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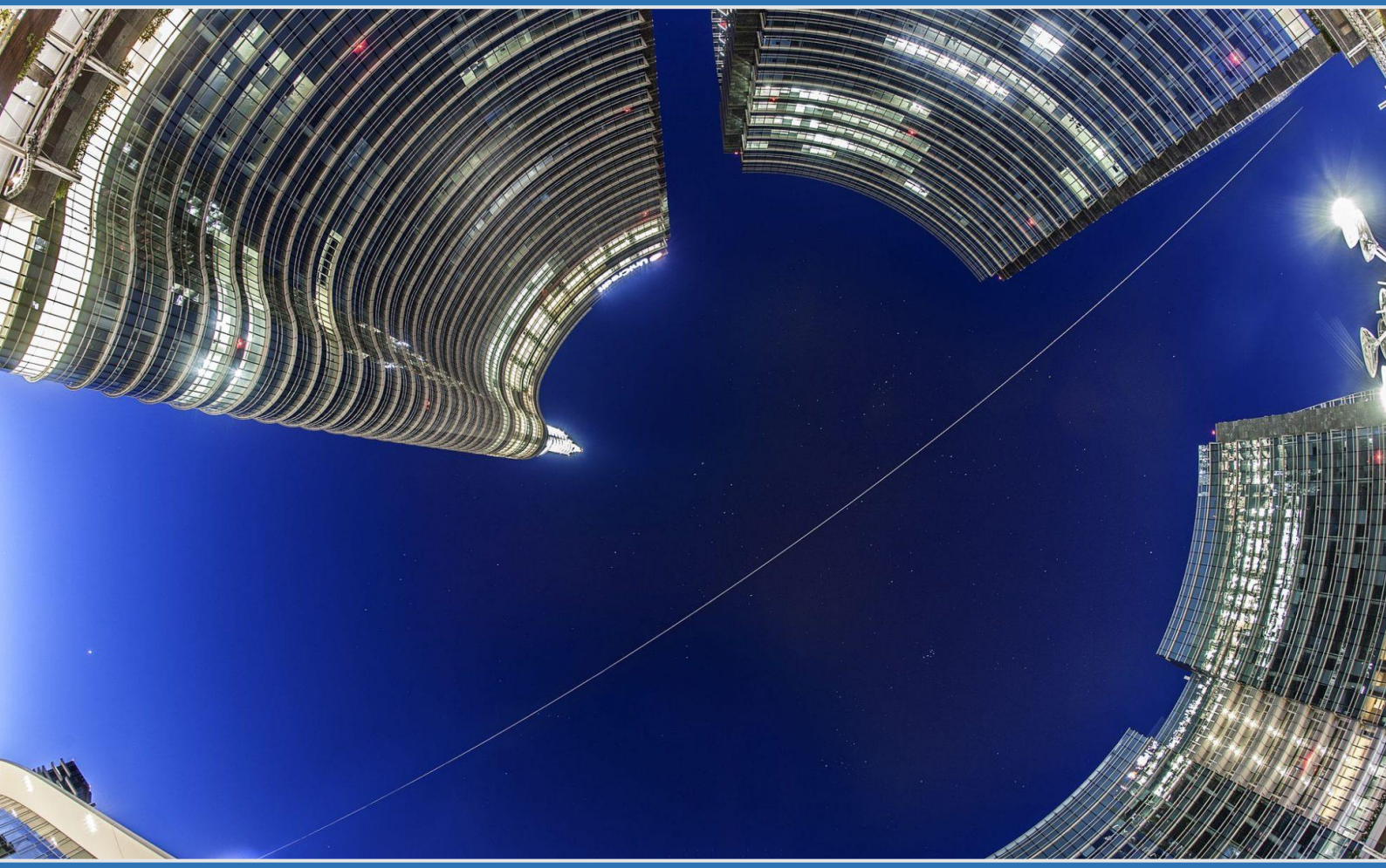

# Arbitration in Italy

## News on international and domestic arbitration in Italy

**Vol. 8 (2023)**

# Arbitration in Italy

## News on international and domestic arbitration in Italy



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**On the appeal to procedural orders**

by Matteo Boselli

A recent decision of the Italian Supreme Court (No. 32996 of 9 November 2022) provides an opportunity for dealing with the possibility to appeal to a procedural order that only resolved preliminary issues.

This case, submitted to the Supreme Court's assessment on matter of law, arose from the issuance of an order by which the arbitration panel ruled only on the preliminary requests made by the parties, mostly related to the admission of a tribunal-appointed technical consultant.

On appeal against this arbitration ruling, the Bologna Court of Appeal declared the appeal inadmissible, having denied its alleged nature as an award. According to the Court of Appeal, the contested order did not constitute a partial award, but a simple order not immediately appealable, since it did not even partially decide the dispute on the merits, exclusively ruling on the parties' preliminary motions.

An appeal was then lodged against the decision of the Bologna Court of Appeal (no. 2287 of 11 September 2018), with two grounds in which the plaintiff alleged violation or false application of Articles 816-bis, 823 and 827 of the Italian Code of Civil Procedure, including that the Court of Appeal has erronously considered the arbitral tribunal's order a simple non-appealable order, rather than an award deciding the dispute on the merits and thus, immediately appealable.

In declared compliance with its own previous arrest (Italian Supreme Court, 24 July 2014, No. 16963), the Supreme Court reaffirmed the principle that the partial award is immediately appealable (Article 827, para. 3, of the Italian Code of Civil Procedure) only when it defines one or more claims. Conversely, immediate appealability must be excluded when the award has decided preliminary issues on the merits without defining any claim.

According to the Supreme Court, although including considerations supporting the adopted ruling, without compromising the final decision of the dispute, the immediate appealability of the arbitration decision that resolves only preliminary

issues must be excluded. In accordance with the Article 816-bis, para. 3, of the Italian Code of Civil Procedure, if the arbitrators do not decide on a non-final award on all issues arising in the proceeding, they provide with a revocable order not subject to filing.

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**Lack of decision: no annulment of the vitiated award if the disregarded claim should still be rejected**

by Chiara Spaccapelo

The recent judgment rendered by the Supreme Court of Cassation no. 32796 dated 8th November 2022 resolved a delicate procedural issue, ruling that the following principle of law is also applicable to the appeal proceedings against the arbitration awards "the principles of economic and reasonable duration of the proceedings (…) and in accordance whit a constitutional interpretation set out in art. 384 cod. proc. civ., inspired by these principles, once verified the lack of ruling on a ground of appeal, the Supreme Court can omit a referral decision on the appealed decision and may give a final judgment on the merit of the case, when the question of law referred to that ground results unfounded, so the final decision confirms the ruling of the judgement of appeal (consequently it is useless to return to the merit phase), unless the matter needs further factual findings".

Therefore, it is necessary to verify, starting from the present case, whether the Supreme Court's conclusion may be shared or not.

The arbitration Panel ascertained and declared O.P. Apol Industriale S.C.A. (hereinafter referred to as "APOL") in breach of the contract, for having delivered to Solana S.p.A. a quantity of tomatoes considerably lower than the local average, stating a penalty of € 248.354,00 upon APOL and in favor of Solana S.p.A. However, in the arbitration award, the arbitrators failed to rule on the counterclaim filed by APOL, aimed to obtain the charge of the penalty upon Solana, for not having collected the quantity of tomatoes offered by APOL. Therefore, the latter filed the appeal against the Arbitration award alleging its nullity for lack of decision on this counterclaim.

The Milan Court of Appeal, although acknowledged that arbitration award did not rule on the counterclaim, dismissed the appeal, considering – wrongly – that the request had been waived because it was not reproposed in the conclusions. The Court of Appeal considered that the assessment in the award of the APOL's breach was in logical-legal contradiction with the counterclaim proposed by itself.

APOL filed a Cassation appeal against that judgment, alleging the violation of art. 112 of the Italian Code of Civil Procedure, and art. 829, para. 1 no. 12 Italian Code of Civil Procedure.

In this case, under the first ground the claimant pointed out that the rule of law contained in the judgment, related to the implied decision to reject any claim or objection incompatible with logical – legal guideline confirmed by the decision on the claim or objection explicitly decided – may be applied only when there is no explicit decision on the claim and/or objection which has not been examined. In fact, only in this case we can presume that the judge, even though he did not evaluate that claim/objection, intentionally ignored it, having decided explicitly over other claims/objections inconsistent under a logical-legal perspective whit those which have not been object of an explicit decision. On the contrary, the Arbitration award did not fail to rule on the counterclaim aimed to obtain an order for Solana's to pay the penalty, but has taken a motivated decision specifically declaring that the claim was waived. This was the reason why the Arbitrators did not rule on the counterclaim, and not because of the implied dismissal deriving from the granting of the main application.

The second ground raised the defect of the judgment for having considered implicitly rejected the APOL's counterclaim, due to logical legal incompatibility with the Solana's granted claim, notwithstanding the award stated the waiver of the counterclaim.

The Supreme Court, considering that both grounds were unfounded, dismissed the appeal and ordered just to amend the grounds of the judgement, according to art. 384 last paragraph, of the Italian Code of Civil Procedure. Indeed, while agreeing with the appellant «that the reason why the arbitration panel did not rule on the counterclaim lies not so much in the unquestionable logical-legal incompatibility of the latter with the main claim, as in the erroneous belief that this counterclaim had been waived, on the other hand, it is not, however, in any case conceivable to refer it back to the Court of Appeals». And this because of its "uselessness" because the referring court could only reject (due to its indisputable groundlessness) the claim for which there had been a failure to rule (by reason of its logical-legal incompatibility with the main claim already granted by a now res judicata ruling).

Those new guidelines, aimed at reducing the referral judgments by Court of Cassation, extended to all jurisdictional decision, including also the arbitration award, may be shared, because they are compatible whit the principles of economic and reasonable duration of proceedings, according to art. 111, para. 2 of the Italian Constitution.

In our procedural system the referral judgment is a residual hypothesis. It is a way to take when there are no other choices..

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**Arbitration law reform and new CAM rules**

by Roberto Oliva

1 March 2023 represents an important date for Italian arbitration practitioners. The Italian Code of Civil Procedure reform enters into force, containing targeted but extremely relevant interventions for arbitration matters. In addition, the new Arbitration Rules of the Milan Chamber of Arbitration also enter into force (their Italian text is available here).

Examining these latter rules, the most exciting provisions concern the precautionary powers of CAM arbitrators.

The new Article 818 of the Italian Code of Civil Procedure allows the parties to vest Italian-seated tribunals with the power to issue interim measures, provided that this is done, also by referring to arbitration rules, in the arbitration agreement or a written agreement entered into before the commencement of the arbitration proceedings.

And under Article 26 of the new CAM arbitration rules, the arbitral tribunal has the power to issue all interim, urgent and provisional measures, also of anticipatory content, that are not forbidden by mandatory rules applicable to the proceedings. This provision has been in the arbitration rules for some time but now finds a broader application under the reform.

Article 26 of the new CAM arbitration rules also provides for the issuance of ex parte orders, which may be confirmed, modified or revoked after the adversarial proceedings have been instituted.

In addition, if the arbitral tribunal is not yet constituted, the parties may address their requests for interim measures either to the State Court (under the new Article 818, para. 2, of the Italian Code of Civil Procedure) or to the emergency arbitrator governed by Article 44 of the new CAM arbitration rules.

Thus, there is a diachronic concurrent jurisdiction (the State Court has jurisdiction before the constitution of the arbitral tribunal, the latter from the moment of its constitution) and a synchronic concurrent jurisdiction (both the State Court and the CAM emergency arbitrator have jurisdiction before the constitution of the arbitral tribunal that will hear the merits).

Another interesting point is that new CAM arbitration rules apply to arbitral proceedings commenced on or after 1 March 2023. No relevance is given to the time of the conclusion of the arbitration agreement concerning the power to issue interim measures after (Article 26) or before the constitution of the Arbitral Tribunal (Article 44).

Indeed, the reference in the arbitration clause to the arbitration rules must be considered a mobile reference, according to Art. 832, para. 3 of the Italian Code of Civil Procedure. This is because the choice for administered arbitration is based on the parties' trust in the arbitral institution, a trust that – as noted by Italian scholars – cannot be resolved in the choice of arbitration rules in force at the date of the arbitration clause, but must instead allow the institution to amend its rules, also to take account of changes in the applicable law, as currently occurred.

The Chamber of Arbitration of Milan made a bold choice (also given the risk of recourse for setting aside under Articles 818-bis and 829, para. 1 of the Italian Code of Civil Procedure). Nonetheless, it seems the right choice, in light of the above-mentioned full compatibility with the law rules governing institutional arbitration in Italy and their rationale. In this perspective, it is relevant that the 'old' CAM arbitration rules already provided for the issuance of interim measures in a provision whose scope has expanded due to the reform.

Indeed, there will be recourses to set aside the interim measures issued by CAM tribunals, and the relevant case law will be published and analysed in this Journal.

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**Some thoughts on the reform of Italian arbitration law**

by Roberto Oliva

Much has been written, and much will still be written, about the recent reform of Italian arbitration law. The undeniable merit of this reform is that it brings the Italian system closer to that of other jurisdictions sharing the same civilizational perspective. The changes that have (finally) allowed arbitrators to issue interim and precautionary measures, as well as those concerning the disclosure and disqualification of arbitrators, should indeed be interpreted in this sense. Italy is now among the most advanced jurisdictions, with changes that include the choice of applicable law, allowing parties and arbitrators to apply non-state rules such as lex mercatoria.

In this context of general satisfaction, however, we cannot overlook the limitations of the reform, which result from the unfortunate drafting of some new rules, a consequence of their hasty approval and premature entry into force. Firstly, regarding disclosure, the law now stipulates that it must be made under penalty of nullity of the acceptance (Art. 813 of the Italian Code of Civil Procedure). The law further specifies that in case of omitted or incomplete disclosure, it is possible to request the court to disqualify or replace the arbitrator.

Thus, three potential remedies are available. In the event of an omitted declaration, it could be possible to have the award set aside due to a defect in the constitution of the Arbitral tribunal, as defined in Article 829 of the Italian Code of Civil Procedure. Additionally, the arbitrator could be disqualified under Article 815 of the Italian Code of Civil Procedure. Finally, the interested party could apply to have the arbitrator replaced according to Article 813-bis of the Italian Code of Civil Procedure.

Scholars who have addressed this issue have attempted to narrow down the range of admissible remedies. For the most part, they have concluded that the nullity of the acceptance would not necessarily have consequences on the award and that the interested party has the burden of applying for the disqualification or replacement of the arbitrator, apparently at its discretion. This is in light of significant differences between disqualification and replacement, and taking into account the party's case theory and strategy.

However, this solution does not appear satisfactory for a straightforward reason: it does not resolve the issue the reform intended to address. Consider the case

of BEG v. Italy, where an arbitrator failed to disclose circumstances that seriously compromised their independence and impartiality. These circumstances were only discovered by the interested party after the award had been signed. Under the old provisions, this had no consequences on the award because the arbitrator could only be challenged during the proceedings, a principle seemingly unaffected by the reform. Nevertheless, this conclusion was deemed a violation of the European Convention on Human Rights.

Therefore, it is preferable to interpret the new rules in a way that excludes, rather than reiterates, a violation of the Convention in cases similar to those already examined by the European Court of Human Rights. To achieve this objective, the barriers to challenging the award must be removed, thus affirming the lawmakers' choice to expressly provide for the nullity of the acceptance made by the arbitrator in the absence of disclosure.

Another issue concerns the interim measures issued by arbitral tribunals. Two doubts have arisen: the types of measures that an arbitral tribunal may grant and whether parties can deviate from the exclusive jurisdiction of the arbitral tribunal after its constitution.

Regarding the first aspect (measures that may be granted), it is worth mentioning that the reform aimed to bridge "a gap that differentiated our system from that of jurisdictions geographically and culturally closer to us." To achieve this, arbitral tribunals should be allowed to issue all interim and provisional measures, which the law appropriately did not specify, that are known in the arbitration practice of jurisdictions geographically and culturally closer to Italy. In this regard, a comprehensive list of provisional measures can be found in The Secretariat's Guide to ICC Arbitration, especially considering that the French system governing ICC arbitration does not define the content of interim and provisional measures issued by arbitral tribunals (see Art. 1468 of the French Code of Civil Procedure). However, if a supporting legal rule is deemed necessary, such as referring not to the interim and precautionary measures known in the practice of international commercial arbitration, but to those measures provided for and governed by the Italian Code of Civil Procedure, Article 700 of the Italian Code of Civil Procedure and established case law can serve as the supporting legal rule.

In this context, particular attention deserves a specific interim measure commonly referred to as security for costs in common law jurisdictions and as "cautio pro expensis" in civil law (continental) jurisdictions. This measure was known in Italy until it was declared constitutionally illegitimate by the Constitutional Court in decision No. 67/1960. However, the reasoning of the Constitutional Court's decision does not seem to apply to arbitration proceedings. The Constitutional Court concluded that "cautio pro expensis" represents a disincentive to bring litigation to court under Article 24 of the Italian Constitution and, therefore, an obstacle to implementing the principle of equality under Article 3 of the Italian Constitution. However, it is widely recognized (and accepted) that the costs of arbitration proceedings themselves

serve as a disincentive to initiating such proceedings. This occurs in a context where the parties have voluntarily chosen arbitration, bearing the relevant costs, over resorting to state courts where the majority of costs are funded by taxes. Nevertheless, one issue that requires careful examination is the consequences of non-payment of security for costs/cautio pro expensis. These consequences would likely not include the (partial) dismissal of the relevant claim based on procedural grounds or a stay of the proceedings, especially if the arbitral agreement or the applicable arbitration rules do not provide for such measures.

Another issue to consider is the possibility of derogating from the exclusive jurisdiction of the arbitral tribunal. Some scholars have argued that the objection to the jurisdiction of the state court can only be examined if timely raised by the interested party. Consequently, the jurisdiction of the arbitral tribunal can be waived through specific behavior in court proceedings. According to these scholars, there is no reason to prevent parties from waiving the jurisdiction of the arbitral tribunal by agreement, allowing the arbitral tribunal to issue only specific interim and precautionary measures while granting the state courts the power to issue other measures.

This reasoning, however, seems flawed. Granting the power to issue specific interim and precautionary measures to the arbitral tribunal and other measures to the state courts would openly contradict Article 818 of the Italian Code of Civil Procedure, which states that "the arbitral tribunal has exclusive jurisdiction to issue interim and precautionary measures." Furthermore, it would lead to potential overlaps in assessing fumus boni iuris and periculum in mora, precisely the issue that the lawmakers intended to avoid.

Ultimately, the overall positive assessment of the reform of Italian arbitration law must be tempered considering the uncertainties arising from doubts about the interpretation of some of the new rules. While it would be advantageous for lawmakers to address these issues, it is unlikely to happen. Therefore, we must await clear guidance from the case law of Italian courts..

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**Breach to the arbitral agreement**

by Roberto Oliva

Commercial arbitration practitioners sometimes face problems arising from the conduct of a party that, recalcitrant to see the dispute decided by the arbitrators as agreed, engages in conduct with the apparent intent to prevent or hinder and slow down, the arbitral proceedings.

The leading arbitral institutions are also aware of this and have included in their rules the admonition represented by the express provision that the parties must conduct themselves in good faith and fair dealing.

The subject has not, however, found particular attention in Italy. For this reason, it seems appropriate to address it.

The first issue to be addressed relates to the nature of the arbitration agreement, i.e., the agreement between two or more parties, under which their disputes are referred to the decision of a private adjudicator, who exercises judicial power instead of the State Courts.

Some scholars say such an agreement would be a non-contractual transaction with procedural effects. Others, on the other hand, recognise it as contractual in nature, although in some cases, they consider the issue to be merely nominalistic.

The approach that seems preferable is the one according to which the arbitration agreement is a contract having as its object the choice of a way to settle a dispute, thus producing procedural effects.

Indeed, this approach is fully compatible with Italian and overseas legal traditions. It also considers specific significant law rules that would otherwise be ignored.

The definition in contractual terms of the arbitration agreement then leads to the direct application of the provisions contained in Title II of Book IV of the Italian Civil Code – particularly that of Art. 1375 of the Italian Civil Code.

On the other hand, the qualification of the arbitration agreement is irrelevant for the purposes of the application of Art. 1218 et seq. of the Italian Civil Code:

whether it is contractual in nature or a non-contractual transaction with procedural effects, it is undisputed that it gives rise to obligations and, thus, to liability for non-performance.

If the arbitration agreement is that contract by which the parties undertake to submit their disputes to the decision of arbitrators, it is clear that it gives rise to a negative obligation: that of not referring, for the disputes covered by the agreement, to the State Courts, or in any event to a different body than the one provided for in the agreement. At the same time, it also gives rise to a positive obligation: that of submitting such disputes to arbitration.

Both Italian and overseas scholars agree on this point.

In addition, a series of further obligations may be derived: in particular, the obligation to appoint the arbitrator(s) in a timely manner and the obligation to pay (to the arbitrators or the arbitral institution, as the case may be) the required advances.

These precise obligations to do are accompanied by equally precise obligations not to do, in addition to the obligation not to refer the dispute to an authority other than the arbitrators, and in particular the obligation not to engage in conduct aimed at preventing or slowing down the constitution and functioning of the arbitral tribunal and the obligation to refrain from challenging the award on grounds other than those permitted by law.

All these obligations are an explication of the principle, set forth in Article 1375 of the Italian Civil Code, that a contract must be performed in good faith.

In more detail.

The parties have the obligation to appoint arbitrators in a timely manner, since the failure to do so cannot be considered compatible with good faith in the performance of the contract. Such omission, in fact, betrays the intent to slow down the constitution of the arbitral tribunal, and thus the arbitrators' decision on the merits of the dispute.

The parties are then obliged to pay the advances requested by the arbitrators or the arbitral institution since non-payment is not compatible with the fulfilment in good faith of the contractual objective of obtaining a decision on the merits by the Arbitral Tribunal (either because it may lead to the dissolution of the clause pursuant to Art. 816-septies of the Italian Code of Civil Procedure, or because it may lead to the stay or termination of the proceedings).

The parties are also under an obligation not to engage in any conduct – other than those just mentioned – aimed at preventing or slowing down the constitution of the arbitral tribunal or its functioning. Thus, they may not, for example, appoint an arbitrator who is compelled not to accept the appointment because of a known conflict of interest. So-called filibustering techniques also fall within this category, although particular caution seems appropriate with

respect to them, given the far from clear-cut boundary between the exercise of the right of defence and its abuse.

Finally, the parties must refrain from challenging the award in cases other than those permitted by law. In particular, this means that they must not attempt to 'disguise' in the form of one of the grounds for nullity of the award pursuant to Article 829 of the Italian Code of Civil Procedure criticisms of the findings of fact made by the arbitral tribunal, or of its rulings on the applicable law. This is because, having chosen a method of dispute resolution that does not provide for a two-tier judgment on the merits, a different course of conduct does not comply with good faith in the performance of the contract.

In the face of non-compliance with the arbitration agreement, the law provides two types of remedies: procedural and substantive.

Procedural remedies are those aimed at removing the most serious effects of non-performance.

Thus, in the event of non-performance consisting in bringing litigation before the State Courts, the procedural remedy is the objection to their jurisdiction. Or, following the non-performance consisting in the failure to appoint an arbitrator, the remedy is to apply to the appointing authority provided for that purpose, whether by agreement or otherwise by law.

All these remedies may, however, prove unsuitable to achieve the objective of placing the non-breaching contracting party in the situation it would have been in the absence of the breach. For example, they do not take into account the costs – except, if appropriate, in the form of litigation costs, which, however, as is well known, may be liquidated in an amount even considerably lower than the costs actually incurred.

There are also breaches for which no remedy is available: thus, if one party has not paid the required advance payments, the other party will have no choice but to pay them in its stead or suffer the dissolution of the arbitration agreement pursuant to Art. 816-septies of the Italian Code of Civil Procedure or, as the case may be, the stay or termination of the proceedings.

In all these cases, the substantive remedy can come to the rescue: damages. All losses (costs) and any lost profits resulting from the non-performance may be compensated, provided that they are, pursuant to Art. 1223 of the Italian Civil Code, an immediate and direct consequence of the said non-performance.

Excluding the numerous cases in which only procedural remedies have been activated, Italian case law on the subject is quite scarce. Among the reported precedents, reference may be made to a decision of the Court of first instance of Verona of November 2012, a decision of the Court of Appeal of Milan (Italian text available here) and a decision of the Court of Appeal of Brescia (Italian text available here).

It is interesting to note that, in the first case (Court of Verona), the party that had acted before the State Court in breach of the obligation undertaken under the arbitration agreement was ordered to pay the non-breaching party a sum of money (equal to approximately half of the liquidated litigation costs) pursuant to Art. 96, para. 3 of the Italian Code of Civil Procedure.

The reasoning followed by the Court of Appeal of Milan to use, once again, the remedy under Art. 96, para. 3 of the Italian Code of Civil Procedure is extremely clear.

It is worth quoting it in full: "From a simple reading of the petition for setting aside the award, it is unequivocally clear the absolute awareness on the part of the claimant (also taking into account the undoubted professional value of the counsel) that the circumstances underlying all the alleged grounds for setting aside (…) were, in fact, claims relating to the assessment of the facts and the violation of the rules of law, allegedly made by the arbitral tribunal, and, as such, wholly inadmissible, while those underlying the alleged violations of the rules of public policy and failure to give a ruling were clearly non-existent. In the present case, what ultimately materialised was a case in which the parties had, at first, by concluding an arbitration agreement, preferred to subtract from 'public justice' the decision of disputes that might have arisen between them, attributing them to 'private justice', which they evidently considered to be quicker or more reliable even if, clearly, much more costly; when, however, a real dispute arose, the 'private justice' took the decision, the losing party tried to request the decision on the merits of the same to the 'public justice', disguising as grounds for the setting aside of the award those which are, with all evidence, objections on the merits and thus aggravating and hindering, uselessly and inadmissibly, the ordinary work of the 'public justice"'.

Based on this reasoning, the Court of Appeal of Milan ordered the losing parties to pay, under Article 96 of the Italian Code of Civil Procedure, sums comparable (and in one case identical) to those subject to the order to pay costs.

Even more interesting is the case the Court of Appeal of Brescia decided. In that case, the party in breach of the arbitration agreement had failed to pay the advances requested by the arbitrators, thus leading to the dissolution of the arbitration agreement under Article 816-septies of the Italian Code of Civil Procedure. Having been forced to refer the matter to the State Court, the non-breaching party had asked the latter to order the other party to reimburse the costs, including those incurred for the futile arbitration proceedings. The Court of Appeal rejected the request but did so because those costs were not litigation costs within the meaning of Art. 91 of the Italian Code of Civil Procedure, but an item of damages, which should have been the subject of a specific claim for damages, which was, however, lacking.

Ultimately, in light of these albeit rare precedents, it can be assumed that the Italian Courts are ready to sanction the party that has breached the arbitration agreement and also to sanction conducts other than and in addition to the mere submission of the claim in an improper forum (before the State Courts rather

than before the arbitral tribunal). A preference also emerges for the instrument of Art. 96 of the Italian Code of Civil Procedure, particularly its third paragraph, allowing an equitable determination even regardless of the demonstration of the existence and extent of the damage.

Some interesting hints may, at this point, be taken from foreign experience.

Numerous precedents in England and Wales address the issue of the consequences of non-compliance with choice of court agreements in general and arbitration agreements in particular. Extremely well known is also a precedent (West Tankers Inc v. Allianz SPA & Generali Assicurazione Generali SPA [2012] EWCA Civ 27) that dealt with a complex case in which, among other things, the jurisdiction to issue a damages award was debated (this issue was resolved in the sense that such jurisdiction also lies with the arbitral tribunal that has finally been seised).

In summary, it may be held that English law recognises the liability of a party who has defaulted on an arbitration agreement and that the damages must be such as to put the non-breaching party in the same situation as it would have been in the absence of the breach.

There is also a line of cases by the Swiss Federal Supreme Court according to which it is provided for by Swiss law – or at any rate not incompatible with Swiss public policy – that the party that has defaulted on an arbitration agreement is liable for damages to the non-breaching party and that the arbitral tribunal has jurisdiction to assess these damages.

Summing up, also in the light of domestic and foreign case law, it seems that an arbitration agreement is a contract, with the consequence that, on the one hand, it must be performed in good faith, and on the other hand, the party that has breached it (to what was explicitly agreed, as well as to the obligation of good faith in its performance) is bound to compensate the damages suffered by the non-breaching party. Moreover, although the Italian Courts have hitherto been predominantly familiar with the subject matter with reference to its procedural implications, it is not confined to those implications and on some occasions the procedural remedy appears to be inadequate, or in any event insufficient.

It is then a matter, as observed by an Italian scholar, "of identifying the damage, which may consist in the costs borne in the State Court proceedings, not covered by order to pay Court's costs to the non-breaching party (…)" as well as in all the other damages that constitute an immediate and direct consequence of the breach..

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