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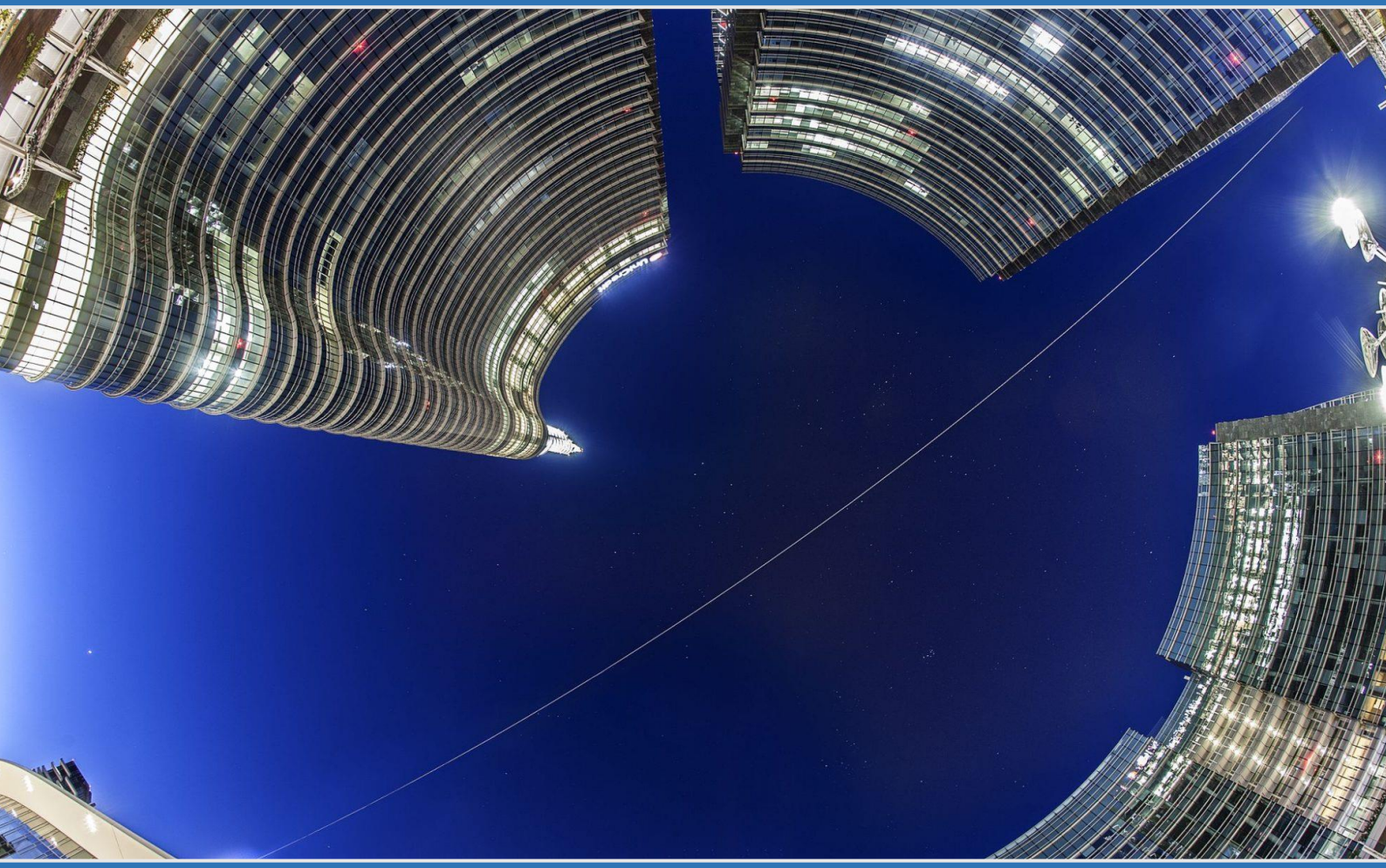

Arbitration in Italy

News on international and domestic arbitration in Italy

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Arbitration and order for payment

by Roberto Oliva

A recent decision issued by the Court of first instance of Rome (no. 24195 of 28 December 2016) gives us the chance to examine an interesting topic: that concerning the relationship between arbitration and order for payment.

The case heard by the Court of Rome was quite simple.

The claimant requested and obtained an order for payment, which was issued by the Court of Rome.

The defendant requested the Court to set aside that order, objecting to the jurisdiction of State Courts since the agreement out of which the claimant's credit stemmed contained an arbitration clause and therefore the jurisdiction over the dispute lied with an Arbitral Tribunal. Moreover, the defendant also objected that the Court of first instance of Rome, in any case, was not the proper venue for the dispute, since in a subsequent agreement – maybe a settlement – the parties had agreed that the proper venue for their disputes was the Court of first instance of Turin. Eventually, as to the merits, the defendant denied owing any sum to the claimant.

The Court of Rome upheld the objection to its jurisdiction and set aside the order for payment.

The decision at hand did not examine a very interesting issue, that is that concerning the enforceability of an arbitration clause in the case of a subsequent settlement agreement (that topic was recently examined by the Court of first instance of Milan in its decision no. 13960 of 21 December 2016). Nonetheless, the decision of the Court of Rome is quite interesting as to the relationship between arbitration and order for payment.

Under Italian law, the order for payment is an ex parte order. In a nutshell, the claimant has to provide the Court with written evidence of his credit. That's all. Thereafter, the claimant's application and the order for payment are served on the defendant. The defendant may request ordinary proceedings by requesting

the Court to set aside the order for payment. In these ordinary proceedings, he is obviously entitled to raise all his objections, as to the procedure and as to the merits.

Even though the claimant's credit arises out of an agreement containing an arbitration clause, the State Court cannot refuse to issue the order for payment. Indeed, the objection to the jurisdiction of State Courts may only be raised by the parties and cannot be raised by the Court by its own motion. This doctrine is settled case law of the Italian Supreme Court (for instance, Supreme Court, II Civil Chamber, decision no. 5265 of 4 March 2011).

In other words, an order for payment may be issued by a State Court notwithstanding the parties entered into an arbitration clause. It is up to the defendant to object to the jurisdiction of State Courts and request to set aside the order for payment. To raise that objection, the defendant has only to prove that the parties entered into an arbitration clause. If that clause is enforceable, the Court sets aside the order for payment. It has not to be satisfied that there is a genuine dispute between the parties (as in certain common law jurisdictions).

This is the reason why some arbitration clauses expressly exclude from their scope of application the order for payment. I believe that such clauses are not so useful. Indeed, an arbitration clause allowing the parties to request the Court to issue an order for payment (as the clause analysed in that post) appears to be useless: the parties are already allowed to do so. Moreover, an arbitration clause excluding from its scope of application the whole proceedings (that is, also the full trial triggered by the defendant's request to set aside the order for payment) appears to jeopardise the parties' intention to have their disputes settled by arbitration.

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Setting aside of arbitral awards

by Roberto Oliva

A recent decision delivered by the Court of Appeal of Brescia (decision no. 71 of 19 January 2017) lets us briefly examine Italian rules on setting aside of arbitral awards and, in particular, the grounds for setting aside under Article 829 of Italian Code of Civil Procedure.

First of all, it should be noticed that the Court rejected the request for setting aside and even blamed the claimant for filing a petition whereby, in essence, it requested a new decision on the merits of the dispute, although it has formally referred to the grounds for setting aside under Article 829 of Italian Code of Civil Procedure. In other words, the claimant was seeking for a new decision on the merits by the State Court, irrespective of the validity/invalidity of the award.

In this respect, the Court of Appeal stated that "*the proceedings for setting aside of arbitral awards are not appellate proceedings. In the proceedings for setting aside of arbitral awards, the Court of Appeal has to (…) ascertain whether the award (…) is invalid due to a reason provided for by Italian law. Indeed, the Court of Appeal may only set aside an arbitral award if it is satisfied that it is invalid due to a reason provided for by Article 829 of Italian Code of Civil Procedure (…).*"

In other words, the proceedings for setting aside are proceedings on points of law: as a general rule (subject to limited exceptions) the State Courts cannot ascertain the relevant facts, nor deliver a new decision on the merits.

These proceedings are two-stage ones: if the State Court set aside the award, and only if it does so, the second stage commences, where the Court re-examine the merits. Anyway, such a stage could be missing, even if the Court sets aside the award: for instance, if the Court finds that the arbitral tribunal does not have jurisdiction over the case, the judge having jurisdiction issues its decision on the merits. Moreover, in the case of international arbitration (that is, if the arbitration proceedings also involved at least an overseas party), a new arbitral tribunal has to be appointed to deliver a new award on the merits (Article 830(2) of Italian Code of Civil Procedure).

The decision at hand also contains interesting references to the case law concerning a specific ground for setting aside: that provided for by Article 829(1)(11) of Italian Code of Civil Procedure ("*if the award contains inconsistent provisions*"). It is settled case law of the Italian Supreme Court that such ground for setting aside refers to an inconsistency in the operative part of the award ('*dispositivo*') or between the reasons ('*motivazione*') and the operative part of the award (Supreme Court, I Civil Chamber, decision no. 3768 of 21 February 2006, Italian text available here) – although some lower Courts maintain that a mere inconsistency between reasons and operative part of the award does not entail its invalidity – whereas an inconsistency in the reasons for the award, that is between statements contained therein, does not allow the Court to set aside the award, unless the actual reasons for the decision issued by the Arbitral Tribunal are incomprehensible by any rational person (in such a case, indeed, it could be stated that there are no reasons for the decision at all). As a consequence, the Court of Appeal ruled that "*the Court cannot set aside the arbitral award if it is satisfied that a quid minimum of reasons was given by the Arbitral Tribunal.*"

At the end of the day, the decision of the Court of Appeal of Brescia is a clear example of the attitude of Italian State Courts towards arbitration: they are supportive of arbitration and reject requests for setting aside whereby the claimants are seeking a new trial on the merits.

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