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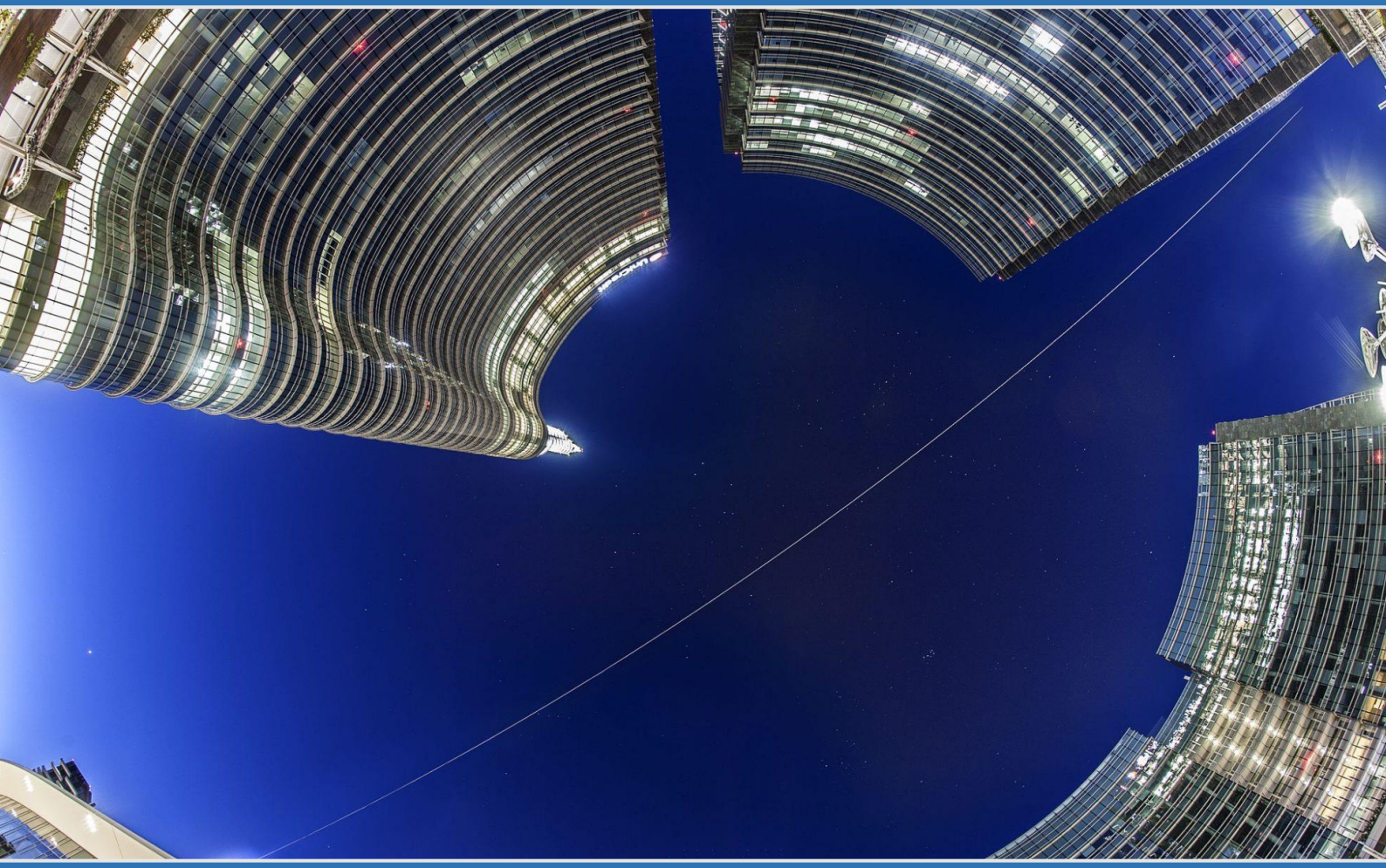

Arbitration in Italy

News on international and domestic arbitration in Italy

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Arbitrability of corporate disputes

by Roberto Oliva

A recent ruling of the Court of first instance of Rome (decision no. 25936 of 30 December 2015) brings up the issue of the arbitrability of corporate disputes, in particular those relating to the challenge of resolutions of company's general meetings.

This is a summary of the case decided by the Court of first instance of Rome.

Some quotaholders of a limited liability company challenged the resolution of company's general meeting whereby certain previous resolutions of distribution of company's profits were repealed/nullified/rendered ineffective.

The defendant appeared in Court and objected that the Court did not have jurisdiction. Indeed, article 29 of the company's Articles of association states that "*all disputes between the quotaholders and the company, the directors, liquidators or the statutory auditors, concerning rights which may be negotiated by the parties and that refer to the company relations, shall be settled by a sole arbitrator appointed by the President of the Notarial Council of the District in which the company has its registered office. (…) The award will have the effects of a judgment issued by the Court and the arbitrator shall decide ex aequo et bono within 90 days of the appointment. The arbitrator is not required to file the arbitration award and shall also decide on the arbitration fees. This arbitration clause shall not apply to the disputes in which the Law requires the compulsory intervention of the Prosecutor.*"

First of all, the Court of first instance of Rome examined the nature of the dispute at hand, in order to ascertain whether it concerned negotiable rights (that would have to be settled by the Arbitral Tribunal), or non-negotiable rights (over which the Courts have absolute jurisdiction). In this particular case, the Court of first instance concluded that the dispute concerned negotiable rights. Indeed, in the opinion of the Court of first instance of Rome: *"the area of non negotiable rights, for which referral to arbitration is forbidden, is limited to those interests protected by imperative rules, the violation of which triggers the Courts' reaction without the need of any initiative by the parties.*" Having said this, the Court of first instance of Rome ruled that the alleged irregularities of the challenged resolution do not trigger such "*reaction without the need of any initiative by the parties*."

In my point of view, the Court of first instance of Rome came to the right conclusion that the dispute at hand may be referred to the Arbitral tribunal. However, its reasoning may not be entirely accepted.

Pursuant to Article 34 of Legislative Decree no. 5, of 17 January 2003, only the "*disputes (…) that concern negotiable rights in corporate matters*" may be settled by an Arbitral Tribunal. Such provision is not different from that of Article 806 of the Italian Code of Civil Procedure, as amended by Legislative Decree no. 40 of 2 February 2006, which states that: "*The parties may have disputes which have arisen between them decided by arbitrators provided the subject matter does not concern rights which may not be disposed of, except in case of express prohibition by law.*"

Consequently, in order to ascertain whether a dispute may be settled by arbitration, the nature of the rights in question (negotiable or non-negotiable) shall be previously assessed.

In this case, I disagree with the Court of first instance of Rome, as to the correspondence between the non-negotiable nature of the disputed rights, and the imperative nature of the law rule that governs such rights. More specifically, the disputed statement claims that, "*it should be stressed that the area of non negotiable rights, for which referral to arbitration is forbidden, is limited to those interests protected by imperative rules, the violation of which triggers the Courts' reaction without the need of any initiative by the parties.*"

Among the interests protected by imperative rules, which if violated may trigger the automatic intervention of the Courts, the Court of first instance of Rome highlights those concerning the clarity and accuracy of companies' financial statements. In this respect, the Court of first instance also refers to previous case law of the Supreme Court, that has been previously discussed here.

Nevertheless, I believe that such concept of non-negotiable right (that is, a right which aims at protecting vital interests that if violated may trigger the Courts' reaction irrespective of any party action) is inconsistent with its exemplification (clarity and accuracy of companies' financial statements).

Indeed, the protection of the public right to having access to accurate financial statements of the company is not unrelated to any party action. In fact, party action is necessary in these cases. And such action has to be prompt enough, as financial statements may not be challenged after those of the next fiscal year have been approved, pursuant to Article 2434/*bis* of the Italian Civil Code.

As several scholars have accurately stated, all rights provided by civil rules are negotiable. In other words, excluding the few cases in which the Prosecutor may exercise the civil action, this action may only be exercised by the concerned parties and their inaction equals to a waiver.

In fact, other scholars have proposed to limit the area of non-negotiable rights to the few matters where the parties may not freely exercise the civil action,

because the Prosecutor is entitled to exercise the civil action or is required to intervene in the proceedings.

This construction is very interesting, but it contradicts the existing law rules. Indeed, Article 34(1) of Legislative Decree no. 5/2003 sets forth that "*the disputes arising among the share/quotaholders involving negotiable rights concerning the corporate relationship can be referred to arbitration, by means of an arbitration clause contained in the Articles of association of the companies (…).*" However, this provision also specifies that "*disputes in which the law requires the intervention of the Prosecutor may not be referred to arbitration.*"

In other words, the law establishes that disputes involving non-negotiable rights are other than the disputes where the law requires the intervention of the Prosecutor. For instance, I do not believe that disputes concerning the judicial revocation of a company's liquidator involve non-negotiable rights. However, such disputes may not be referred to arbitration, since they require the intervention of the Prosecutor, pursuant to article 70 of the Italian Code of Civil Procedure (indeed, that disputes could be commenced by the Prosecutor, pursuant to Article 2487(4) of the Italian Civil code).

On the other hand, the imperative nature of certain rules does not entail the non-negotiability of the rights governed by such rules, and consequently, the non-arbitrability of any dispute concerning these rights.

Indeed, cases in which imperative rules have to be applied may be referred to arbitration. For instance, cases concerning the nullity of legal transactions, even if such nullity is a consequence of a breach of public order rules (that is, antitrust disputes).

What is, then, the definition of non-negotiable rights?

In my point of view, non-negotiable rights are the rights that may not be waived by contract.

If we assume that the above definition is right, it becomes much easier to determine which disputes may not be settled by arbitration.

In fact, "*negotiable rights concerning the corporate relationship*" pursuant to article 34 of Legislative Decree no. 5/2003 are those rights which may be negotiated according to Italian corporate law.

Moreover, the non-negotiable rights are the inalienable rights of the share/quotaholders. That is, the rights that cannot be waived by the general meeting, even if all shareholders including their owner agree.

The above theory would be able to significantly reduce the multiple criteria that the Courts consider in order to determine whether a corporate dispute may be referred to arbitration.

Arbitrability of disputes

by Roberto Oliva

I find interesting a recent ruling of the Italian Supreme Court (order no. 1119 of 21 January 2016, VI Civil Chamber), which dealt with the issue of arbitrability. In fact, the Supreme Court's reasoning in that case (concerning the extent of disputes which may be referred to common arbitration) differs from the reasoning of Supreme Court in cases of corporate arbitration.

The case at hand may be summarised as follows.

A company, lessee under a leasing agreement, filed a lawsuit against the lessor (a financial institution) alleging that the interest rates stipulated in the leasing agreement were abusive. Therefore, the claimant asked the Court to order the refund of the unduly paid amounts, and compensation for damages.

The lessor appeared in Court and objected to its jurisdiction, since the parties had agreed to refer their disputes to arbitration. In fact, according to the leasing agreement, all disputes have to be settled by arbitration, as per Article 806 of the Italian Code of Civil Procedure. This provision states that: "*The parties may have disputes which have arisen between them decided by arbitrators provided the subject matter does not concern rights which may not be disposed of, except in case of express prohibition by law.*"

The order, whereby the Court of first instance declared the jurisdiction of the Arbitral Tribunal, has been appealed by the lessee. In the opinion of the lessee, the Court of first instance should have applied the 'old' Article 806 of the Italian Code of Civil Procedure (that is, the provision in force before its amendment as per Legislative Decree no. 40 of 2 February 2006), since the agreement containing the arbitration clause was entered into in January 2001. According to this 'old' provision, the dispute at hand cannot be settled by arbitration, as it could not be subject of a settlement. Indeed, 'old' Article 806 holds that: "*The parties may have the disputes arising between them decided by arbitrators, except for the disputes (…) which may not be the subject of a settlement.*"

The Supreme Court stated that the Court of first instance was mistaken when applying the current version of Article 806 of the Italian Code of Civil Procedure, as modified by Article 20 of Legislative Decree no. 40/2006. Article 27 of this

Decree explicitly states that its Article 20 shall only apply to arbitration clauses entered into after its entry into force on 2 March 2006. It is therefore clear that 'new' Article 806 of the Italian Code of Civil Procedure cannot be applied to an arbitration clause entered into in January 2001.

Nevertheless, the different wording of 'new' and 'old' Article 806 of the Italian Code of Civil Procedure does not substantially change the meaning of the provision. It states that disputes, involving rights that, due to their nature or due to legal prohibition may not be negotiated by the parties, may not be referred to arbitration.

The Supreme Court noted that, in determining the nature of these non-negotiable rights, "*the existence of imperative rules is not crucial, as there are several matters governed by imperative rules, in which the parties are recognised some autonomy in disposing of their rights, under certain conditions or in accordance with the procedures prescribed by law.*" In other words, the concept of the non negotiability of rights should not be mistaken with the imperative nature of the relevant law rules. These findings are the settled case-law of the Supreme Court, but they are sometimes forgotten (with respect to that issue, the order at hand refers to a precedent of the Supreme Court: decision no. 3975 of 27 February, I Civil Chamber).

In the case at hand, the Supreme Court stated that the imperative nature of the law rules that govern the applicable interest rates (establishing the conditions and limits to the agreement concerning interest rates, and setting the criminal sanctions for those imposing abusive interest rates) determines the nullity of any agreement in breach of such rules, but does not entail the non-negotiable nature of the subsequent disputes. It is, therefore, the role of Arbitral Tribunal to rule on the alleged nullity and/or illegality of the interest rates.

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Relationship between arbitration and judicial proceedings

by Roberto Oliva

The relationship between arbitration and judicial proceedings was the topic of a ruling of the Italian Supreme Court (order no. 783 of 19 January 2016 of the III Civil Chamber). In this ruling, the Supreme Court came to the right conclusion that it is not allowed to order the stay of proceedings pending before a Court while awaiting the decision in proceedings pending before an Arbitral Tribunal. However, the Supreme Court's reasoning is not entirely correct. This is the reason why I would like to briefly discuss its ruling.

The case may be summarised as follows. Two lawsuits (a case concerning the dissolution of joint ownership and another one concerning the opposition to a payment order) were jointly heard by the Court of first instance. At the same time, other proceedings were pending before an Arbitral Tribunal. The subject matter of the arbitral proceedings cannot be grasped by reading the Supreme Court's ruling; however the Court of first instance stated that the solution of the proceedings pending before it depends on the solution of the case pending before the Arbitral Tribunal. Therefore, the Court of first instance ordered the stay of the judicial proceedings, according to Article 295 of the Italian Code of Civil Procedure.

The stay order has been appealed, pursuant to Article 42 of the Italian Code of Civil Procedure.

The appeal was accepted by the Supreme Court, which brought the parties back to the Court of first instance.

The Supreme Court referred to a precedent on this matter (decision no. 22380 of 1 October 2009, III Civil Chamber of the Italian Supreme Court). The Supreme Court, in that case, ruled that Article 295 of the Italian Code of Civil Procedure does not apply to the relationship between arbitration and judicial proceedings, as per Article 819/*ter* of the Italian Code of Civil Procedure.

Such opinion is right. Article 819/ter(2) of the Italian Code of Civil Procedure states that "*the provisions corresponding to Articles 44, 45, 48, 50 and 295 shall not be applicable to the relations between arbitration and judicial proceedings.*"

The Italian Constitutional Court in its decision no. 223 of 19 July 2013 ruled that the above mentioned provision was constitutionally unlawful. More specifically, the Constitutional Court ruled that it was unlawful to exclude the application of Article 50 of the Italian Code of Civil Procedure to the relationship between arbitration and judicial proceedings. However, the inapplicability of Article 295 of the Italian Code of Civil Procedure (which governs the stay of proceedings) has never been questioned.

The lawmakers explicitly chose that arbitration and judicial proceedings will have to simultaneously continue. If the arbitration proceedings deal with a preliminary issue key to the judicial proceedings (as it happened in the case at hand), the Court may decide this issue without force of res judicata, unless the arbitral award has become final. In that case, which I believe more often happens (taking into account the average duration of Court proceedings in Italy), the Court will be bound by the decision of the Arbitral Tribunal.

The decision of the Supreme Court is right: therefore, where is its mistake?

The Supreme Court accepted the findings of the State Prosecutor. And the State Prosecutor's reasoning was wrong.

Indeed, the State Prosecutor in his written submissions to the Supreme Court stated that: "*the private nature of the arbitration proceedings excludes the possibility of any contrast between Court decision and arbitral award and, as a consequence, prevents the stay of proceedings pending before the Court.*"

Nevertheless, Article 824/*bis* of the Italian Code of Civil Procedure states that "*the award shall have the same effects as a judgment rendered by the judicial authority.*" In other words, there is a risk of conflict between the Court decision and the arbitral award. Therefore, "*the private nature of the arbitration proceedings*" is not the reason why it is not allowed to stay proceedings pending before a Court awaiting the decision of the Arbitral Tribunal. The reason is the law rule contained in Article 819/*ter* (2) of the Italian Code of Civil Procedure.

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Arbitration and directors' remuneration

by Roberto Oliva

The Supreme Court addressed the arbitrability of disputes between companies and directors concerning the directors' remuneration (decision no. 2759 of 11 February 2016 of the I Civil Chamber).

In June 2008, the former director of a company limited by shares applied for and obtained a payment order (that is, an *ex parte* order) for the remuneration allegedly owed to him.

The order was rendered by the Labour Chamber of the Court of first instance.

The company appealed that order before the Court of first instance. In order to do so, it served on the other side a writ of summons: in other words, it commenced an ordinary procedure (under Italian law, proceedings before the Labour Chambers are commenced by filing a petition with the Court, which is thereafter served on the respondent; ordinary proceedings before Civil and Corporate Chambers are commenced by serving a writ of summons on the respondent, which is thereafter filed with the Court). The company argued that the jurisdiction on the case rested with an Arbitral Tribunal, due to the arbitration clause in the company's Articles of association. As to the merits, it also objected that the director's claim was ungrounded.

The director appeared in Court and objected that the company's appeal was not admissible (indeed, he argued that the appeal should have been commenced before the Labour Chamber). Furthermore, he argued that the arbitration clause did not apply since the dispute at hand was a dispute under Article 409 of the Italian Code of Civil Procedure (Article 806(2) of the Italian Code of Civil Procedure notes that "*Disputes provided for in Article 409 may be decided by arbitrators only if so provided by law or by collective labour contracts or agreements*") and he also contested the company's objections on the merits.

The Court, both at first instance and on appeal, upheld the objection of arbitration raised by the company.

The Supreme Court confirmed the rulings rendered by the lower Courts.

First, the Supreme Court noted that the Corporate Chamber is the proper venue for all the disputes between directors and companies. More specifically, the Court ruled that "*Article 3 letter a) of Legislative Decree no. 168/2003 states that the Corporate Chamber is the proper venue for all disputes relating to corporate relations. In particular, it is the proper venue for all disputes involving the company and its directors: the disputes concerning the corporate relationship, as well as those concerning the directors' remuneration.*"

The Supreme Court referred to its settled case law, whereby a director cannot be an employee of the company (decision no. 2861 of 26 February 2002 of the Labour Chamber of the Supreme Court; decision no. 13009 of 5 September 2003 of the Labour Chamber of the Supreme Court; decision no. 7961 of 1 April 2009 of the I Civil Chamber of the Supreme Court; decision no. 19714 of 13 November 2012 of the I Civil Chamber of the Supreme Court; decision no. 22046 of 17 October 2014 of the I Civil Chamber of the Supreme Court) and concluded that "*it can no longer be claimed that the disputes between companies and directors on the directors' remuneration are not capable of arbitration.*"

The Supreme Court used to rule that the Labour Chamber is the proper venue of the disputes concerning the directors' remuneration, as per Article 409(1)(3) of the Italian Code of Civil Procedure.

On the contrary, in the decision at hand the Supreme Court ruled that the procedure for labour cases as per Article 409(1)(3) of the Italian Code of Civil Procedure did not apply to the disputes relating to the directors' remuneration. Indeed, the Corporate Chamber is currently the proper venue of all the disputes between companies and directors.

On the other hand, Article 34(4) of Legislative Decree no. 5 of 17 January 2003, expressly provides that "*the Articles of association may provide that the arbitration clause covers disputes brought by directors (…) or those brought against them (…).*" Therefore, even if one were to assume that the procedure for labour cases still applies to disputes between the company and directors concerning the remuneration of the latter, these disputes are capable of arbitration. Article 806(2) of the Italian Code of Civil Procedure provides that the disputes governed by the procedure for labour cases "*may be decided by arbitrators only if so provided by law or by collective labour contracts or agreements.*" And a legal provision does exist.

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Once again, on the relationship between arbitral and judicial proceedings

by Roberto Oliva

A recent ruling of the Court of first instance of Rome (decision no. 4216 of 1 March 2016 of the III Civil Chamber of the Court of first instance of Rome) goes trough the issue of the relationship between arbitral and judicial proceedings. In particular, the ruling considers whether it is possible to order the stay of proceedings pending in Court, while awaiting the decision in other proceedings pending before an Arbitral Tribunal.

This is a summary of the case decided by the Court of first instance of Rome.

Three companies, two from Taiwan (Powercom Co. Ltd and Sunpower Semiconductor Ltd) and one from Singapore (Yuraku Pte Ltd) set up a joint venture (a Singaporean company named Powercom Yuraku Pte Ltd) for the construction of photovoltaic plants in Europe.

In its turn, the company resulting from the joint venture (Powercom Yuraku Pte Ltd) set up a sub-holding in Luxembourg (Powercom Yuraku SA) and the latter set up eight special purpose vehicles in Italy, a vehicle for each photovoltaic plant to be built.

The relationship between the parties to the joint venture was regulated by two shareholders' agreements: the first one entered into in May 2009, and the second one in October 2009. A dispute arose between the parties concerning the fulfilment of the obligations arising out of the shareholders' agreement. This dispute was referred to an Arbitral Tribunal in Singapore.

While the arbitration proceedings were still pending in Singapore, Sunpower Semiconductor Ltd was granted eight injunction orders for the payment of the amounts allegedly owed by the special purpose vehicles to it, in its quality as seller of the photovoltaic panels.

The decision at hand was issued in the proceedings commenced by one of the eight special purpose vehicles in order to challenge the payment order (which is an *ex parte* order under Italian law).

During the proceedings, the special purpose vehicle, apart from disputing the merits of the claim, requested the Court to stay its proceedings (pursuant to Article 295 of the Italian Code of Civil Procedure and Article 7 of Law no. 218 of 31 May 1995) awaiting the decision of the Arbitral Tribunal in Singapore.

Indeed, among the provisions in the shareholders' agreements, there was a condition precedent whereby the price of the photovoltaic panels (that is, the sums claimed by Sunpower Semiconductor Ltd) would become due only after the special purpose vehicles were granted loans by the banks. According to the special purpose vehicle, that condition had not been met due to a breach to the shareholders' agreement on the part of Sunpower Semiconductor Ltd (that is, the claimant and alleged creditor in the Italian proceedings). Since the dispute concerning that breach was referred to the Arbitral Tribunal in Singapore, the special purpose vehicle requested the Court to stay its proceedings waiting for the decision of the Singaporean Arbitral Tribunal.

The Court of Rome came to the right conclusion that proceedings pending in Court cannot be stayed awaiting the decision of an Arbitral Tribunal.

Nonetheless, the reasoning of the ruling at hand is (partially) wrong.

The Court noted that Article 819/*ter*(2) of the Italian Code of Civil Procedure prevents the stay of judicial proceedings awaiting the decision of an Arbitral Tribunal. Indeed, this Article sets forth that "*the provisions corresponding to Articles 44, 45, 48 (…) and 295 shall not be applicable to the relations between arbitration and judicial proceedings.*"

Nevertheless, the Court also referred to a previous ruling of the Supreme Court (decision no. 12124 of 9 June 2005 of the III Civil Chamber of the Supreme Court, Italian text available here) and added that "*the nature of the relationship between two disputes, which requires the Court to order the stay of the proceedings pursuant to Article 295 of the Italian Code of Civil Procedure, only occurs when the first decision affects the ruling to be issued in the second procedure. That means that the first ruling is able to produce effects in relation to the right subject to the second dispute and therefore it may theoretically create a conflict between decisions. Consequently, the private nature of arbitration proceedings and of the decision arising out of these proceedings, excluding the risk of a conflict between decisions, also excludes that the Court may stay its proceedings awaiting the arbitral award.*"

In my opinion, this statement is wrong. After the reform of 2006, Italian law provides that "*(…) the award shall have the same effects as a judgment rendered by the judicial authority*" (Article 824/*bis* of the Italian Code of Civil Procedure). In other words, a conflict between decisions may happen.

Therefore, the only reason why proceedings in Court may not be stayed, pursuant to Article 295 of the Italian Code of Civil Procedure, awaiting an arbitral award is that the law expressly precludes that stay.

Another interesting point of the ruling of the Court of Rome concerns the applicability to its case of Article 7 of Law no. 218/1995. This provision governs the relationship between Italian and foreign Courts where the same disputes (or related actions) are pending. It provides that "*when an objection is raised concerning the previous existence of pending proceedings in a foreign Court between the same parties and involving the same cause of action, the Italian Court shall stay its proceedings if it considers that the foreign decision is able to be recognised in Italy (…)*" (para. 1). This provision also states that "*if the foreign proceedings deal with an issue key to the Italian proceedings, the Italian Court may stay its proceedings if it considers that the foreign decision is able to be recognised in Italy*" (para. 3).

The Court of Rome ruled that the provision at hand (Article 7 of Law no. 218/1995) does not apply to the relations between Italian Courts and foreign Arbitral Tribunals. On the contrary, it only applies to the relations between Italian and foreign Courts, as the Supreme Court had already ruled (decision no. 20688 of 25 November 2009 of the I Civil Chamber of the Supreme Court).

The Court of Rome is right.

Pursuant to Law no. 218/1995, the existence of Italian proceedings prevents the recognition of a foreign decision between the same parties and involving the same cause of action, if the Italian Court was first seised (Article 64(f)).

Conversely, if the foreign Courts were first seised, the Italian Court stays its proceedings, awaiting the decision to be issued abroad (Article 7).

On the contrary, on this very point, the 1958 New York Convention provides for a rather different rule. In fact, under the New York Convention, the existence of a dispute between the same parties and involving the same cause of action does not preclude the recognition of a foreign award (in this respect, see decision no. 671 of 21 January 2000 of the I Chamber of the Supreme Court).

Therefore, proceedings in Court and arbitration proceedings (both domestic and international ones) proceed parallel, until the decision issued in a procedure becomes final and binding on the parties and therefore also in the other procedure. Taking into account the average duration of Court proceedings in Italy, it is likely that the Italian Court will be bound by the arbitral award.

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Corporate arbitration: and yet it moves!

by Roberto Oliva

A recent decision by the Court of first instance of Florence (decision no. 1129 of 21 March 2016 of III Civil Chamber of the Court of first instance of Florence) re-opens the debate on the topic of arbitrability of corporate disputes, and it is particularly notable for the clarity of its reasoning.

The case decided by the Court of Florence may be summarised as follows.

A member of a cooperative company of taxi drivers was excluded from the company (firstly by a resolution passed by the company's General Meeting and thereafter by another resolution passed by the company's Board of Directors), due to his alleged improper behaviour (hoarding of clients damaging his colleagues).

The taxi driver challenged before the Court both the resolutions above mentioned (the General Meeting resolution and the Board of Directors one).

The cooperative company appeared in Court and objected to its jurisdiction. Indeed, the company's Articles of association contain an arbitration clause (Articles 44 and 45) whereby any dispute concerning the corporate relations (apart from those for which the law provides for the intervention of the Public Prosecutor) shall be referred to a sole arbitrator.

The Court of Florence checked whether the dispute at hand was capable of arbitration and ruled that it was.

First, Article 2533(3) of the Italian Civil Code (whereby the excluded member of a cooperative company is entitled to challenge the company's resolution "*before the Court*") does not exclude the jurisdiction of the Arbitral tribunal.

In fact – and this is the most interesting point in the ruling of the Court of Florence – "*The sole disputes which are not capable of settlement by arbitration are those disputes concerning non-negotiable rights, that is, the disputes concerning an (alleged) incurable nullity.*" In other words, "*A non-negotiable right (…) is other than a right provided for by a mandatory law rule. Indeed, only a non-negotiable right is enforceable and actually enforced*

regardless of the conduct of the parties, in order to protect the public interest; moreover, the violation of a non-negotiable right entails an incurable nullity."

Therefore, the Court of Florence ruled that, if a resolution of the company's General Meeting is challenged due to an alleged lack of notice, the lack of the minutes and even if its object is not possible or unlawful, the relevant dispute is capable of arbitration. In fact, the invalidity at hand is cured if no challenge is filed within three years (counting from the registration or filing of the resolution with the Companies' Register or its transcription in the Book of General Meetings, as the case may be: Article 2379(1) and Article 2479.ter(3) of the Italian Civil Code).

On the other hand, a resolution modifying the corporate purpose by providing illegal or impossible activities is null and void and may not be cured (in fact, it may be challenged without time limit). As a consequence, the disputes concerning that resolution are not capable of settlement by arbitration.

Therefore, the disputes concerning the resolutions passed by the Annual General Meeting, whereby the company's financial statements are approved, are always capable of arbitration, irrespective of the reasons of their challenge. The Court of Florence did not explicitly make that statement, but it is a clear and obvious consequence of its reasoning. In fact, the invalidity of the above mentioned resolutions is cured if no challenge is filed before the approval of the following financial statements (Article 2434/*bis* of the Italian Civil Code).

In other words, the Court of first instance of Florence superseded the case law of the Supreme Court. According to the Supreme Court case law, a dispute concerning resolutions approving financial statements is not capable of arbitration if the claimant claims that the content of the financial statements is inaccurate. That case law is now reversed by a statement of the same Supreme Court: "*The sole disputes which are not capable of settlement by arbitration are those disputes concerning non-negotiable rights, that is, the disputes concerning an (alleged) incurable nullity.*" (decision no. 15890 of 20 September 2012 of the VI Civil Chamber of the Supreme Court).

And yet it moves!

⁂

The objection of arbitration

by Roberto Oliva

A recent ruling of the Court of first instance of Genoa (decision no. 1325 of 14 April 2016) deals with the issues of the objection of arbitration and its characterisation and construction.

The case heard by the Court of Genoa may be summarised as follows.

The quotaholder (and director) of a limited liability company sued the other director, claiming his liability *vis-à-vis* the company. The latter raised the objection of arbitration and asked the Court of Genoa to declare that the claimant's claim was inadmissible, since the company's Articles of association contained an arbitration clause providing for an '*arbitrato irrituale*' (that is, an alternative arbitration procedure provided for by Italian law which does not result in an enforceable award).

The arbitration clause at hand is fully quoted by the ruling of the Court of Genoa and it notes that: "*Any dispute amongst the quotaholders or amongst the quotaholders and the company, its directors, liquidators or auditors, concerning the negotiable rights concerning the corporate relationship shall be settled by a sole arbitrator. The sole arbitrator shall be appointed by the Chairperson of the Institute of Chartered Accountants of the District where the company has its registered office and the appointment shall occur within thirty days of the written request filed by either party. The appointed arbitrator shall determine the seat of arbitration, provided that in any event it shall be in the province where the company has its registered office. The arbitrator shall conduct the proceedings as an 'arbitrato irrituale', with no formalities or procedural constraints, and shall issue the award, in accordance with the law, within ninety days of the appointment (…).*"

The Court of Genoa considered that this clause provided for a regular arbitration, despite the wording of the arbitration clause ("*The arbitrator shall conduct the proceedings as an 'arbitrato irrituale', with no formalities or procedural constraints (…)*"). According to the Court, the wording of this clause does not show the intention of the parties to stipulate an '*arbitrato irrituale*' (that is, arbitration proceedings resulting in a mere contractual determination, whereas the regular arbitration results in an enforceable award). Indeed, the use of the verb 'settle' ("*Any dispute (…) shall be settled (…)*"; in the Italian text, the verb '*risolvere*' is used) would show

the intention of the parties to agree upon a regular arbitration. In the opinion of the Court of Genoa, therefore, even from a semantic point of view the clause referred to an award with the effect of Article 824/*bis* of the Italian Code of Civil Procedure, whereby "*(…) The award has (…) the effects of a judgment delivered by a judicial authority.*" Moreover, according to the Court of Genoa these findings were further confirmed by the fact that the award had to be issued "*in accordance with the law.*" Therefore, the Court of Genoa ruled that the arbitration procedure referred to by the Articles of association were only 'informal' ('*irrituale*') with respect to the procedural rules.

As said, the respondent raised the objection of arbitration and asked the State Court to declare the inadmissibility of the claimant's claim, holding that the dispute should be settled through an '*arbitrato irrituale.*' However, the Court of Genoa dismissed the objection.

The ruling of the Court of Genoa is valuable for its declared intention to follow the case law of the Italian Supreme Court whereby, if a doubt arises, the arbitration clause should be construed as providing for a regular arbitration (on this point, for instance, see decision no. 6909 of 7 April 2015 of the First Civil Chamber of the Supreme Court).

However, the ruling of the Court of Genoa may be contested on two points.

First, I do not think that the arbitration clause examined by the Court of Genoa may give rise to doubts as its construction. This clause precisely provides for the referral of any dispute to an '*arbitrato irrituale.*' And '*arbitrato irrituale*' is only the one governed by Article 808/*ter* of the Italian Code of Civil Procedure. The construction of the State Court, which ruled on the existence of an arbitration '*irrituale*' only with respect to "*the procedural rules of the proceedings*" does not seem persuasive enough. It is not even clear how this particular arbitration ('*irrituale*' only with respect to the procedural rules) differs from an *ad hoc* arbitration in which the parties – and the arbitrators if the parties do not act – are the only masters of the procedure and its rules (Article 816/*bis* of Italian Code of Civil Procedure).

Furthermore, I consider that the Court of Genoa should have accepted the objection of arbitration. The Court rejected that objection because the respondent asked for a declaration of inadmissibility (that is, the consequence of the stipulation of a clause providing for an '*arbitrato irrituale*'), instead of a declaration of lack of jurisdiction (that is, the consequence of the stipulation of a clause providing for a regular arbitration). Doing so, however, the Court forgot its capacity to characterise the parties' claims and objections. Indeed, pursuant to the principle '*iura novit Curia*', the Court – and the Court alone – is responsible for determining which law rule applies to a particular case; and how it applies, considering the facts submitted by the parties. Therefore, in the case at hand, the Court – having found that the arbitration clause provided for a regular arbitration – should have declared the lack of jurisdiction in favour of the Arbitral Tribunal.

Maybe, we will have the chance to read again about this case.

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The return of the twin-track approach

by Roberto Oliva

A recent decision of the Court of first instance of Naples (decision no. 4874 of 19 April 2016) follows the (outdated) line of cases, according to which two different types of corporate arbitration would be possible: on the one hand, corporate arbitration pursuant to article 34(2) of Legislative Decree 5/2003 (which states that "*the arbitration clause shall specify the number of the arbitrators and how to appoint them. In any case, the arbitrators shall be appointed by a third party unrelated to the company; otherwise, the clause shall be deemed as null and void (…)*"); and on the other hand, common arbitration pursuant to Article 808 of Italian Code of Civil Procedure. This is the so-called 'twin-track'.

The case heard by the Court of Naples is in short as follows.

A general partnership had only two members. Upon the death of one partner, the partnership did not continue with the heir, who accordingly sued the partnership to have it declared dissolved (given the lack of plurality of partners), and for the heir to receive his liquidation of shares. The partnership appeared in Court and pleaded the lack of jurisdiction of the State Court, given that Article 13 of its own Articles of association provided for an arbitration clause, according to which "*any dispute arising between partners, or between them and their heirs, and the partnership, concerning the construction and fulfilment of these Articles, the jurisdiction on which does not rest with the State Courts, shall be settled by a sole arbitrator, to be chosen by the parties, or failing the parties to do so, by the Chair of the Court of first instance of L'Aquila.*"

The Court of Naples held that this clause – although inconsistent with Article 34 of Legislative Decree 5/2003 – was nevertheless enforceable, and therefore declared its lack of jurisdiction.

My impression is that this ruling was erroneous and what surprised me is that the Court of Naples deemed the aforementioned arbitration clause was enforceable, stating that: "*what appears more convincing is the line of cases followed by lower Courts, according to which the rules on corporate arbitration set forth by the new law should be considered peculiar and alternative to the rules of the Code of Civil Procedure and the parties are allowed to choose which set of rules applies.*"

In other words, the Court of Naples contradicted the settled case law of the Supreme Court (according to which the twin-track approach is wrong and the only arbitration clause that may be validly included in the Articles of Association is a clause pursuant to Article 34 of Legislative Decree 5/2003). Moreover, the Court of Naples did so without even indicating the reasons which led it to 'revive' the twin-track approach.

The result is to bring back uncertainty on an issue ('twin- track' or 'single-track'), which had apparently been solved (in favour of the 'single-track'). And this uncertainty cannot but bring about unfavourable consequences on corporate arbitration.

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Review on the merits

by Roberto Oliva

The Supreme Court sitting *en banc* unified the case law on the issue of the review on the merits of an award, rendered pursuant to an arbitration clause stipulated before the 2006 reform of Italian arbitration law, in proceedings commenced after that reform (decisions nos. 9284, 9285, and 9341 of 9 May 2016).

Prior to the reform of 2006 (Legislative Decree 2 February 2006, n. 40), pursuant to Article 829(2) of Italian Code of Civil Procedure, "*A request for setting aside may also be filed where the arbitrators did not decide according to rules of law, unless the parties have authorised them to decide ex aequo et bono or they have declared that there may be no recourse against the award.*"

Article 829(3) of Italian Code of Civil Procedure currently in force sets forth the opposite rule: "*The recourse for violation of the rules of law relating to the merits of the dispute shall be admitted if so expressly provided by the parties or by the law (…).*"

What is the applicable rule in the case of a request for setting aside an award, rendered pursuant to an arbitration clause stipulated before the 2006 reform of Italian arbitration law, in proceedings commenced after the entry into force of the reform (2 March 2006)?

According to the transitional provisions of Legislative Decree 40/2006 (and in particular Article 27), "*Articles 21, 22, 23, 24 and 25 shall apply to arbitration proceedings, in which the request for arbitration was made after the entry into force of this Decree.*" Article 24 of Legislative Decree no. 40/2006 amended, among other things, Article 829 of the Italian Code of Civil Procedure. Therefore, it could be inferred that new Article 829 of the Italian Code of Civil Procedure (with its limitations on the review on the merits) applies to any procedure for setting aside an award issued in proceedings commenced after 2 March 2006 (entry into force of the reform), irrespective of the time of stipulation of the arbitration clause, and the applicable rules at that time.

In fact, this is the result reached by a first line of cases of the Supreme Court, also followed by some lower Courts.

A divergent line of cases of the Supreme Court reached the opposite result. This line of cases holds that an award issued under an arbitration clause entered into before the 2006 reform may be reviewed on the merits (unless the Arbitral Tribunal decided *ex aequo et bono* or the parties excluded any recourse against the award); otherwise, new rules would retrospectively apply.

In December 2015, the Supreme Court sitting *en banc* was requested to unify the case law.

The construction offered by the Supreme Court sitting *en banc*, as well as its grounds, is a proper Columbus' egg.

According to the Supreme Court, there is no doubt that new Article 829 of Italian Code of Civil Procedure applies to any arbitration commenced after the entry into force of the reform (*i.e.*, after 2 March 2006).

The rules previously in force, however, are anything but irrelevant.

Article 829(2) of Italian Code of Civil Procedure sets forth – as we have seen – that: "*The recourse for violation of the rules of law relating to the merits of the dispute shall be admitted if so expressly provided by the parties or by the law (…).*" According to the Supreme Court sitting *en banc* the law to be regarded, to ascertain whether the review on the merits is allowed, is the law in force at the time of stipulation of the arbitration clause.

Therefore, an award issued after the reform pursuant to an arbitration clause stipulated before the reform may be challenged on the merits because, at the time of stipulation of the arbitration clause, the law expressly allowed that review. In fact, old Article 829(2) of Italian Code of Civil Procedure set forth that "*A request for setting aside may also be filed where the arbitrators did not decide according to rules of law, unless the parties have authorised them to decide ex aequo et bono or they have declared that there may be no recourse against the award.*"

Moreover, the same conclusion is also reached as far as corporate arbitration is concerned. Indeed, the only change refers to the rule of law allowing the review on the merits: instead of old Article 829(2) of Italian Code of Procedure, that rule is Article 36 of Legislative Decree no. 5 of 17 January 2003. That Article mandates the Arbitral Tribunal to decide according to the law (even if the parties have authorised them to decide *ex aequo et bono*) if the dispute concerns, *inter alia*, the validity of shareholders' resolutions. Therefore, according to the Supreme Court sitting *en banc*, that Article also allows the review on the merits of an award dealing with the validity of shareholders' resolutions.

To sum up, this is the doctrine set out by the Supreme Court sitting *en banc*: "*Pursuant to the transitional rules laid down by Article 27 of Legislative Decree no. 40 of 2006, Article 829(3) of Italian Code of Civil Procedure, as amended by Article 24 of Legislative Decree no. 40 of 2006, applies to arbitration proceedings commenced after the entry*

into force of the above-mentioned Decree. Nonetheless, the law referred to in Article 829(3) of Italian Code of Civil Procedure to establish whether the review on the merits of the award is allowed, is the law in force at the time of stipulation of the arbitration clause" (decisions no. 9284 and 9341, concerning common arbitration); "*Pursuant to the transitional rules laid down by Article 27 of Legislative Decree no. 40 of 2006, Article 829(3) of Italian Code of Civil Procedure, as amended by Article 24 of Legislative Decree no. 40 of 2006, applies to arbitration proceedings commenced after the entry into force of the above-mentioned Decree. In the case of corporate arbitration, the law referred to in Article 829(3) of Italian Code of Civil Procedure to establish whether the review on the merits of the award is allowed, is Article 36 of Legislative Decree no. 5 of 2003 that explicitly allows the above-mentioned review*" (decision no. 9285, concerning corporate arbitration).

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Corporate arbitration and transfer of shares

by Roberto Oliva

If the Articles of Association of a company contain an arbitration clause, does that clause apply to disputes concerning the transfer of shares? This topic was recently discussed in the Court of first instance of Catania (decision no. 3127 of 7 June 2016), which has replied negatively to this question.

The case ruled by the Court of Catania can be summarised as follows.

Two companies have concluded a preliminary contract (that is to say, a kind of agreement to agree which is enforceable under Italian law) whereby the respondent undertook to sell to the claimant shares representing 100% of the corporate capital of a target company.

The preliminary contract was in part fulfilled (indeed, 49% of the target company's corporate capital was actually transferred).

The claimant therefore sued the respondent so as to obtain the transfer of the remaining 51% of corporate capital by way of a Court's decision pursuant to Article 2932 of Italian Civil Code (whereby "*If a party bound to execute a contract does not fulfil this obligation, the other party (…) may obtain a judgment producing the same effects of the non-executed contract*").

The respondent appeared in Court and, prior to any defence on the merits, objected to the jurisdiction of the State Court, noting that Article 24 of the Articles of Association of the target company contained an arbitration clause, with reference to "*disputes that may arise between the shareholders and the company or amongst the shareholders, in relation to these Articles of Association and the company's management*".

However, the Court of Catania, as mentioned, rejected that plea.

It noted, in fact, that: "*a literal construction of the clause leads (…) to the conclusion that it does not apply to this case, which is not a dispute between the company and the shareholders, or between the shareholders. In other words, that dispute is unrelated to the Articles of Association as well as to the management of the company.*" The Court of Catania also

added that: "*in this case (…) the Articles of Association are a precondition of the dispute, but the scope of the arbitration clause contained thereto does not include disputes referring to another contract.*"

The same approach is shared by the Supreme Court, whose rulings are in fact referred to by the Court of Catania: "*The clause (…) of the Articles of Association whereby an Arbitral Tribunal has jurisdiction on 'any dispute amongst shareholders', in the absence of any express contrary intention, shall (…) be construed as meaning that the jurisdiction rests with the Arbitral Tribunal with respect to (all the) disputes relating to the corporate relationship and whose cause of action arises out of the Articles of Association (…). In this case, the Articles of Association are a precondition of the claim, but they are not the cause of action of the claim. Indeed, the alleged breach to the preliminary agreement would allow the innocent party to terminate the contract and does not amount to a breach to the Articles of Association containing the arbitration clause and which were even executed before the execution of the preliminary agreement*" (Supreme Court, II Civil Chamber, decision no. 7501 of 31 March 2014; see also Supreme Court, I Civil Chamber, decision no. 17328 of 25 June 2008).

I am not aware of case-law on a different case; that is to say, the case where the arbitration clause contained in the Articles of Association explicitly also refers to disputes between shareholders relating to the sale and purchase of shares. I suspect that such a clause is extremely rare: perhaps because the parties seek to avoid further complications, also in the light of the divergent case law in the matter of corporate arbitration; perhaps because they would rather appoint the Arbitral Tribunal (whereas in the case of corporate arbitration the Arbitral Tribunal has to be appointed by a third-party).

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On arbitration and statute of limitations

by Roberto Oliva

The Supreme Court sitting *en banc* (decision no. 13722 of 6 July 2016) resolved the question of law (previously discussed in this post) concerning the relationship between arbitration and the limitation period provided for by a specific statute of limitations, that is to say by Article 2527(2) of Italian Civil Code (Article 2533(3) of Italian Civil Code currently in force).

The Supreme Court sitting *en banc* upheld the position of the First Civil Chamber (which had however referred the matter to the Court sitting *en banc*) and stated the following doctrine: "*the limitation period of thirty days for the challenge of the exclusion from a cooperative company (as per Article 2527(3) of Italian Civil Code in force prior to its reform made by Article 8 of Legislative Decree no. 6 of 2003) applies also if the Articles of Association of the cooperative company contain an arbitration clause*."

In other words, the Supreme Court sitting *en banc* confirmed the jurisdictional nature of arbitration under Italian law and stated that "*the request for arbitration is equated by law to the summons to a Court hearing, also as far as statute of limitations and transcription of the claim are concerned. Therefore and conversely, the summons to a Court (that is to say, the document instituting the proceedings in Court) is also equated to the request for arbitration.*"

This is a little bit of good news, particularly in the light of the disfavour for arbitration – and its (erroneous) classification as a 'private' and non-jurisdictional mechanism of dispute resolution – which occasionally comes out in certain decisions of State Courts.

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Assignment of the arbitration agreement

by Roberto Oliva

Italian Courts set forth peculiar rules concerning the assignment of the arbitration agreement in case of assignment of credit. In this respect, a recent decision issued by the Court of first instance of Milan (Court of first instance of Milan, VII Civil Chamber, decision no. 8379 of 5 July 2016) is worth a mention.

The case decided by the Court of Milan is particularly complex. Therefore, the following outline is only focused on certain issues of the case; that is to say, those concerning the assignment of the arbitration agreement.

Two companies set up a joint-venture, won a tender for works and eventually set up a special purpose vehicle (a limited liability consortium).

The consortium bought certain goods to be used for the works. The purchase agreement contained an arbitration clause, which reads as follows: "*Any dispute concerning the construction and/or performance of this contract shall be settled by an Arbitration Tribunal, whose decision shall be issued according to the law (…).*" The obligations of the purchaser (the consortium) were secured by a guarantee issued by one of its members. Thereafter, a third party – the claimant – issued a further guarantee.

The purchaser (the consortium) breached its obligations, and the seller demanded the claimant to pay the guaranteed amount. The claimant did so and was eventually subrogated to the seller's rights *vis-à-vis* the purchaser.

In the meantime, the purchaser went bankrupt. Therefore, the claimant brought proceedings against the parent company of the consortium, which in fact under Italian law is jointly and severally liable with it (Article 13(2) of Law no. 109 of 11 February 1994 and Article 96 of Presidential Decree no. 554 of 21 December 1999).

The claimant was granted a payment order (which under Italian law is an *ex parte* order). The defendant appealed to the payment order and objected, among

other things, to the jurisdiction of the State Courts because of the stipulation of the above-mentioned arbitration clause.

Italian Courts, as said, set forth peculiar rules concerning the assignment of the arbitration clause in case of assignment of credit. The assignee is not entitled to enforce the arbitration clause (that is to say, he cannot commence arbitration proceedings against the obligor); however, the obligor may object to the jurisdiction of State Courts, if the assignee commences litigation in Court.

In other words, any procedural choice made by the assignee would face a procedural objection raised by the obligor.

The Supreme Court sitting *en banc*, on the one hand, ruled that the assignee of a credit arising out of a contract containing an arbitration clause cannot object to the jurisdiction of State Courts: "*Since (…) the assignment of contract under Articles 1406 ff. of Italian Civil Code does not entail (according to the prevailing case law) the assignment of the arbitration clause contained therein, a fortiori the arbitration clause is not assigned in the case of assignment of a credit arising out of a contract containing it. Indeed, the assignment of credit, which could be agreed even without the consent of the obligor (Article 1260(1) of Italian Civil Code), has narrower effects than the assignment of contract, as it only concerns the assignor's credit under the contract and does not entail the assignment of the whole contract nor of other contractual rights and obligations (…) Accordingly, in case of assignment of a credit arising out of a contract including an arbitration clause, the assignee does not become a party to that clause, which in fact stands as a separate contract, and therefore it cannot enforce the arbitration clause against the obligor*" (Supreme Court sitting *en banc*, decision no. 12616 of 17 December 1998, n. 12616).

On the other hand, the Supreme Court sitting *en banc* stated that the obligor may object to the jurisdiction of State Courts: "*The above-mentioned doctrine is not disputed by the case law of this Court, whereby in case of assignment of a credit arising out of a contract containing an arbitration clause, the obligor is entitled to object to the jurisdiction of State Courts (…). Indeed, that case law does not deal with the case of the assignee: it deals with the case of the obligor, and its aim is not to deprive the obligor of its right to arbitrate. In fact, that case law found that: 'otherwise, the obligor would be deprived of his right to arbitrate by virtue of an agreement to which he is not a party, that is to say, the assignment agreement entered into by the assignee and the assignor.' The arbitration agreement is not assigned to the assignee: as already stated, he cannot enforce the arbitration clause, due to the fact that it stands as a separate contract. Nonetheless, it is settled case law (and the scholars agree) that the assignment cannot deprive the obligor of his objections. Therefore, he is entitled to raise vis-à-vis the assignee all the objection he could have raised vis-à-vis the assignor. (…) As a consequence, the obligor may object to the jurisdiction of State Courts due to the stipulation of an arbitration clause in the contract he entered into with the assignor*" (Supreme Court sitting *en banc*, decision no. 12616 of 17 December 1998; that doctrine was subsequently upheld by the Supreme Court in a number of decisions: Supreme Court, II Civil Chamber, decision no. 24681 of 21 November 2006; Supreme Court, VI Civil Chamber, decision no. 29261 of 28 December 2011; Supreme Court, I Civil Chamber, decision no. 13893 of 19 September 2003, n. 13893; and Supreme Court, I Civil Chamber, decision no. 6809 of 21 March 2007).

The Court of Milan also confirmed that doctrine, since in the decision at hand it ruled that: "*although the assignee of a credit arising out of a contract containing an arbitration clause does not become a party to that clause and therefore cannot enforce the arbitration clause against the obligor, the latter may enforce that clause against the former.*"

The objection raised by the obligor was therefore upheld by the Court of Milan which stated that the jurisdiction rested with the Arbitral Tribunal.

The above outlined doctrine of circulation of the arbitration agreement has been subject to criticism, both in terms of its theoretical foundations and in terms of its consequences. Nevertheless, such a doctrine do exist, and it is upheld by the Supreme Court as well as by lower Courts (for instance, by the Court of first instance of Modena, in its decision no. 807 of 23 May 2013, and by the Court of Rimini, in its decision of 17 December 2015). Moreover, it is unlikely that it would be repealed, also because the (sporadic) divergent case law does not state an alternative doctrine (in this respect, for instance, see Supreme Court, I Civil Chamber, decision no. 17531 of 1 September 2004).

In this framework, might the Court of Milan have reached a different solution? There is an issue with which the decision does not deal. Indeed, the defendant was not the obligor. It was a third party, jointly and severally liable with the obligor. Is that third party allowed to object to the jurisdiction of State Courts, because of the stipulation of an arbitration clause in the contract entered into by the assignor and the obligor?

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Corporate arbitration and interim measures

by Roberto Oliva

A recent decision of the Court of first instance of Catania (decision no. 4041 of 19 July 2016) focused on the relationship between corporate arbitration and interim measures and it is particularly interesting for its potential impact.

The case, in a few words, is as follows.

The claimant, a quotaholder of a limited liability company, challenged certain resolutions passed by the general quotaholders' meeting (approval of financial statements, increase in corporate capital and transfer of the registered office).

The defendant, that is to say, the company, appeared in Court. Prior to any defence on the merits, it objected to the jurisdiction of the State Court on the challenge of the resolutions of increase in corporate capital and transfer of the registered office. Indeed, the Articles of Association of the company contained an arbitration clause. That objection was not raised with reference to the challenge of the company's financial statements, notwithstanding the claimant's claim was capable of arbitration. In fact, the claim concerned alleged procedural errors, whereas according to the prevailing case law the jurisdiction of the Arbitral Tribunal is only excluded if the claim concerns the content of the financial statements (this topic has been previously discussed, for example, in this post, in this one and in this one too).

The Court of Catania stated that the Arbitral Tribunal had jurisdiction on the challenge of the resolutions of increase in corporate capital and transfer of the registered office. In doing so, however, it also ruled that State Courts did not have jurisdiction to issue interim measures and, in particular, to order the stay of the challenged resolution pending the appointment of the Arbitral Tribunal.

In the case of corporate arbitration, the Arbitral Tribunal has jurisdiction to order the stay of the challenged resolutions passed by the general share/quotaholders' meeting (Article 35(5) of Legislative Decree no. 5 of 17 January 2003, n. 5: "*The jurisdiction of an Arbitral Tribunal does not prevent State Courts from issuing interim measures according to Article 669(d) of Italian Code of Civil Procedure.*

Nonetheless, if the arbitration clause also refers to disputes concerning the validity of shareholders' resolutions, the Arbitral Tribunal has jurisdiction to order the stay of these resolutions"). In other words, in the case of corporate arbitration, the Arbitral Tribunal does have a jurisdiction it does not have in the case of common arbitration. In the case of common arbitration, in fact, the Arbitral Tribunal does not have interim jurisdiction (Article 818 of Italian Code of Civil Procedure) and therefore that jurisdiction only rests with the State Courts (Article 669(d) of Italian Code of Civil Procedure).

As a consequence of the above, a question arises on the nature of the interim jurisdiction of Arbitral Tribunals in the case of corporate arbitration: is that jurisdiction exclusive, that is to say, does that jurisdiction exclude the State Courts' jurisdiction? The solution reached by the Court of first instance of Milan (upheld by other Courts) is that interim jurisdiction only rests with the Arbitral Tribunal, provided that it has been already appointed. Before its appointment, however, interim jurisdiction lies with the State Court: otherwise, the parties would be deprived of an energetic (and often necessary) remedy.

The Court of Catania does not seem to be concerned by the possible deprivation of such remedy. Indeed, in its opinion, that deprivation would be a consequence of the stipulation of an arbitration clause: "*the stipulation of an arbitration clause entails that the parties intended to have their disputes settled by arbitration, whose timing – even if interim measures are sought – is other than the timing of State Courts.*"

The above is settled case law of the Court of Catania: in fact, the decision at hand also refers to certain similar rulings (Court of Catania, 14 November 2013 and Court of Catania, 14 October 2005).

For the time being, that doctrine is only followed by the Court of Catania; nonetheless, other Corporate Chambers could follow it in the near future and therefore a question occurred to me as to the available solutions.

A number of arbitration institutions set up specific rules on emergency arbitration. In Europe, International Chamber of Commerce (Article 29 of ICC Rules of Arbitration and their Appendix V), Stockholm Chamber of Commerce (Appendix II of SCC Arbitration Rules), and Swiss Chambers' Arbitration Institution (Article 43 of the Swiss Rules of International Arbitration) could be mentioned. In Asia, Singapore International Arbitration Centre (Article 26 and Schedule 1 of SIAC Rules currently in force, corresponding to Article 30 and Schedule 1 of the Rules in force starting from 1 August 2016) and Hong Kong International Arbitration Centre (Article 23 and Schedule 4 of the HKIAC Rules).

All these Rules provide for the appointment of an Arbitral Tribunal having only interim jurisdiction and also set forth streamlined procedural rules.

Similar provisions do not seem necessary (nor useful) in Italy because Arbitral Tribunals usually do not have interim jurisdiction and also because of the above-

mentioned case law concerning the very case where they do have such jurisdiction, that is to say, the case of corporate arbitration. However, the perspective would significantly change, should other Courts follow the doctrine laid down by the Court of Catania.

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Making of the award

by Roberto Oliva

A recent decision of the Court of Appeal of Venice (decision no. 1855 of 17 August 2016) deals with the topic of the making of the award in the case of 'filibustering' arbitrators.

The case heard by the Court of Appeal, in a nutshell, is as follows.

The claimant requested the setting aside of an arbitral award on a number of grounds.

In particular, he claimed that the award had not been made by a decision of the Arbitral Tribunal, as per Article 823 of Italian Code of Civil Procedure.

In this respect, the Court found that when the arbitrators met to make the award, one of the three arbitrators left the meeting as soon as he realised that the majority did not share his view on a preliminary issue. Therefore the award, as to the merits, was only made by the two remaining arbitrators.

The Court of Appeal of Venice set aside the award, and it was right. Indeed, the arbitral award has to be made by the Arbitral Tribunal as a whole; that is to say, all the arbitrators shall take part in the decision process, even though the decision is taken by majority. On the other hand, Italian law usually does not require the arbitrators to meet in person: therefore, for example, the Chair might send by email a draft, subject to comments and amendments by the co-arbitrators.

A question then arises: in the factual framework of the case heard by the Court of Venice, was there a remedy? In other words: is there a remedy in the (hopefully rare) case of a 'filibustering' arbitrator?

Italian law provides for a remedy. Indeed, under Article 813(b) of Italian Code of Civil Procedure, the arbitrator who omits to carry out an act related to his office (*e.g.*, an arbitrator refusing to make the award) may be replaced. Moreover, he could also be liable, if the parties suffered damage because of his behaviour (in this respect, for instance, see Supreme Court, I Civil Chamber, decision no. 4823 of 27 February 2009)

Corporate disputes

by Roberto Oliva

Corporate disputes are capable of arbitration, under Italian law, if they concern negotiable rights (Art. 34(1) of Legislative Decree no. 5 of 17 January 2003). Therefore, the question is: what does 'negotiable rights' mean?

The Court of first instance of Florence established an interesting doctrine of arbitrability of corporate disputes, which is enunciated in a recent decision (no. 2906 of 8 September 2016).

The case heard by the Court of Florence was quite simple. The claimant, a quotaholder of a limited liability company, challenged a resolution passed by the general meeting. The defendant, that is the company, appeared in Court and objected to the jurisdiction of State Courts, because of the stipulation of an arbitration clause in its Articles of association. The Court of Florence upheld that objection and declared that the jurisdiction rested with the Arbitral Tribunal.

So, why is that decision of interest?

The claimant's case was that he has been not duly summoned to the general meeting. As a consequence, the resolution would have been void (and not just voidable), and therefore a doubt arose as to the arbitrability of the dispute.

The Court of Florence ruled that the dispute was capable of arbitration and, to do so, it carefully examined the law.

First, as a general rule, corporate disputes – including those concerning the validity of general meeting resolutions – are capable of arbitration. In this respect, the Court of Florence referred to the case law of the Italian Supreme Court (Supreme Court, VI Civil Chamber, decision no. 17283 of 28 August 2015).

In addition, a dispute concerning the validity of a resolution passed by a general meeting to which a quotaholder has not been summoned is also capable of arbitration. Indeed, although such a resolution is void, it may be so declared

only if it is challenged within a three-year limitation period. Also in this respect, the Court of Florence referred to the case law of the Italian Supreme Court (Supreme Court, VI Civil Chamber, decision no. 15890 of 20 September 2012).

Moreover, the Court derived a general principle from that particular rule. If the law sets forth that a resolution may only be challenged within a certain limitation period, the relevant dispute concerns negotiable rights. As a consequence, it is capable of arbitration.

At the end of the day, the disputes non capable of arbitration are only those concerning the validity of resolutions changing the corporate purpose to an impossible or unlawful one. Indeed, these resolutions may be challenged without time limits.

Another kind of disputes non capable of arbitration, which the Court of Florence did not mention, are those in which the law requires the intervention of the public prosecutor. Indeed, the law expressly sets forth that these disputes are not capable of arbitration (Art. 34(5) of Legislative Decree no. 5/2003).

What about the disputes concerning the resolutions approving the company's financial statements? Are they capable of arbitration? In the light of the doctrine of the Court of Florence: yes, they always are. Indeed, these resolutions may only be challenged within the approval of the following financial statements (Art. 2434(b) of Italian Civil Code). However, the Supreme Court reached the opposite conclusion: it stated that if the claimant's claim concerns the content of the financial statements, the jurisdiction only rests with State Courts. On the contrary, the jurisdiction may lie with an Arbitral Tribunal if the claim does not relate to the content of the financial statements: say, it concerns the summons to the general meeting.

This doctrine of the Italian Supreme Court does not have a proper foundation in law. Moreover, the relevant decisions of the Supreme Court seem to be made *per incuriam* of the case law of the same Supreme Court, referred to by the Court of Florence.

So, we should wait for the Supreme Court to review its doctrine – or for the Parliament to clarify the law.

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Arbitrability of corporate disputes

by Roberto Oliva

A recent decision of the Court of Appeal of Catanzaro (no. 1478 of 22 September 2016) sums up the current doctrine of arbitrability of corporate disputes.

The case heard by the Court of Appeal was pretty simple.

The claimant, a quotaholder of a limited liability company, sued the director of the company, claiming his liability, and commenced arbitration proceedings as provided for by the company's Articles of association. Besides claiming damages on behalf of the company, the claimant also requested the Arbitral Tribunal to remove the director under Article 2476(3) of Italian Civil Code.

The defendant objected to the jurisdiction of the Arbitral Tribunal, the *locus standi* on the part of the claimant, and the merits of the claim.

The Arbitral Tribunal found not to have jurisdiction to remove the director and to have jurisdiction over the claim for damages, which was upheld.

The defendant requested the Court of Appeal of Catanzaro to set aside the award. He insisted that the Arbitral Tribunal did not have jurisdiction over the claim, since it concerned a collective interest which is not capable of arbitration (an old and superseded doctrine of the Supreme Court maintained that disputes concerning a so-called 'collective interest' were not capable of arbitration: Supreme Court, I Civil Chamber, 25 May 1965, no. 999). Moreover, the defendant also alleged that he was prevented from presenting his case in the arbitration proceedings.

The Court of Appeal dismissed both the grounds for the setting aside. The most interesting one is that concerning the arbitrability of the dispute.

The Court of Appeal referred to the case law whereby "*the disputes between the company and the directors, although concerning the director's activity and the rights arising thereof (as the right to remuneration), are capable of arbitration, if so provided by the Articles of association*" (Supreme Court, I Civil Chamber, 11 February 2016, no. 2759; the

topic was specifically discussed with respect to a claim for damages against a director by Supreme Court, I Civil Chamber, 19 February 2014, no. 3887, which the Court of Appeal did not mention).

From a general point of view, the Court of Appeal referred to the doctrine of the Supreme Court whereby the area of non negotiable rights, which are not capable of arbitration, only concerns the rights arising out of "*imperative rules, the violation of which triggers the Court's intervention without the need of any initiative by the parties*" (Supreme Court, I Civil Chamber, 12 September 2011, no. 18600). This is the doctrine the Supreme Court relies on to rule that disputes concerning resolutions approving the company's financial statements are not capable of arbitration, if the claim refers to the content of the financial statements.

Another doctrine, which is sometimes stated by Supreme Court, appears more persuasive: "*the disputes concerning resolutions passed by the General Meeting having an unlawful or impossible subject are the sole disputes concerning non negotiable rights and which therefore are not capable of arbitration under Article 806 of Italian Code of Civil Procedure*" (Supreme Court, VI Civil Chamber, 27 June 2013, no. 16265).

Claims against a company's directors may be waived or may be the subject matter of a settlement agreement (Article 2394 of Italian Civil Code). Therefore, it is clear that the relevant right is negotiable and the jurisdiction over the case heard by the Court of Appeal of Catanzaro lied with the Arbitral Tribunal.

An interesting issue was not analysed by the Court of Appeal (apparently, it was only analysed in the arbitration proceedings): the issue concerning the request to remove the director under Article 2476(3) of Italian Civil Code.

The Arbitral Tribunal found that it did not have jurisdiction over that request. I believe these findings are right. Indeed, under Italian law such a request amounts to a request for an interim order (although it is disputed whether it is also possible to seek a pre-trial interim order). In the matter of corporate arbitration, Arbitral Tribunals do have interim jurisdiction, but only to stay resolutions passed by the General Meeting (Article 35(5) of Legislative Decree no. 5 of 17 January 2013).

The reasons supporting such a limitation of the interim jurisdiction of Arbitral Tribunals are unclear. A new reform of Italian arbitration law has been proposed since a number of years and it appears that, at last, the Parliament is willing to enact it. Let's hope that this (possible) new piece of legislation will reconsider the matter.

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Arbitration and interim relief

by Roberto Oliva

It is the first time I comment on a non-Italian decision: it is a decision delivered by the High Court of England and Wales (Gerald Metals SA v. The Trustees of the Timis Trust & others [2016] EWHC 2327 (Ch)). The decision concerns the relationship between interim jurisdiction of State Courts and Arbitral Tribunals and it remembered me of the doctrine of Italian State Courts in the few cases Italian Arbitral Tribunals have such a jurisdiction (that is, in the case of corporate arbitration).

The claimant commenced arbitration proceedings under LCIA rules, claiming the breach of a guarantee. LCIA rules allow the appointment of an emergency arbitrator, in case of exceptional urgency, and the claimant requested the LCIA to appoint such emergency arbitrator, seeking a freezing order (amongst other things).

The defendant replied by undertaking not to dispose of any assets other than for full market value and at arm's length, and to give seven days' notice before disposing of certain assets. In the light of these undertakings, the LCIA rejected the application for the appointment of an emergency arbitrator.

As a consequence, the claimant sought an interim measure from the High Court. In particular, he pleaded that the mere fact that the LCIA rejected its application did not prevent it from filing the same application with the High Court. Indeed, the LCIA only appoints an emergency arbitrator in case of exceptional urgency, whereas the High Court issues interim measures in any case of urgency – even if it is not exceptional.

The High Court stated that "*it would be uncommercial and unreasonable to interpret the LCIA rules as creating such a gap*" and that "*it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may*" issue interim measures.

The doctrine set forth by Italian Courts is quite similar: under Italian law, even in the few cases where Arbitral Tribunals have interim jurisdiction, State Courts

may issue interim measures, if the Arbitral Tribunal cannot exercise its powers (say, if the Arbitral Tribunal has not been constituted).

The decision delivered by the High Court appears to be a significant one, since it limits the Court assistance to LCIA arbitrations. The same doctrine – quite paradoxically – allows the Court assistance to Italian arbitrations in corporate matters.

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Arbitration and tort claims

by Roberto Oliva

Italian Arbitration Law, as amended in 2006, expressly provides for the parties to enter into an arbitration clause concerning their possible tort disputes. Indeed, Article 808(b) of Italian Code of Civil Procedure, as enacted by 2006 reform, sets forth that "*The parties may establish, in a specific agreement, that future disputes relating to one or more specific non-contractual relations be decided by arbitrators (…).*"

There are only a few reported cases concerning Article 808(b) of Italian Code of Civil Procedure, and therefore it appears that that tool is rarely used. Nonetheless, it could be very helpful: for instance, in the case of related actions, it could prevent the doctrine of 'parallel paths' from applying.

A recent decision of the Italian Supreme Court (Supreme Court, VI Civil Chamber, decision no. 20673 of 13 October 2016) deals with that matter. As far as I know, it is the first decision issued by the Italian Supreme Court concerning the construction of Article 808(b) of Italian Code of Civil Procedure.

The case heard by the Italian Supreme Court may be summarised as follows.

Wind Jet and Alitalia entered into a memorandum of understanding and an agreement (in April 2012) concerning the possible purchase by Alitalia of Wind Jet's going concern.

Wind Jet claims that Alitalia unlawfully refused to enter into the sale and purchase agreement; moreover, it has even used some confidential pieces of information it received during the negotiations so as to gain market shares at the expenses of Wind Jet. Such behaviour would entail, under Italian law, a liability in tort and therefore Wind Jet sued Alitalia in the Court of first instance of Catania, seeking compensation for the suffered damage.

Alitalia appeared in Court and objected to its jurisdiction, noting that the agreement entered into by the parties provided for an arbitration clause, further specifying that the Court of first instance of Milan shall be the proper venue for disputes that cannot be brought in arbitration. As an alternative, the proper

venue would be the Court of first instance of Civitavecchia, where Alitalia has its registered office.

The Court of Catania upheld Alitalia's objection and stated that the jurisdiction lies with the Arbitral Tribunal provided for by the arbitration clause entered into by the parties. Wind Jet appealed that decision to the Italian Supreme Court, claiming that the above mentioned arbitration clause does not refer to non-contractual disputes (such as the one arose between the parties).

Alitalia appeared in Court, pleading that the Court of Catania was right in giving a broad construction of the arbitration clause, as it is expected (and indeed required) to do under Article 808(d) of Italian Code of Civil Procedure. In any event, Alitalia noted that, should the arbitration clause not apply, the Court of Milan (or of Civitavecchia) would be the proper venue for the dispute.

The Supreme Court ruled that the jurisdiction over the dispute does not rest with an Arbitral Tribunal because the arbitration clause does not refer to non-contractual disputes. That clause reads as follows: "*All the disputes arising out of this Agreement, including those concerning its validity, construction, fulfilment and termination, shall be settled under the national rules of the National and International Arbitration Chamber of Milan (…).*" The Supreme Court ruled that, in order to have a non-contractual dispute settled by arbitration, that dispute has to be mentioned in the arbitration clause and, failing the parties to mention it, the construction rule contained in Article 808(d) of Italian Code of Civil Procedure is to no avail: "*under Article 808(b) of Italian Code of Civil Procedure, if the parties wish their non-contractual disputes, stemming from a contractual agreement, settled by arbitration, they have to expressly state their intention. In other words, in the light of the provision contained in Article 808(b) of Italian Code of Civil Procedure, if the parties did not express their intention to also have their non-contractual disputes settled by arbitration, Article 808(d) of the above mentioned Code is to no avail. Indeed, Article 808(d) of Italian Code of Civil Procedure allows a broad construction of the arbitration clause, provided that the parties have expressly provided for the jurisdiction of an Arbitral Tribunal over their non-contractual disputes.*"

In the case at hand, the findings of the Supreme Court are also confirmed in the light of another clause contained in the agreement entered into by the parties, that is the clause whereby "*(…) the Court of first instance of Milan shall be the proper venue for any dispute concerning this Agreement that cannot be brought in arbitration.*" Indeed, that clause would be meaningless, if the parties had agreed on an arbitration clause concerning all their possible disputes (regardless of their contractual or non-contractual nature).

The Supreme Court ruled that the jurisdiction over the case rests with the State Courts and that the proper venue is the Court of first instance of Milan. Meanwhile, it also provided helpful guidance as to the content and the wording of arbitration clauses, in the case the parties wish all their disputes (contractual and non-contractual) be settled by arbitration.

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Setting aside of a partial award

by Roberto Oliva

If the Arbitral Tribunal issued a partial award on jurisdiction, should the parties immediately request its setting aside or may they await the issuance of the final award? A recent decision of the Italian Supreme Court sitting *en banc* (decision no. 23463 of 18 November 2016) maintains that the request for setting aside of such a partial award shall be filed together with the request for setting aside of the final award.

In a nutshell, the case heard by the Supreme Court is as follows.

The claimant, a contractor, commenced the arbitration proceedings provided for by the arbitration clause contained in the contract for works.

The case was somewhat peculiar since the contractor who entered into the contract for works was a sole trader; on the other hand, the contractor which performed the works and commenced the arbitration proceedings was a company, to which the sole trader transferred its business before the stipulation of the contract for works.

The Arbitral Tribunal issued two awards: in 2007, a partial award on jurisdiction, and in 2008 the final award on the merits.

The respondent, that is the principal of the contract for works, requested the setting aside of both awards and they were actually set aside by the Court of Appeal of Naples. The Court, indeed, upheld the respondent's objection that the claimant (contractor-company) is other than the party who entered into the arbitration clause (contractor-sole trader) and therefore the Arbitral Tribunal does not have jurisdiction over the disputes between the principal and the contractor-company.

The claimant appealed to the decision of the Court of Appeal on two grounds. The second one referred to the construction of the contract for works (and I do not examine it here). As far as the first ground for appeal is concerned, it referred to the request for setting aside of a partial award on jurisdiction. Indeed, in the opinion of the claimant, the request for setting aside of such an award

should be immediately filed under Article 827(3) of Italian Code of Civil Procedure (whereby "*The award which decides partially the merits of the dispute may be challenged immediately (…).*")

That issue entails two questions. The first question is whether the request for setting aside of a partial award may only be filed if the partial award decides on a claim (this is the doctrine of Supreme Court, I Civil Chamber, decision no. 4790 of 26 March 2012) or also if the partial award decides on particular issues, such as on jurisdiction or the statute of limitations (as stated by Supreme Court, I Civil Chamber, decision no. 5634 of 6 April 2012). Moreover, the second question is whether the decision on jurisdiction is a decision on the merits (as stated by Supreme Court, I Civil Chamber, decision no. 5634 of 6 April 2012) or a decision on a procedural matter (this is the doctrine of Supreme Court sitting en banc, decision no. 24153 of 25 October 2013).

The answer to the second question is that already provided by the Supreme Court sitting *en banc*: the issue concerning the jurisdiction of the Arbitral Tribunal is an issue on a procedural matter.

As far as the first question is concerned (that is, whether the request for setting aside of a partial award on jurisdiction may – and therefore shall – be immediately filed), the decision at hand is not crystal clear. Nonetheless, its conclusion is clear: the parties shall immediately request the setting aside of a partial award on liability (as already stated by Supreme Court, I Civil Chamber, decision no. 2715 of 7 February 2007) or a partial award only deciding on some claims while the arbitration proceedings continue with respect to other claims. On the contrary, the parties cannot immediately request the setting aside of a partial award on jurisdiction nor a partial award on preliminary issues (such as the statute of limitations).

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