues on the merits, while an arbitral tribunal heard the case concerning the procedural issues (Court of first instance of Milan, 28 July 2015, No. 9115).

In the decision at hand, the same Court retraced its steps.

The case can be summarised as follows.

Certain quotaholders of a limited liability company challenged the resolution of the general meeting approving the accounts as of 31 December 2018, claiming three issues. The first issue was a procedural one: the accounts to be approved had not been filed at the company's registered office fifteen days before the meeting, as required by Italian law (Article 2429-ter of the Italian Civil Code). The other two issues, however, concerned the merits: according to the claimants, the accounts did not comply with the principles of a clear and faithful representation of the company's situation (Article 2423, para. 2, of the Italian Civil Code), nor did they comply with the principle of prudence (Article 2423-bis, para 1, No. 4 of the Italian Civil Code).

The company's articles of association contained an arbitration clause. This is the reason why the company objected to the Court's jurisdiction.

The Court of Milan rejected that objection and set aside the resolution, upholding the claim concerning the procedural issue without examining the issues on the merits.

Leaving aside the reasoning that led the Court to grant the claimants' claim concerning the procedural issue, as it is not of interest here, it is worth focusing on the reasoning that led the State Court to reject the objection to its jurisdiction.

The Court held that if a claim concerning disposable rights (the request to set aside the resolution due to procedural issues) is raised together with a claim concerning non-disposable rights (the request to declare the resolution null and void due to issues on the merits), State Courts have jurisdiction over the case as a whole under Article 2378, para. 5, of the Italian Civil Code (whereby all the claims concerned the same resolution shall be heard as a single case), representing a special rule with respect to Article 819-ter of the Italian Code of Civil Procedure.

This conclusion seems wrong for many reasons.

First of all, the Court assumed that Article 2378, para. 5, of the Italian Civil Code applies in the case it heard. Nonetheless, there is a precedent (Court of Appeal of Rome, 4 December 1979) that has ruled that the (then in force) Article 2378,

para. 3, of the Italian Civil Code (corresponding to the currently in force Article 2378, para. 5 of the Italian Civil Code) only applies if the claimants request the Court to set aside a resolution under Article 2377 of the Italian Civil Code while it does not apply if the claimant requests to declare that a resolution is null and void under Article 2378 of the Italian Civil Code.

Moreover, another lower Court (Court of first instance of Foggia, 14 October 2005) laid down, albeit in a very different case, a principle that appears to be relevant also in the case at hand: Article 2378, para. 5, of the Italian Civil Code applies if the same relief is sought. And the request to set aside a resolution is a relief other than the request to declare that a resolution is null and void.

The Court's finding that Article 2378, para, 5 of the Italian Civil Code represents a special rule in relation to Article 819-ter, para. 1, of the Code of Civil Procedure, also seems erroneous. Indeed, the two provisions have different scopes of application. The first provision (Article 2378 of the Civil Code) contains the procedural rules governing Court litigation concerning corporate resolutions. It relates to the rules set forth in the Second Book of the Italian Code of Civil Procedure, and therefore Article 2378, para. 5, of the Civil Code has to be read with Articles 273 and 274 of the Italian Code of Civil Procedure. On the other hand, the second provision (article 819-ter, para. 1 of the Italian Code of Civil Procedure) concerns a pretty different issue: the relationship between arbitral tribunals and State Courts. In fact, the procedural rules governing arbitration proceedings in cases regarding corporate resolution are set forth by Article 35 of Legislative Decree No. 5 of 17 January 2003.

Finally, even the Court's application of the lex specialis doctrine does not appear correct. The purported lex specialis (Article 2378, para. 5, of the Italian Civil Code) was enacted by Legislative Decree No. 6 of 17 January 2003; however, it was also contained (as Article 2378, para. 3) in the original text of the Italian Civil Code, approved by Royal Decree No. 262 of 16 March 1942. Article 819-ter, para. 1, of the Italian Code of Civil Procedure, on the other hand, is a later provision: it was enacted by Legislative Decree No. 40 of 2 February 2006, while a similar provision was previously enacted by Law No. 25 of 5 January 1994. As a consequence, Article 819-ter, para. 1, of the Italian Code of Civil Procedure is a rule enacted after Article 2378, para. 5, of the Italian Civil Code. As learned scholars pointed out, under Italian law, the newest law, even if general, repeals the previous law, even if special unless the Parliament provides for any exceptions. From this perspective, it would be entirely irrelevant to ascertain whether Article 2378, para. 5, of the Italian Civil Code is a special rule with respect to Article 819-ter, para. 1, of the Italian Code of Civil Procedure. The latter is indeed the newest rule and must be applied; otherwise, Article 15 of the Preliminary Provision of the Italian Civil Code would be infringed.

In a few words, the Court of Milan took a step backwards before the 1994 reform of Italian arbitration law, when the relationship between arbitral tribunals and State Courts was governed by the principle that the latter prevails over the former. Only after taking this step backwards could the Court hear the merits of the case and issue a decision on a matter that the parties had agreed to refer to arbitration.

This backward step is particularly alarming, as it was taken by a Court that supported arbitration for various reasons in the past. The hope is, therefore, that the decision at hand is the mistake of a single Judge and a specific panel and not the first of a new line of cases.

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A Case Study on the Enforcement of Foreign Arbitral Awards in Turkey: Document production v. Confidentiality

by İdil Bozoğlu

Turkey has taken significant steps in becoming an arbitration-friendly jurisdiction over the past decade. Nevertheless, we observe that the foreign arbitral award enforcement proceedings in Turkey are being subject to a more detailed review than other arbitration-friendly jurisdictions on a comparative basis.

Until the very recent past, enforcement proceedings were not clearly defined in terms of court fees and the competent court to hear the case. Although these uncertainties have been cleared, it should be added that each case should still be evaluated on its own merits.

The award analyzed in this short study is dated year 2021 and constitutes a good example of the scope of a Turkish enforcement review. Indeed, the principle of révision au fond and not reviewing the case on its merits in the enforcement of foreign arbitral awards should be interpreted in light of the specific aspects of each case which can and do change.

In the case that is the subject of this brief study, the parties were requested to simultaneously submit to the Arbitral Tribunal and to the counter party a copy of their expert reports and evidence regarding the determination of the amount of damages suffered by the Claimant. Each party is entitled to examine the other party's evidence and the expert reports received during the proceedings, to submit responses to the reports and to "cross-examine" the experts who submitted the reports.

Both parties submitted their own expert reports on the amount of damages to the file, and no parts of these reports were concealed from the other party.

In order to strengthen its claims, Claimant also relied on the examination reports on the financial structure and value of company [x] for the years 2008, 2009 and 2010, which were obtained long before the lawsuit, as evidence, but submitted a copy of these reports to the arbitral tribunal along with other evidence according to the dispute resolution schedule, The Respondent party stated that these reports were not sent to them and requested that a copy, but the Claimant

refused to send a copy, and the Respondent party applied to the Arbitral Tribunal.

The Arbitral Tribunal made a procedural order for Claimant to submit these reports and to send a copy of them to the Respondent party, but this order was again rejected by the Claimant and the PO was not being complied with. Respondent made another request, which was again rejected by the Claimant, this time on the grounds of confidentiality of trade secrets.

Upon Respondent's renewed request, the Arbitral Tribunal ordered the submission of only the relevant chapters of the Claimant's review reports for the years 2009 and 2010 relating to the valuation of the company, and ruled that the names of the submitters and the non-valuation related parts of the reports could be changed and submitted, and that the reports could only be reviewed by the Respondents' counsel and valuation experts, not by the Respondent's principals. This time, the Claimant removed the information regarding the parts of the 2009 and 2010 reports that they deemed appropriate and submitted them to the file, and the lawyers and valuation experts of the Respondents were able to examine these reports only as to the parts shown to them, but this time, the Respondents were prohibited from sharing the draft of the report prepared by their own experts with the Respondents' principals and making a joint evaluation.

In the award, the Arbitral Tribunal evaluated the damages suffered by the Claimant based largely on the report dated March 2010, one of the reports commissioned by the Claimant. [some of the language in the quotations has been simplified in the Turkish version]

According to the Court of Cassation, as a requirement of the right to be heard, the parties should be able to freely express and prove their claims before the judicial bodies without encountering any obstacles and should be able to refute the claims of the other party freely without encountering any obstacles within the scope of the right to defense. In this respect, the exercise of these rights also includes easy access to the evidence and documents subject to the dispute. Therefore, the parties should be able to freely examine the evidence, and a matter that is not open to the knowledge of the parties should not be the basis of the decision. This approach is a remarkable assessment. As the examination of a document taken as a basis for a decision by the counter party is deeply concerned with it rights and requirements such as the right to reply to and refuse a claim.

In principle, "protection of trade secrets" is a legitimate right that commercial actors attach major importance to. Moreover, one of the most important reasons for parties to opt for arbitration as their preferred dispute resolution method is the protection of trade secrets, i.e. "confidentiality".

However, although confidentiality and the protection of trade secrets are legitimate and reasonable rights, these needs cannot be invoked in such a way to jeopardize the right to be heard in the context of a lawsuit, which has an additional and far more important impact on the case. Such a prejudice to the

right to be heard may often even prevent the actual establishment of a case. Indeed, substantive evidence is crucial to the proof of the case and its absence will prevent the case from being tried in an equitable manner. On the other hand, the need for confidentiality and protection of trade secrets can still be ensured by some other measures. In this case, it is clear that the right to be heard and the right to defense will prevail when a proportional approach is adopted.

"The framework of public order in domestic law has been drawn by the General Assembly of Civil Chambers of the Court of Cassation as "contradiction to the fundamental values of Turkish law, the Turkish general sense of decency and morality, the basic understanding of justice on which Turkish laws are based, the fundamental rights and freedoms enshrined in the Constitution, the common principles valid in the international arena, the level of civilization of civilized communities, society, political and economic regime, human rights and freedoms". The determination of whether the foreign judgment subject to the recognition and enforcement request is contrary to the Turkish public order is essentially left to the discretion of the judge. However, while exercising its discretion, the judge must take into account the raison d'être of private international law and the general principles of this law (Court of Cassation HGK 26.11.2014 T. and 2013/1135-2014/973)."

Again in the case at hand, "Regarding the examination of the report dated March 2010, which was largely taken as a basis for the award by the Arbitral Tribunal, in violation of the procedural rules agreed upon by the parties, allowing the report to be submitted to the file incompletely by concealing the names of the persons who prepared the examination report, the part related to the financial model and method used in the calculation of the port value and the purpose of obtaining this report, and concealing the original and copy of the report from the Respondents who doubts the existence of such a report and that it may have been altered, The fact that the Respondents were not even allowed to see the draft report prepared by the Respondents' valuation expert as part of the report that was the basis of the award, that the Respondents were prevented from cross-examining the persons who prepared these reports, and that all this secrecy was not based on any reasonable and legal basis, raising doubts about the impartiality of the Arbitral Tribunal, it was concluded that the Respondents' right to access to evidence and to defend themselves during the arbitration proceedings was severely violated.

The restriction of the right of defense and thus the violation of the right to a fair trial also constitutes a clear violation of the Turkish public order."

In this case, there are some other procedural issues that are not related to the subject matter of the present brief, and the said issues will not be discussed here.

However, the most important conclusion to be drawn from the aforementioned decision is that while Turkish judges refrain from looking into the merits in the enforcement of foreign arbitral awards in Turkish proceedings yet will still use their discretionary powers to ensure that the arbitration proceedings are conducted in accordance with the equity principle.

For this reason, when planning for the enforcement of foreign arbitral awards in Turkey, not only the text of the arbitral award, but also the entire arbitration process should be examined in parallel with the examples of enforcement proceedings and an evaluation should be made in the light of the required experience in both arbitration proceedings and enforcement proceedings.

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The Italian-Turkish BIT

by Roberto Oliva

Bilateral investment treaties (BIT) are international agreements providing the terms, conditions and protections for private investment by individuals and entities of a contracting State (the home State) in the other Contracting State (the host State).

The proliferation of BITs at the turn of the 20th century has transformed the international investment environment, as they represent a crucial element of globalization.

As far as it is known, approximately 3,000 BITs were signed, and more than 2,000 are in force.

Italy is a party to 102 BITs (and 77 treaties with investment provisions, including the EU treaties). Turkiye is a party to 132 BITs (and 22 treaties with investment provisions).

On 22 March 1995, Italy and Turkiye signed their BIT, which entered into force on 2 March 2004.

Available data shows that Italian investments in Turkey amount to USD 3,374,000,000, spreading across various sectors (food, clothing, chemicals, electric and electronic supplies, machinery, furniture, iron-steel and vehicle industries). Turkish investments in Italy only amount to USD 75,000,000. On the other hand, Italian entities have been investing in Turkiye since the 1960s. In fact, as of September 2020, Turkish companies with Italian partners, and Italian companies with a presence in Turkiye, number more than a thousand.

While according to ICSID's database, only a case was brought under the Italian-Turkish BIT (Enel S.p.A. v. the Republic of Turkiye, Case No. ARB/21/61, still pending), the above situation makes it possible that more cases will arise.

This is the reason why this short commentary was written: to provide Italian investors in Turkiye (as well as Turkish investors in Italy) with a concise description of their rights and protections under the said BIT.

To do so, the methodology of UNCTAD's IIA Mapping Project will be mainly used.

As said, the Italian-Turkish BIT was signed in 1995, almost thirty years ago. Therefore, its preamble does not refer to sustainable development or social or environmental aspects.

In addition, the BIT's preamble does not mention the host State's regulatory prerogatives, such as "right to regulate", "regulatory autonomy", "policy space", "right to introduce new regulations", "flexibility to safeguard public welfare", and similar statements that sometimes are indicated.

Article 1 contains the definition of "investment". An asset-based definition was agreed upon, and an open-ended list of assets was included. This is the broadest definition (in contrast to an enterprise-based definition), theoretically including, in some cases, even ordinary commercial transactions. Indeed, "credit for sums of money and interest payment arising under loan agreements or any right for obligations, performances or services having an economic value connected with an investment" is mentioned, as well as "any right of a financial nature accruing by law or by contract".

The sole limitation concerns that the protected investments have to be made "in conformity with the laws and regulations of" the host State.

It is worth noting that BIT's protection applies to any investment made after or even before the BIT's entry into force.

Article 1 also defines the "investor": a natural person or a juridical person who effected is effecting or even intends to effect an investment. The definition of "investor" does not include permanent residents of the home State. On the other hand, it does not exclude dual nationals: a relevant point, considering the citizenship by investment law enacted in Turkiye.

Concerning legal entities, the BIT does not provide any further requirements (such as substantial economic activity in the home State or with respect to ownership and/or control).

Moreover, the BIT does not include a denial of benefit clause, i.e. a provision allowing the host State to deny treaty protection to an otherwise covered investment (e.g., in case the investor's beneficial owner is national to a State against which the host State enacted economic and/or trade restrictions). Another point of great interest, for instance, in the light of sanctions enacted by the EU (but not by Turkiye) against specific Russian individuals and entities following the Russian annexation of Crimea and the recent invasion of Ukraine.

The treaty's protection does not exclude taxation matters, subsidies and grants, government procurement, or other subject matters (such as investments in

cultural activities, services supplied in the exercise of governmental authority, etc.).

Article 2, para. 2, states the principle that "Both Contracting Parties shall at all times ensure fair and equitable treatment of the investments of investors of the other Contracting Party". This clause (sometimes referred to as a "FET clause") does not qualify the host State's obligation by reference to international law nor by including an indicative or exhaustive list of more specific elements (e.g., denial of justice and flagrant violations of due process; manifestly arbitrary treatment; evident discrimination; manifestly abusive treatment involving continuous, unjustified coercion or harassment; infringement of legitimate expectations).

On the other hand, the BIT expressly forbids unjustified or discriminatory measures. Nonetheless, it does not set forth a specific obligation to accord full protection and security to investors and investments.

Article 2, para. 3, facilitates the entry and sojourn of the home State nationals in the host State territory for purposes related to a covered investment.

Article 2, para. 4, contains the host State's obligation to make public all laws, regulations, administrative practices and procedures concerning investments.

Article 3 lays down the principle of national treatment and contains the most favoured nation clause. The host State shall grant foreign investors a treatment not worse than that of its nationals (or of the national of a third party, as the case might be). It is worth noting that the above only applies to the post-establishment phase of the investment, while it does not apply to economic integration agreements. In other words, for instance, Turkish investors under the BIT do not enjoy the treatment of EU nationals in Italy, as this treatment is outlined in the EU treaties (i.e., in economic integration agreements).

Article 4 concerns protection from strife (war or other forms of armed conflicts, State of emergency, revolt, insurrection, riot or other similar events) on a national treatment / most favoured nation basis. On the other hand, no absolute right to compensation is set forth (such a right usually is granted in situations where the losses were caused by the forces or authorities of the host State).

Article 5 sets forth the protection from expropriation. It also covers indirect expropriation, although it does not provide a definition thereof. No cases (such as general regulatory measures) are carved out from the notion of expropriation.

Article 6 provides free transfer of funds relating to the investment, only subject to compliance with fiscal obligations. The BIT does not provide for specific exceptions (such as those sometimes established to protect creditors in case of insolvency).

Article 7 contains the subrogation clause, whereby if the home State covers the losses suffered by an investor in the host State, it acquires the investor's right to bring a claim and may exercise it to the same extent as the investor.

Disputes resolution mechanisms are covered by Articles 8 and 9. While Article 9 concerns the disputes between the contracting States, Article 8 refers to disputes between investors and the host State. It covers any dispute concerning the investment, provides for the possible fora (domestic Courts of the host State, ICSID, UNCITRAL, and possible other fora agreed on), and contains the host State's consent to ICSID arbitration.

Articles 10 provides for the non-derogation clause: if another international treaty, to which the Contracting States are parties, or national legislation of the host State, provides for more favourable treatment of investors/investments, that other treaty (or national legislation) shall prevail in the relevant part over the provisions of the BIT.

Article 11 concerns the entry into force of the BIT, which happened, as said, on 2 March 2004.

With respect to its duration, under Article 12 the BIT remains in force for ten years and is tacitly renewed for five years. Currently, it is in the second renewal period expiring on 1 March 2024. Each contracting State may prevent the renewal by giving written notice a year before the expiry date (i.e., by 1 March 2023). In the case of non-renewal, under a sunset clause, investors are granted the BIT's protection for five years after the BIT's expiry for investments made before that expiry..

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Sanctions and arbitrability

by Roberto Oliva

The sanctions adopted against certain Russian entities and individuals after the invasion of Ukraine by the Russian Federation might raise an issue of arbitrability of disputes between sanctioned entities and third parties.

This is not a new subject for practitioners of international arbitration, as it has been addressed in the past when the international community adopted sanctions, for example, against Iraq or Iran. The current sanctions are somehow different (for example, they are not adopted by the United Nations) and are more similar to those adopted against the same Russian Federation following the annexation of Crimea.

The issue now requires further attention, either because of the scope of the new sanctions or because of the relevance in the international trade of several of the sanctioned entities.

At first glance, the analysis of the issue could start from the sole pieces of legislation expressly addressing the relationship between sanctions and arbitration proceedings: European Union Regulation No. 883 of 2014, as amended by European Union Regulation No. 1269 of 2022 and by European Union Regulation No. 1904 of 2022. This Regulation clearly excludes from the scope of sanctions: (i) the "transactions which are strictly necessary to ensure access to (…) arbitral proceedings, as well as for the recognition or enforcement of (…) an arbitration award rendered in a Member State", and (ii) "the provision of services which are strictly necessary to ensure access to (…) arbitral proceedings in a Member State, or for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State".

The apparent meaning of these provisions is that sanctions do not directly affect arbitration. It is not by chance that several European arbitration institutions welcomed the enactment of such provisions with great satisfaction.

Nonetheless, this first impression proves to be wrong.

The said provisions merely state, in a few words, that sanctions do not apply: (i) to payments from sanctioned entities to arbitral institutions, arbitrators and lawyers, and (ii) to services rendered in connection with arbitration proceedings

pending in a Member State. Their scope of application is very similar to that of the general licence recently issued in the United Kingdom in favour of the London Court of International Arbitration. However, these provisions (as the British licence) do not address the issue at hand, that of the arbitrability of disputes.

In fact, there is no univocal answer.

For the sake of clarity, with regard to the issue at stake, we can distinguish two kinds of jurisdictions.

A first kind of jurisdictions – "Type A jurisdictions" – are quite more conservative. In these jurisdictions, a dispute may be referred to an arbitral tribunal only if the parties are allowed to dispose of the underlying rights.

On the other hand, the second kind of jurisdictions – "Type B jurisdictions" – are more liberal. In these jurisdictions, it does not matter if the parties may freely dispose of their rights. A dispute may be referred to arbitrators if it concerns an economic interest. Nothing more is required.

With this great distinction in mind, it is possible to make a preliminary assessment of the effects of the sanctions on the issue of arbitrability. Sanctions have or may have great – potentially disruptive – effects on arbitration in Type A jurisdictions. In Type B jurisdictions, in contrast, their effects are quite limited.

These effects may occur (i) before, or (ii) during the arbitral proceedings. The party that considers the dispute non-arbitrable due to the sanctions may (i) disregard the arbitration clause and initiate litigation in State Courts, or (ii) raise an objection in the arbitral proceedings, or (iii) bring an action in State Courts while the arbitration is pending. But the losing party may also use the argument of non-arbitrability to prevent the circulation of the award under Art. V, para. 2(a) of the New York Convention. In the near future, the risk is that of having a number of "lame" awards, which are valid and enforceable in the jurisdiction where they were issued but cannot be enforced in some other jurisdictions (an issue also under Art. 42 of the ICC Rules or similar provisions of other institutions).

Starting with Type A jurisdiction, the first example is Italy.

Italian Code of Civil Procedure provides that the parties may defer to arbitrators only disputes concerning rights of which they may dispose. If the parties cannot dispose of the right in dispute, jurisdiction only belongs to the State Courts.

Then, a question arises. Do sanctions have the effect of transforming a disposable right, such as the right to receive contractual consideration, into a non-disposable right? As Italian law currently stands, the answer seems positive, also considering the sanctions nature as rules of public policy.

Indeed, Italian Courts have already ruled on the point: the Court of Appeal of Genoa in May 1994 and, more recently, the Supreme Court in November 2015. The sanctions that then came into play were those adopted against Iraq. And in both cases the conclusion was that, as a consequence of sanctions, rights became non-disposable and therefore, there was no room for arbitration.

The decision of the Court of Appeal of Genoa also contains a very interesting clarification. When we are discussing of rights the parties cannot dispose of as a consequence of the sanctions, we are discussing of all the rights arising out of the contract between the sanctioned entity and the third party. The right to request the termination of the contract (for force majeure, frustration, and so on) is included. Indeed, as the Court stated, "otherwise, we could face the possibility (or rather, the risk) that the parties dispose of rights they cannot dispose of due to the sanctions".

The same clarification is also contained in the Supreme Court's decision. Indeed, the Supreme Court stated that the contractual relationship has to be assessed "in its entirety", and that it is not possible to distinguish between rights of the sanctioned entity (of which the parties cannot dispose) and rights of the third party (of which it could dispose). All the rights and interests arising out of the contract are rights and interests of which the parties cannot dispose. Arbitration is not possible.

The recent reform of Italian arbitration law, which will come into force in June 2023, has not affected the definition of arbitrable disputes. Therefore there is no reason to believe that Italian Courts will change their conclusions. If they have jurisdiction, they will issue a decision on the merits, maintaining that an arbitration clause between a sanctioned entity and a third party is null and void or, in any case, unenforceable. And if they are requested to recognise a foreign award issued in favour of, or against a sanctioned entity, they may refuse recognition.

There are two other Type A jurisdictions of particular interest for their relations with the Russian Federation, in which arbitrability is defined in a manner overlapping with the Italian one: Sweden and Turkiye.

Swedish Arbitration Act provides that disputes "in respect of which the parties may reach a settlement" are arbitrable. This definition in some ways appears even more restrictive than the Italian one, and there is no doubt that sanctions preclude a settlement between sanctioned entity and third party.

The Svea Court of Appeal in November 2005 and the Swedish Supreme Court in November 2012 held that two disputes involving Russian parties that could not be settled under Russian law are nonetheless arbitrable under Swedish law. However, these are very different cases, and even then, the Courts made it clear that a case-by-case approach is necessary for such situations.

In this case-by-case approach, it could also be possible that Swedish Courts would distinguish on the basis of the specific rights that are the subject matter of the parties' requests; that is to say, that they would draw the very same

distinctions the Italian Courts willingly refused to do. Therefore, a Swedish arbitral tribunal could issue an award on the merits, for example, if the claimant is the non-sanctioned entity, and it claims the consideration for the services it rendered before the sanctions, or the termination of the contract due to the sanctions. On the other hand, the situation would be uncertain in case of a claim raised by the sanctioned entity. In addition, possible counterclaims or objections raised by the sanctioned entity would further complicate the matter, even leading to a possible bifurcation.

As a matter of fact, at least in one case an award was issued in Stockholm in arbitration proceedings involving a sanctioned entity: Pesa v. Ural Trans Mash. The sanctions then at stake were those enacted following the annexation of Crimea, and this case triggered the first application of Russian procedural counter-sanctions in December 2021. Nonetheless, the arbitral tribunal issued an award on the merits, and so it held that the dispute was arbitrable.

In addition, some rumours in the international arbitration community indicate that arbitration proceedings are currently pending in Stockholm between newly sanctioned entities and third parties.

In the end, it could be concluded that there is a risk that arbitration proceedings in which arbitrability is governed by Swedish law cannot be commenced, or cannot be continued, due to the sanctions. However, due to the lack of precedents from Swedish Courts on that very point, for the time being it is not possible to assess such risk.

Turkiye is the other Type A jurisdiction where arbitrability is defined in terms similar to Italy.

However, Turkiye has not, at least so far, adopted sanctions against the Russian Federation. The issue is thus more complicated: for Turkish law, no question affects the parties' possibility to dispose of their rights; however, it could happen that these rights are not available to a party due to public policy provisions of its own jurisdiction (for example, if that party is an entity based in the European Union). There are no reported Turkish Courts decisions on the subject or related topics. Therefore, it could not be completely ruled out the risk that sanctions affect Turkish arbitrations. Nonetheless, for the time being such risk seems quite remote.

The same mechanism possibly applies to other Type A jurisdictions, such as a number of North African and Middle Eastern jurisdictions, which are in a position very similar to that of Turkiye.

The other significant set of jurisdictions – Type B jurisdictions – define arbitrability of disputes based on the fact that they concern an economic interest.

The first example of Type B jurisdiction is Switzerland.

Under Swiss Private International Law, any claim involving an economic interest may be the subject matter of an arbitration. And it is worth noting that Swiss Supreme Court has already examined the matter with respect to trade sanctions. It heard the very same case that was heard in Italy by the Court of Appeal of Genoa in 1994. And it came to an opposite conclusion: in the view of the Swiss Court, that dispute between the Italian company and the sanctioned Iraqi entity could have been decided by the arbitral tribunal. In a few words, the sanctions did not affect arbitrability, but only the content of the law to be applied to the merits.

France is also a Type B jurisdiction, but a peculiar one. Indeed, Art. 2050 of French Civil Code sets forth that "It is not possible to enter an arbitral agreement concerning (…)" among other things, also "public policy".

Nonetheless, that Article only applies with respect to French domestic arbitration. Concerning international arbitration, French Courts have a very liberal approach. In fact, also a French Court – the Court of Appeal of Paris – heard the case heard by the Court of Appeal of Genoa. And it came to the conclusions already reached by the Swiss Supreme Court: sanctions do not exclude arbitrability.

The decision of the Court of Appeal of Paris is also interesting under another point of view. Besides informing us that France is a Type B jurisdiction, it also informs us that French Courts would be reluctant to recognise a decision issued in a Type A jurisdiction by a State Court maintaining that an arbitration clause entered into by a sanctioned entity is not enforceable.

The same conclusions would be reached in two other Type B jurisdictions, Germany and Austria: indeed, although there are no reported precedents in these jurisdictions, they adopt a definition of arbitrability overlapping with that of Switzerland. A dispute is capable of arbitration if it concerns an economic interest. And a dispute between a sanctioned entity and a third party would involve an economic interest.

Consider, for instance, the cases between Russian principals and their European contractors, which resulted in the recent issuance in Moscow of anti-suit injunctions preventing the European contractors from commencing or continuing ICC and VIAC arbitration proceedings. The disputes would be arbitrable under French law and Austrian law, i.e. the law of the seats of the arbitrations. But the awards would not be enforceable in Russia due to the said anti-suit injunctions. Nor would it be enforceable in Type A jurisdictions adopting sanctions (such as Italy) where arbitrability depends on the parties' possibility to dispose of their rights.

Similarly, moving from civil law to common law jurisdictions, it could be reasonably assumed that the sanctions against the Russian Federation do not prevent a dispute from being referred to arbitration. The English Arbitration Act, for example, is utterly silent on the issue of arbitrability, and the English Courts are very reluctant to uphold objections asserting the non-arbitrability of a dispute. A situation that is very similar to that in France concerning

international arbitration. It is very difficult for an English Court to follow the doctrine whereby a dispute may be referred to arbitrators only if it concerns rights of which the parties may freely dispose. Nonetheless, caution is required, as at least an English authority in 2009 held that an arbitration clause is null and void if it is purported to require the submission to arbitration of questions pertaining to mandatory provisions (in that case, of European Union law).

The same situation occurs in the United States. Indeed, as in England and Wales, the Federal Arbitration Act does not address the issue of arbitrability. Nonetheless, the evolution of US case law in the past four decades has been viewed as a striking example of the decline of the nonarbitrability doctrine in this field. In short, a claim would be deemed as non-arbitrable under the statutory regime of the Federal Arbitration Act only where federal legislation expressly requires this result.

In the end, particular caution is required, and a case-by-case approach has to be followed: arbitrability is a very sensitive issue for domestic Courts, even more sensitive because of sanctions.

A one-size-fits-all answer that applies to every international commercial arbitration is not possible. On the contrary, it is necessary to weigh the specific features of the jurisdiction whose laws govern the issue of arbitrability.

In addition, it should be taken into account the risk (or rather, the likelihood) that a dispute concerning a contractual relationship between a sanctioned entity and a third party could be decided by (i) a State Court in Russia (as a consequence of Russian counter-sanctions), (ii) a State Court in some Type A jurisdiction (as the sanctions could prevent arbitration in these jurisdictions), and (iii) an arbitral tribunal in a Type B jurisdiction (as the sanctions do not affect arbitration in these jurisdictions). And that would also possibly imply conflicting decisions, and serious issues in their circulation and enforcement.

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Challenge to the shareholders' meeting resolution and arbitrability

by Stefano Fermi

The Court of Milan reaffirms, in a recent decision (No. 8411 of 26 October 2022, Italian text available here), the broad applicability of the arbitration clauses contained in the Articles of Association, also with respect to the challenge to the shareholders' meeting resolutions, with the sole exception of so-called irremediable nullity.

The claimant, in particular, who was the coheir of a deceased shareholder and was excluded from the shareholding by reason of the exercise of an approval clause by the surviving shareholders, brought an action against the company for the court to overrule the resolution for the exclusion and the consequent accretion of the share of the non-admitted shareholder to the other shareholders.

The company objected that the matter should be dealt with by arbitration due to a provision in the Articles of Association that referred all disputes between the company and its shareholders to arbitration. The claimant, however, argued that the raised claim concerned so-called irremediable nullities since they relate to the violation of inalienable rights. The claimant therefore argued that the arbitral tribunal does not have jurisdiction according to established case law. The claimant also argued that the claimed invalidity was irremediable, asserting that the heir of the deceased shareholder was not enabled to call the shareholders' meeting because of a lack of authorisation from the community of heirs created by the death of the deceased. The claimantwent on to assert that, in any event, the acknowledgement of the exclusion and the resulting accretion should first have been entered in the companies' register.

On the basis of these assumptions, the claimant asserted that such resolutions were contrary to mandatory rules and public policy and, therefore, it should be held that the relevant issues could not be heard by arbitrators.

The Court, finding that the case fell within the broad scope of the arbitration clause, based its decision on an analysis of the dispositive or non-dispositive nature of the matters invoked by the claimant, observing that the aforesaid objections in fact concerned matters extraneous to public policy, explaining that were inherent to strictly individual matters of the would-be shareholder. With regard to the lack of a summons or calling of the company meeting, the criticism was in fact confined to the qualities and powers of the summoning heir and thus

to the mere succession (or community) relationship between natural persons, which obviously remains a matter outside the scope of the corporate contract.

While with reference to the exercise of the approval clause, the Court observes that it can only be of a purely internal company matter, and there is no room for objection in this regard since the position of a natural person who aspired to become a shareholder after the death of the deceased shareholder is what is at issue here. The Court therefore found no obstacles to the disposability of the rights at issue and thus to the deferability to arbitration, and this also by virtue of the reference to Article 34, para 3, of Legislative Decree No. 5/2003 according to which the arbitration clause "shall be binding on the company and all shareholders, including those whose membership is in dispute". Having ascertained the strict reference to the complainant's individuality of the rights claimed by him and therefore their disposability, the court of Milan could not fail to uphold its own previous view according to which: "the only limit to the arbitrability of disputes also based on corporate relationships is the non-disposability of rights they involve, now limited to cases of violation of mandatory rules of law placed to protect interests superordinate to those of the company and its shareholders" (Court of Milan, decision No. 4594 of 23 April 2018). This view has moreover been unanimously adopted by case law (ex multis: Italian Supreme Court, decision No. 14340 of 25 June 2014, and Court of first instance of Venice, decision No. 35 of 08 January 2015). Therefore, the Court rejected the claimant's claims, declaring its lack of jurisdiction and finding for that of the arbitrators.

As an aside, it is interesting that the court did not consider verifying why the dispute in question could be considered to have arisen between the company and the shareholder, (viz member) as actually provided for in the clause in question (the arbitration reservation referred all disputes between the company, shareholders, directors and liquidators to arbitrators). Indeed, the claimant, having been affected by the 'disfavour' of the surviving shareholders, does not appear to have ever assumed the status of shareholder and, therefore, it did not seem so clear that he could be included in the list of persons covered by the text of the arbitration clause. The judge probably decided not to dwell on the potentially ambiguous aspect concerning the word "shareholder (/member)" absorbing this into the established case law view that: "the articles of association of the company, as a deed of negotiation, must be interpreted according to the hermeneutic canons provided for by articles 1362 et seq. of the Italian Civil Code, inquiring into what was the common will of the parties without limiting itself to the literal meaning of the words and that article 808 quater of the Code of Civil Procedure provides that in case of doubt the arbitration agreement must be interpreted in the sense that the arbitration jurisdiction extends to all disputes arising from the contract or relationship to which the agreement refers" (ex multis, Court of first instance of Turin, decision No. 1012 of 17 June 2021; Court of Appeal of Naples, decision No. 3718 of 09 September 2022). A similar conclusion was moreover reached, for example, by the Court of Venice (decision No. 2178 of 16 August 2016), which, holding that it lacked jurisdiction, stated that "a clause in the articles of association providing that 'disputes that may arise

between the company and the shareholders, directors and liquidators under these articles of association shall be decided by a board of three arbitrators appointed by the President of the Court of Treviso' must be interpreted as meaning that the board of arbitrators has jurisdiction over all disputes arising from the company's relationship (within the limits of their arbitrability, according to the rules set forth in Article 34 of Legislative Decree no. 5/2003), including disputes arising from the company's relationship with the shareholders, directors and liquidators, and from the liquidators' relationship with the company. 34 D.Lgs. no. 5/2003), including disputes concerning the challenge of shareholders' meeting resolutions".

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Service of the award

by Federico Banti

The Milan Court of Appeal, with the ruling hereby commented (No. 3466 of November 4th 2022), decide a challenge of an arbitral award (rendered at the end of an arbitration proceeding concerning a dispute on the leasing of a branch of business) accepting the objection of tardiness raised by the appealed party.

As to the facts, the appellant served the digital copy of the award received by certified e-mail from the Secretary of the Arbitral Tribunal, rather than a certified copy of the original decision itself. Precisely, the appealed party served a digital copy of the arbitral award stating that "the digital copy of the file named 'Final Award.pdf' is a true copy of the original digital document communicated by the Arbitral Tribunal though PEC1".

The appellant notified its appeal beyond the short term of 90 days starting from the notification of the award, pursuant to Article 828(1) of the Code of Civil Procedure, hence the exception of inadmissibility of the appeal for lateness.

The appellant refers to the principle set forth in Article 824 of the Code of Civil Procedure, according to which: "Arbitrators shall draw up the award in one or more originals. The arbitrators shall give notice of the award to each party by delivery of an original or a certified copy by the arbitrators themselves, even by registered post, within ten days from the signing of the award". In essence, the appellant contests the inadmissibility of the appeal, arguing that the notification made by the appealed party is null and void (or in any case invalid), because it concerns a not certified copy of the original award (and as such, according to the appellant, not eligible for the running of the short deadline provided by Article 828 of the Code of Civil Procedure).

In favour of the appellant's argument, the Court of Cassation had established the following principle: "With regard to cassation appeals, the notification of the contested judgment made to the other party by PEC is suitable to start the short term of appeal against the addressee where the notifying party proves to have attached and produced the hard copy of the transmission message, the receipts of delivery and acceptance, the notification report and the certified copy of the judgment, unless the addressee of the notification does not contest its regularity in one or more aspects. (In this case, the Court of Cassation ruled out the

lateness of the cassation appeal, raised by the appellant with reference to the first notification made by PEC, since the appellant had contested its regularity in relation to the extraction of the analogical copy and the notifying party had therefore proceeded with a second notification, with the consequent running of the time limit to appeal from the date of the latter)". (Court of Cassation, Labour Section, 19 June 2019, no. 16421)

As a further support of the need for a correct certification of conformity, under penalty of nullity of the notification, is relevant also a ruling of the Court of Appeal of Rome: "For the purposes of the validity of the notification by pec the notifier must prepare a notification report drawn up, as required by Article 3-bis Law no 53/1994, on a separate digital document, signed with a digital signature and attached to the certified e-mail message. This report must contain … the certificate of conformity referred to in the second paragraph of the same article, i.e. the certificate required in the event that the document to be served is on paper and a file containing a scanned image has been generated by the scanner itself. … The absence in the report of the attestation of conformity of the digital copy of the original paper from which it is taken is sanctioned by Article 11 of Law no. 53/1994 with the nullity of the notification" (Rome Court of Appeal, 25 November 2019, no.4197).

However, and rightly so, the Court of Appeal of Milan avoids excessively formalistic approaches when, as in the case at hand, the "legal knowledge of the award acquired by the contesting party as a result of the other party's notification activity aimed at provoking the appeal" is not at issue.

In fact, the Court of Appeal of Milan endorses the Supreme Court's case law on the subject of the service of judgments according to which: "To the rule according to which the service of the judgment does not admit any equivalents, for the purposes of article 326 of the Code of Civil Procedure, however, an exception is made in one case: when the party has not only acquired legal – and not mere factual – knowledge of the judgment, but has acquired it by an act intended only to cause the appeal, or to challenge it (like Sez. 6 – 3, Order no. 1539 December 2nd 2012, Rv. 621568, in reasoning; as well as, more explicitly, Sez. 3, Judgement no. 5793 of March 8th 2017)" (see Court of Cassation, 26 February 2019, No. 5495

Not only. The Court of Appeal of Milan goes further by noting that even if there was a defect in the appealed party's service activity, because the scanned copy of the original hard copy was not served (but rather the digital copy received by the Secretary of the Arbitral Tribunal was served), such defect would not be considered capable of invalidating the service for the purposes of the running of the short term of appeal.

In this sense, the Court of Appeal of Milan adheres to (and expressly refers to) the principle expressed by the Supreme Court of Cassation case law according to which "The absence, in the copy of the notified judgment, of the certificate of conformity with the original, issued by the Registrar, does not affect the validity of the service, given the limited nature of the cases of nullity provided for by article 160 of the Code of Civil Procedure, and does not entail its ability

to start the short time limit for appeal, unless the addressee of the notification complains about the incompleteness of the copy received or the discrepancy between that copy and the original. (In the present case, the Court of Cassation held that the service of the copy of the contested decision, which in turn had been received by the notifying party from the clerk's office in performance of the obligation imposed by Article 133 of the Code of Civil Procedure made by certified email by the notifying party's attorney was able to start the short time limit term of appeal and there was no dispute as to its correspondence to the original)" (Court of Cassation, 29 March 2022, no. 10138).

On this point it also seems pertinent the judgement no. 28818 of November 8th 2019 of the Court of Cassation, according to which: "Any irregularity of the notifications by PEC is relevant if it concretely relates to the infringement of the counterparty's right of defence, and to a specific complaint by the latter on the consequences of such irregularity; according to the principle of fairness and loyal cooperation, if not of self-responsibility of both parties, irregularities in relation to which the party concerned has not deduced, and if appropriate proved, the specific prejudice suffered are not relevant. (In this case, the lack of certification of conformity of the copy of the notified judgment, in relation to the commencement of the short time limit for appeal, was excluded).".

In the same sense, other jurisprudence of merit has also recently expressed itself:.

"The notification by certified email of the judgment, even if lacking of the certificate of conformity with the original of the decision extracted from the electronic file, is suitable to start the short deadline to appeal if the addressee does not prove that the irregularity of the notification has impaired his right of defence (for example, due to the incompleteness of the copy, or non-conformity with the original), not being sufficient the generic deduction of the non-conformity or irregularity of the notification itself." (Florence Court of Appeal, 29 September 2021, no. 1828).

"The notification of the judgement made by certified email is suitable to start the short term of appeal against the addressee if the notifying party encloses and produces the copy of the transmission message by certified electronic mail, the receipts of delivery and acceptance, the notification report digitally signed by the lawyer, as well as the notified document. It should also be pointed out that even electronic notification of the judgment by means of a digital copy without regular certification of conformity with the original is capable of triggering the short time limit for appeal." (Catania Court of Appeal, 10 February 2022, no. 276).

In conclusion, by adhering to such case law, the Court of Appeal of Milan confirms that, also with respect to the service of arbitral awards, any lack of certification of conformity with the original (and a fortiori any irregularity thereof) does not invalidate the service nor prevent the running of short time limit for appeal if it is ascertained in court that the copy of the award served is indeed a true copy of the original.

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