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Drafting Arbitration Clauses and Arbitration Agreements Governed by Italian Law

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1. Introduction

As elsewhere in the world, arbitration is the most common form of alternative dispute resolution in Italy.

Due to the need to keep all matters in a dispute confidential and the efficiency of private judges, arbitration may be the preferred method over the ordinary courts' jurisdiction as a means to solve disputes. However, of the usual qualities of arbitration, the speed of a decision is perhaps the most appreciated in Italy, a country where the civil courts' are overwhelmed by a backlog of work, hence unable to provide decisions within a reasonable time. Rapidity of decision has also the effect of counterbalancing the higher expenses incurred for arbitration compared to the cost of ordinary judiciary proceedings.

The non-Italian legal advisor has to be aware – and carefully consider when negotiating contracts governed by Italian laws, when agreeing on dispute resolution clauses, - a few peculiarities of Italian law.

The following are notes on some of these peculiarities, affecting the drafting of arbitration clauses and arbitration agreements in contracts governed by Italian law.

The procedure for arbitration subject to Italian law is extensively set forth in "Codice di Procedura Civile" (hereinafter referred to as "C.P.C."), vide Articles 806 to 840, and such set of rules has been recently amended by means of Legislative Decree No. 40 dated 2.2.2006. Such Decree (hereinafter referred to as "Decree 40/2006") was passed by the Italian Government in order to update the rules of law regulating arbitration, in line with the developments of practice and of jurisprudence.

In addition to the general rules of C.P.C., some specific rules of law provide for the option to refer to arbitration the disputes arising out of particular contractual relationships, e.g. labour disputes and disputes pertaining to public tenders.

2. Disputes that cannot be referred to arbitration

According to C.P.C., in principle all disputes can be referred to arbitration, with the exception of the disputes concerning inalienable rights and in any case subject to provisions of law to the contrary (Article 806 C.P.C.).

Article 1966, paragraph 2 of Italian Civil Code (hereinafter referred to as "C.C."), excluding any possibility of settlement agreements with respect to inalienable rights, may be seen as complementary to Article 806 C.P.C..

The following are the most common example of matters which, according to Italian laws, cannot be referred to arbitrators:

a) disputes falling under the jurisdiction of criminal courts;

b) disputes falling under the jurisdiction of administrative courts. It shall be noted that in the Italian Legal system a number of disputes between private entities and public authorities are not referred to the civil jurisdiction, most of them being on the contrary subject to the exclusive jurisdiction of administrative judges. In particular, the disputes pertaining to all legitimate interests, as well as to some individual rights claimed by the individual towards the public authority, are referred to the exclusive jurisdiction of administrative judges.

b1) However, one exception is to be found in Article 6, paragraph 2 of Law 205/2000, the disputes which between a private entity and a public authority pertaining to an individual right can be settled by means of arbitration if so the parties decide. In such an event, the only arbitration admissible is the "arbitrato rituale" (on which vide paragraph 5. of this paper) and arbitrators must decide applying the provisions of law;

c) disputes between the parties of a public contract concerning the implementation of such a contract; it shall be noted that said disputes were subject to a specific regulation set forth in Article 241 of Legislative Decree 163/2006, which provided for the possibility (not the obligation) to settle such disputes by means of arbitration to be administered through an authority set up for this specific purpose, the Camera Arbitrale dei Lavori Pubblici; said regulation however has been substantially repealed according to Article 3, paragraphs 19 to 22 of Law 244/2007, that expressly exclude the possibility to resort to arbitration in said disputes;

d) labour law disputes can be settled by arbitration only if and when so provided by law or by terms of collective labour agreements (vide Article 806 Paragraph 2 C.P.C.).

An example of provision of law providing for arbitration in labour disputes is given by Article 7 of Law 300 dated 20.5.1970, which entitles the worker to appeal against a disciplinary measure levied by the employer (such appeal having the effect to suspend the effects of the measure), however without prejudice to the possibility to resort to the jurisdiction of the Courts[1]. It shall be noted that, also in the event that provisions of collective labour agreements provide for disputes to be solved by means of "arbitrato irrituale" (about the difference between "arbitrato rituale" and "arbitrato irrituale" please vide paragraph 5. of this paper) then either Party has nevertheless the right to resort to the jurisdiction of courts instead of arbitration (Article 5 of Law 533/1973), while the Decree 40/2006 has deleted from C.P.C. the same possibility in the event of "arbitrato rituale".

In consideration of the specificity of the such matter, the compulsory conciliation attempt in labor disputes, which is a precondition for starting an action in court (Art. 410 C.P.C.) is not the subject of the present paper, although in the opinion of the author such compulsory attempt may be considered as an "arbitrato irrituale" (vide paragraph 5 hereto).

e) In the contracts between a consumer and a "professional" (such term meaning to indicate entrepreneurs operating in the course of their professional activity), the clauses derogating the competence of the ordinary civil courts are presumed to be unbalanced in favor of the professional, and therefore void, when included in contracts which are not

[1] Such an arbitration shall be considered as "irrituale" (on arbitrato "irrituale" vide paragraph 5. hereof) in such regard vide the interpretation of Italian Corte di Cassazione, Labour Law Section, decision 4.4.2002 no. 4841

the result of a negotiation (vide Legislative decree 206/2005 Article 33 paragraph 2, letter t)). However, Article 36 Paragraph 2, letter b) of the same decree states that any clause (whether negotiated or not) having the effect to limit the legal actions available to the consumer against the professional (as defined above) is void. The invalidity of the clauses derogating the competence of ordinary civil courts may be enforced by the sole consumer.

Apparently an exception to the rule is found in Article 141 of the same decree, allowing the valid inclusion in the contract of terms and conditions providing for ADR through legal institutions therein indicated- however, whatever is the result of such ADR, the consumer has always the option to resort to ordinary civil courts instead of arbitration.

3. The agreement leading to arbitration

With the limited exceptions of arbitration provided for by the law (e.g. Article 7 of Law 300/1970 seen above), the source of the obligation, or of the option to refer a dispute to arbitration, is to be found in the will of the Parties, either preliminarily expressed in a contract through an arbitration clause (in Italian "clausola compromissoria") agreed before possible disputes, or set forth in a contract having the precise object of referring a dispute to arbitration after such a dispute has arisen (arbitration agreement, in Italian "compromesso"). Given the substantial identity of the provisions of law affecting arbitration clauses and arbitration agreements, both said legal institutes are collectively hereinafter referred to as "arbitration covenant(s)" (whereas Italian law uses the category of "convenzione arbitrale").

For the sake of completeness, Article 808-bis C.P.C. (enclosed in C.P.C. by Decree 40/2006) has introduced a third kind of covenant, i.e. the arbitration covenant aiming to refer to arbitration the future disputes arising out of "non contractual relationships" between two individuals or companies. This third kind of arbitration covenant is not treated in the present paper.

Regarding the investigation of the validity of an arbitration clause, it shall be noticed that the legal advisor in the international trade environment has to deal with the circularity arising out of the relationship between evaluation of the validity of a certain contract and availability and effectiveness of the arbitration clause therein enclosed- in other words: can the dispute regarding invalidity of the Contract be settled by means of an arbitration, which is precisely provided by the same contract alleged to be void or invalid?

In international trade praxis, in order to solve this apparent circularity, in the arbitration clauses expressions are inserted in order to expressly state that all disputes are is solved by expressed provisions aiming to include in arbitration even the disputes pertaining to validity, termination, interpretation of the contract.

As regards Italian law, Paragraph 2 of Article 808 C.P.C. may be seen as dealing with this matter, since it clarifies that (i) the validity of the arbitration clause shall be evaluated autonomously from the rest of the contract it pertains to; and (ii) the power of the individual to stipulate the contract includes also the power to agree the arbitration clause.

From (i), it follows that, while a certain contract is invalid under Italian law, such invalidity does not affect the full effectiveness of the arbitration clause therein enclosed, therefore arbitration can be resorted to as regards disputes arising out of the invalid contract[2].

[2] Corte di Cassazione 14.4.2000, no. 4842- in such decision the Corte di Cassazione ruled that in the event that the arbitration clause enclosed in a contract is valid, the arbitration panel envisaged in such a clause shall be validly competent in settling a dispute pertaining to a contract, even if the remaining part of the contract is

When the validity of an arbitration covenant is under scrutiny, besides the specific rules of law in the matter of arbitration, it shall be stressed that, since either arbitration is foreseen in an arbitration clause set forth in a contract, or –less frequently- a dispute is referred to arbitration by means of an arbitration agreement being itself a contract, the provisions of Italian C.C. regarding the matter of the validity of contracts and the form thereof shall also be considered.

Actually, the first problem that the legal advisor has to face when dealing with drafting arbitration clauses is precisely their form.

The form of the agreement

3.1 The written form requirement

The first –quite obvious- consideration is that the arbitration clause must be in writing; in such regard vide Article 808 C.P.C., which extends to arbitration clauses the requirements provided for arbitration agreements by Article 807 C.P.C., this latter expressly qualifying the written form as required on pain of the arbitration agreement being void. The requirement of written form can be satisfied also in the event of the contract being stipulated by fax, telex or email transmissions, provided that the requirements of Italian law for the validity of such transmission means are complied with.

The requirement of written form is also complied with in the event of contract being concluded by exchange of letters between the parties and therefore a valid arbitration clause might result from two different documents (proposal and acceptance) each one signed by one party.

In the (extremely unlikely) event that the parties verbally agree on a dispute to be settled by arbitration, such an agreement is to be considered in all respects to be null and void under Italian law.

3.2 The "double signature" procedure

Besides the written form requirement, the rule –to the knowledge of the author hereof not to be found anywhere else in Western countries- of the so called "double signature" shall be taken into account.

According to Italian Civil Code, vide Articles 1341 and 1342 C.C., in the adhesion contracts which are not subject to negotiation, being unilaterally drafted by the Offeror (whether in standard forms or in ad-hoc contracts) and submitted to the counterparty for its mere acceptance or withholding, i.e. without possibility of negotiation of the terms and conditions thereof, there is a list of categories of clauses, the so called "clausole vessatorie" (which term could be translated as "vexatious clauses" or "clauses which may lead to the abuse of one Party against the weaker other") that shall be "specifically accepted in writing" by the accepting party.

This is done as follows: first the whole Contract is signed; then under the signatures of the parties, a further line is added, stating that "In consideration of the provisions of Articles 1341 and 1342 of C.C., the undersigned [accepting party] specifically accepts the

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invalid or even void. The Corte was dealing with a case where a contractual proposal (including an arbitration clause) had been accepted with comments (such comments however not affecting the arbitration clause). Under Italian law (vide C.C. Art. 1326, Paragraph 5) a contractual acceptance which is not fully consistent with the relevant proposal is deemed to be a new proposal, therefore no valid contract (to be more precise, no contract at all) was arising from the aforementioned qualified acceptance, however with the exception –thanks to the provision of 808 Paragraph 2 C.P.C.- of the arbitration covenant embodied in the arbitration clause, which having been accepted without comments was valid and binding. Therefore the valid arbitration covenant entitled the arbitrators to settle disputes arising from the invalidity of the rest of the Contract, including the claim by the proponent for restitution of the cash deposit attached to the aforesaid proposal.

following provisions: [reference to the "vexatious clauses" follows- please note that it is advisable to mention such clauses by means of their clause number and also heading]". Then a second signature by the accepting party shall follow, being a token of its specific acceptance of the listed "vexatious clauses".

The arbitration clauses are expressly mentioned among the "vexatious clauses".

The obvious consequence is that, in order to be sure of the full validity of an arbitration clause, the drafting party shall have the accepting party approve it in writing.

However, it shall be underlined that the consequence of non specific approval in writing (e.g. in the event that the accepting party signs the contract only once) may not be the total invalidity of arbitration clause. In fact, according to Article 1341, paragraph 2 of C.C., the "vexatious clauses" that have not been expressly approved in writing cannot be invoked by the drafting party… but they might actually be invoked by the accepting party, at its option.

4. Arbitration as exclusive method to solve disputes

When reviewing a contract subject to Italian law, the legal advisor shall carefully consider also the matter of the exclusivity of the arbitration.

In the first place, it shall be noted that, according to Article 807 C.P.C., the arbitration agreement shall determine which is the matter in controversy, on pain of nullity of the arbitration, and the field of applicability of said provision is extended to arbitration clauses by Article 808 C.P.C..

When the arbitration is foreseen in an arbitration clause set forth in a Contract, the question arises as to whether such provision pertains to all of the disputes relevant to such contract or not.

Prior to the Decree 40/2006, the jurisprudence of Italian supreme court (the Corte di Cassazione, hereinafter also referred to as "C. Cass." or, when composed of representatives of all Sections of C. Cass., "C. Cass. SS. UU.) when interpreting arbitration clauses, assumed that, unless otherwise agreed in writing by the parties, any and all disputes arising out or in connection with the Contract where the clause was inserted were to be settled by means of arbitration3.

This interpretation has been consolidated by Article 808-quarter C.P.C., introduced by the Decree 40/2006.

It shall be kept in mind that, in the event that a claimant starts an action in front of the Court notwithstanding the arbitration clause being set forth in the Contract, the defendant shall object to it in its first act in the trial ("Comparsa di risposta"), otherwise the arbitration shall be considered as waived by the parties (vide Article 819-ter C.P.C.); this is due to the fact that the exception of arbitration cannot be raised by the Judge autonomously.

5. Choosing between "arbitrato rituale" and "arbitrato irrituale"

Arbitration covenants governed by Italian Law may qualify the arbitration as "rituale" (such a term might roughly be translated as "formal arbitration" or "arbitration by law") or "irrituale" ("informal arbitration").

It shall be clarified that, prior to Decree 40/2006, the arbitration governed by the C.P.C. was governing the so called "arbitrato rituale" and not the "arbitrato irrituale", although this latter, being a creation of the legal practitioners, has been now referred to in C.P.C.

[3] in such regard vide in particular C. Cass. 22.12.2005 no. 28485

through Decree 40/2006, that has introduced Article 808-ter, such Article mainly dealing with the matter of voidability of the arbitrators' decision rendered in an "arbitrato irrituale".

The most important hallmarks of "arbitrato rituale", being the "base case" for arbitration under Italian law, are set forth in Articles 824-bis and 825 C.P.C..

Article 824-bis C.P.C. plainly states that the arbitral award has got the same effectiveness as the judicial award rendered in the courts as of the date of the signature thereof by the members of the arbitration panel.

Article 825 C.P.C. sets forth the formalities for the judicial enforcement of the arbitral award: the party applying for enforcement shall file its claim, along with original (or certified copy) of the arbitral award and of the arbitration covenant with the competent Court, being the Court ("Tribunale") of the venue of the arbitration. The competent court, once the sole formal validity of the arbitral award has been verified, declares by means of decree the enforceability of the award. Just as for the judicial award rendered in court, the arbitral award so declared enforceable shall be noted or entered in public registers as and when required in accordance with applicable law.

For the sake of completeness, the recognition of foreign arbitral award is ruled by Articles 839 C.P.C., which provides for a procedure quite similar to the exequatur described in Article 825 C.P.C., with two differences:

- the competent Court is the Court of appeal of the place where the counterpart is resident, or, in the event of such counterpart not being resident in the Republic of Italy, the Court of Appeal of Rome;

- the recognition cannot be granted in the event that that its provisions constitute a breach of the public policy or in the event that the judicial award is issued on matters on which arbitration is not admissible under Italian law.

It shall be reminded that, in accordance with Article I of New York Convention of 1958, the arbitral award is to be considered as "foreign" when the venue of arbitration is outside Italy.

While in the "arbitrato rituale" the decision of the arbitrators effectively bears the same effect of a court decision, the "arbitrato irrituale" is much different in nature.

The "arbitrato irrituale", to whom the said Articles 824-bis and 825 C.P.C. do not apply (vide Article 808 ter C.P.C.), is commonly defined as the delegation of the power to resolve the dispute to a third party, whereas the parties in dispute undertake to accept the text of the decision of the third party as if such text was effectively a settlement agreement signed by them. A particular example of "arbitrato rituale" is the so called "arbitrato per biancosegno" (arbitration by signing a blank page) whereas the parties actually sign a settlement agreement whose content is intentionally left blank, and then hand over such document to the third party, the arbitrator, who fills in the blank.

From the above definition of "arbitrato irrituale", the consequence follows that in the "arbitrato irrituale" in the event of non-compliance by one party with the decision, immediate enforceability thereof through petition to the Courts is not possible, since said decision is not properly an arbitration decision- it bears effectively the same effects and value of a contract, or, to be more precise, of a settlement agreement; consequently, in the "arbitrato irrituale" the non compliance with the decision of the arbitrators gives rise to liability at contract of the non complying party- therefore the other party wishing to have such liability recognized and sanctioned will have to resort to ordinary civil courts.

Although the effects of the arbitration covenants providing for "arbitrato irrituale" are of a contractual rather than jurisdictional nature, the rules of law concerning their voidability partly differ from the general rules applicable to the other types of contracts.

In fact, according to the above mentioned Article 808-ter, the decision by the arbitrators in the "arbitrato irrituale" can be rendered void by the competent court, not only in the circumstances provided for voidability of the contracts, but also in a further circumstances listed in such Article, i.e. (i) in the event of arbitration clause being invalid (e.g. since it requires arbitrators to solve matters which cannot be resolved by arbitration); or (ii) in the event the arbitrators have exceeded their mandate; or (iii) if the arbitrators have not been appointed in accordance with the clause; or (iv) if the procedure agreed by the parties in dispute to be followed by the arbitrators as condition for validity thereof has not been followed by the arbitrators; or (v) in the event that the right of controverting has not been granted to one of the parties in dispute.

Apparently some of the circumstances listed in the preceding paragraph are mere reproductions of the "vices of the will" leading to voidability of contracts, and therefore such new article represents a clarification of the previous common practice. On the contrary, item (v) has resolved once for all an ambiguity as to the requirements of "arbitrato irrituale".

Notwithstanding that in the event that "arbitrato rituale" is chosen by the parties, the relevant decision has got the same value of a decision rendered by the competent courts, provided that the conditions of the C.P.C. are fulfilled, however the "arbitrato irrituale" is often preferred by some legal advisors since it allows a speedier and less expensive decision, the parties in dispute not being bound by strict procedural ties. The choice as to which of the two types has to be used shall of course be made on a case by case basis, taking into consideration the value of the contract and history of the relationship between the contracting parties.

Given the substantial difference between the two types of arbitration, questions arise as to (i) whether the requirements of "written form" are applicable to "arbitrato irrituale"; (ii) whether the rule of "double signature" is applicable to "arbitrato irrituale".

As regards the first question, the above quoted Article 808-ter provides for a final answer, defining the written form as a requisite for the validity of the clause providing for "arbitrato irrituale". Before such new provision introduced by Decree 40/2006, a stream of Italian Supreme Court decisions had maintained that written form was required for the validity of the clause only to the extent of dispute being referred to "arbitrato rituale"[4].

However, in consideration of Article 1967 C.C. dealing with settlement agreements, even before the Decree 40/2006 with respect to arbitration agreements and arbitration clauses providing for "arbitrato irrituale": (a) written form was anyway considered as necessary for their validity, to the extent that arbitration was relevant to contracts that, according to Italian Law (vide in particular Article 1350 C.C.) must be drawn up in writing on pain of nullity thereof such as real estate sale[5]; otherwise (b) written form was anyway needed for the purpose of proving the existence of arbitration agreement or of arbitration clauses[6]; meaning that the existence of an arbitration agreement could not be proven by means of witnesses of by means of presumptions.

As regards the second question, the new law does not expressly specify that 1341 and 1342 C.C. shall apply to an arbitration clause providing for "arbitrato irrituale";

[4] C. Cass. SS. UU. 14.5.97, no. 4258; C. Cass. 4.11.2004 no. 21139
[5] C. Cass 25.8.98 no. 8417
[6] C. Cass. 22.2.99 no. 1476; C. Cass. 7.7.99 no. 7048

precedents are to be found in jurisprudence of the Italian Supreme Court prior to Decree 40/2006[7], attesting that the requirement of double signature is applicable to "arbitrato rituale" only.

Although the inclusion of the provision for "arbitrato irrituale" de facto does not represent a final waiver by the parties in dispute of their right to resort to the Courts, and even if the relevant decision of the arbitrators cannot be comparable with a Court's decision, if in doubt it is strongly advisable to consider the clause providing for "arbitrato rituale" as being comprised in the field of application of Articles 1341 and 1342 C.C.- just as the clause providing for "arbitrato rituale".

Therefore, the advice for the legal advisor is of course to apply "double signature" in any event of arbitration clause enclosed in any adhesion contract.

In consideration of the foregoing observations, it will have become apparent for the reader that qualifying an arbitration as "rituale" or "irrituale", especially in the event that the wording of the arbitration clause is not crystal-clear in such regard, becomes a crucial matter.

Based on the principles ruling interpretation of contractual clauses (vide Articles 1362-1371 C.C.), the Corte di Cassazione stated that, in order to qualify the arbitration provided in the contract as "rituale", the Judge had to ascertain the actual intention of the parties of the contract even by reviewing and interpreting the whole contract[8]; in such regard, expressions tending to emphasize the mandate vested in the arbitrators to "judge" a dispute were usually interpreted as leading to "arbitrato rituale"[9].

When in doubt, ambiguous expressions were interpreted by the Courts[10] as being references to "arbitrato irrituale".

This trend might partially be due to a certain disfavour for the derogation of the Courts' power to issue enforceable decisions- which is basically the consequence of resorting to "arbitrato rituale", as already said.

Contrary to previous praxis, arbitration is currently (after the Decree 40/2006) presumed to be "rituale". In such regard vide new Article 808-ter of C.P.C., according to which the parties in dispute may, but only by means of an expressed written agreement to this effect, refer the dispute(s) to "arbitrato irrituale", thus excluding application of Articles 824-bis and 825 C.P.C..

In consideration of the aforementioned developments introduced by Decree 40/2006, it is strongly advisable that the legal advisor wishing to obtain an "arbitrato irrituale" set expressly such intention in the arbitration covenant; as a matter of fact, in the process of drafting and negotiating arbitration provisions, it is always better to specify in clear terms which kind of arbitration the parties have opted for.

6. Covenants entitling the arbitrators to decide "ex bono et aequo"

Unless otherwise set forth in the arbitration covenant, the arbitrators shall resolve the dispute by applying the Italian law then in force (vide Article 822 C.P.C.).

As an exception to this general rule, the Parties may agree (by so expressly stating in the arbitration covenant) that the arbitrators decide the dispute "secondo equità", i.e.: "ex bono et aequo", thus holding that arbitrators should decide disputes according to that which is deemed by them to be fair, and in good conscience.

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[7] C. Cass. 5.9.92 no. 10240
[8] C. Cass. 20.3.90 no. 2315; C. Cass. 26.7.01 no. 10188
[9] C. Cass. 1.2.99 no. 833
[10] C. Cass, Labour Law Section 4.4.02 no. 4841; C. Cass. 8.8.01 no. 10935

Many scholars have discussed at length through the years about the meaning of the Italian term "equità" (not to be mistaken with the English term "equity", but rather to be translated as "fairness") and about its relationship with the rule of law. In the personal opinion of the author, Aristotle's pages in such regard, although written more than two millennia ago, keep on being the most interesting for lawyers. The Greek philosopher (384 BC-322 BC) pointed out[11] that the rule of law by its own nature is universal, since it has to govern a generality of possible events, and therefore it is necessarily approximate, and can even turn to be inappropriate or unfair in some specific circumstances[12]. When such circumstances occur, the human feeling of fairness can operate as a correction of the rule of law, to the extent that such rule is defective due to its universal nature. When so specifically entitled by the parties in dispute, the arbitrators, in deciding ex bono et aequo, are therefore offered the option to apply "the justice for the concrete case" that is under arbitration, exceptionally replacing the legislator in finding out that rule, that presumably the legislator himself would have dictated, had he been aware of that peculiar circumstance under arbitration.

It shall be noticed that, even if the parties in dispute have issued a mandate to decide ex bono et aequo to the arbitrators, nevertheless the arbitrators may anyway validly decide to apply the rule of law[13]; in fact, the arbitrators may well consider that, given the circumstances, the application of the rule of law is perfectly consistent with the feeling of fairness. In the opinion of the author, one would expect that this be the most common case, but it is not necessarily so.

For the sake of clarity: the mandate to resolve the dispute "ex bono et aequo" does not imply that the arbitration has to be considered as "arbitrato irrituale", since both the "arbitrato rituale" and the "arbitrato irrituale" can be decided either "ex bono et aequo" (if so specifically required by the parties in dispute) or applying the provisions of law (in all other events).

Quite often the qualification of the arbitrators as "amichevoli compositori" (meaning that the arbitrators shall act as "amicable compounders") is found in arbitration clauses; under Italian praxis, said expression is usually considered as equivalent to an instruction to decide the dispute ex bono et aequo[14], but not necessarily as prescribing "arbitrato irrituale"[15].

Therefore the arbitrators acting as "amichevoli compositori" shall anyway follow, unless otherwise prescribed by the arbitration covenant, the procedure set forth in Articles 816 to 819-ter C.P.C., but their decision may be motivated upon the feeling of fairness, rather than on strict interpretation of the provisions of law.

In the opinion of the author, resorting to ex bono et aequo arbitration is in principle never advisable since it introduces a broad discretionary power –and therefore a certain level of uncertainty- in the decision of the arbitrators.

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[11] Nichomachean Ethics, Book 5, Chapter 10.

[12] One could also recall the ancient Roman saying that goes "*summum ius, summa iniuria*" (when the law is too strictly and literally applied, injustice may follow); quoted among others by the Roman senator (and attorney at law…) Cicero, 106 BC-43 BC (in De Officiis, I, 33)

[13] C. Cass. 12.4.88, no. 2879; C. Cass. 11.11.91 no. 12014; C. Cass. 13.3.98 no. 2741; C. Cass. 11.6.04 no. 11089

[14] However the expression "amichevoli compositori" is only a clue, not a definitive evidence: according to C. Cass. (decision 8.7.04 no. 12561) quoting the expression "amichevoli compositori" is not "per se" sufficient to qualify the arbitration as of aequo et bono arbitration, in the absence of further elements to be found in the Contract in accordance with the interpretative guidelines set forth in Codice Civile Articles 1362 to 1371

[15] C. Cass. 1.2.99 no. 833

It shall be also be reminded that specific provisions of law exclude arbitration ex bono et aequo in specific categories of disputes, (examples are given in paragraph 2. letters b1) and d) hereof). A peculiarity is given by labor disputes, that arbitrators must settle only applying the provisions of law and also the provisions of the applicable collective labor agreements (vide Art. 829 C.P.C.).

7. Provisions of the arbitration covenant pertaining to procedural matters

Although the present paper is not meant to examine the provisions of Italian law pertaining to arbitral procedure, the wording of the arbitration covenant may have a direct impact on the rules that the arbitrators have to follow, hence a few issues shall be taken into consideration in the contract negotiation stage in order to avoid unexpected (and possibly unpleasant) consequences in the event a dispute arises in connection with the contract.

Just as in any international contract not governed by Italian Law, under Italian law the parties, thanks to their contractual autonomy, may decide to set forth in the arbitration agreement some details of the arbitration proceeding, such as the number of arbitrators, the way to appoint them, the venue of arbitration, the language of arbitration; the parties can also provide for the detailed procedure to be followed by arbitrators (vide Article 816-bis C.P.C.).

In the event that the Parties in the arbitration clause or arbitration agreement do not set forth such details, the rules of C.P.C. shall apply, which rules provide for some broad discretionary rights of the arbitrators is deciding procedural issues. One peculiarity to be taken into account is the language to be used. In the event the arbitration clause do not specify the language of the arbitration, the arbitrators are free to choose the language of arbitration, which may, or may not be the language of contract.

Anyway, some limits to the autonomy of the parties in drafting arbitration clauses are found in C.P.C.. The main issues to be taken care of are the following:

1) In any event the arbitrators must abide by two principles, that cannot be waived or derogated by the parties: equal ranking ("par condicio") of the parties in front of the private judges and equal and reasonable right of controverting for each party (Article 816-bis C.P.C.). The second principle is expressly required to be followed even in the event of "arbitrato irrituale" (vide Article 808-ter No. 5 C.P.C.).

2) Venue of arbitration: the arbitration which is subject to Italian law shall be carried out in Italy, and when the venue of arbitration is set abroad, the arbitration shall be carried out in Rome. In the event of the Parties not taking any agreement as to the venue of arbitration, the arbitration shall be set in the place agreed upon by the arbitrators or, where no such agreement is reached, where the arbitration covenant has been stipulated, and if such place of stipulation is outside Italy, the venue of arbitration shall be Rome (Article 816 Para. 2 C.P.C.).

It should be noted that, even in the event that the parties have chosen the venue of arbitration, unless otherwise specified in the arbitration covenant the arbitrators may decide to convene, and carry out their tasks (including issuance and signature of the award), in another place, even abroad (Article 816 Paragraph 3 C.P.C.)

3) Number of the arbitrators and their appointment: the number of the arbitrators must be odd (Article 809 Paragraph 1 C.P.C.).

The matter referred to in Item 3) hereinabove deserves a further analysis.

As regards the exact number of the arbitrators, on one hand Article 809 (Paragraph 2) C.P.C. states that the arbitration covenant must contain either the appointment of the arbitrators, or their number and the procedure to appoint them.

On the other hand, the same Article provides (in Paragraph 3) for the circumstance of an arbitration covenant which does not specify such details, setting forth a body of supplative rules.

In particular, according to Paragraph 3 of Article 809 C.P.C., in the event that the parties do not specify the number of the arbitrators, the arbitrators shall be three. In the event of the parties having specified an even number of arbitrators, one further arbitrator shall be appointed by the President of the Court (Tribunale) where the venue of the arbitration is set, upon claim raised by one of the parties in dispute.

According to Article 810 C.P.C., each party has to appoint –in accordance with the provisions of arbitration clause or agreement- one or more arbitrators. Such appointment shall be notified in writing to the counterpart inviting such party to proceed with appointment of the respective arbitrators within the next 20 days. In the event of such latter party failing to appoint its arbitrator(s), then, upon request of the diligent party, the President of the Court ("Tribunale") where competent in the venue of the arbitration shall be proceed with the appointment. The same solution applies in the event of a third party having been entrusted with the task of appointing some or all of the arbitrators: one example may be the case where each party in dispute appoints one arbitrator, and the two arbitrators, although required to appoint the third arbitrator, are not able to find an agreement in such regard.

According to precedents to be found in the Italian Supreme Court16 the rules set forth in Article 810 C.P.C. shall be applicable also to "arbitrato irrituale".

In any event, also in consideration of the apparent contradiction within Article 809 C.P.C. seen above, the strong advise it to clearly set forth in the arbitration covenant the –uneven- number of arbitrators as well as the procedure for their appointment.

8. Arbitration administered by an Agency

In common practice, the appointment of arbitrators is one of the most delicate and complex phases of the arbitration procedure.

By way of example,

- delays may arise from the inactivity of one party not being interested in appointing its arbitrator, and from the consequent procedure aiming to obtain the appointment by the competent court as per Article 810 C.P.C.;
- it may not be easy, especially for the foreign contractor entering in dispute, to find arbitrators who are experts in Italian Law dealing with particular matters being the subject of the contract;
- the arbitration is by its nature more expensive for the parties in dispute than Civil Courts proceedings are, given that the parties in dispute have to pay not only for their attorneys, but also for the fees of arbitrators (who not necessary shall be a lawyer, whose scale of fees in Italy is determined by law: any legally competent adult can be appointed as arbitrator, vide Article 812 C.P.C.); it is in the interest of each of the two parties to be put in the position to quantify (at least roughly) such fees before starting the arbitration.

[16] C. Cass. SS. UU. 3.7.1989 no. 3189

One way to deal with the aforementioned criticalities is to resort to the s.c. "administered arbitration", i.e. to resort to an administering agency for (a) the appointment of the arbitrators, and possibly (b) for the ruling of the procedural aspects of the arbitration; such option being exercised by enclosing in the arbitration covenant a reference to the rules of administering agency as being applicable to the arbitration.

The administering agency does not act as an arbitration panel, nor is it liable for the correctness of its decision; it only provides the requesting parties with:

- Rules of arbitration, which however shall comply with requirement of par condicio of the parties in dispute and provide each party with the right of controverting
- ancillary services, such as the appointment of the third arbitrator
- possibly, a list of potential arbitrators.

The positive qualities of resorting to administered arbitration may be summarized as follows:

- the arbitral proceeding can be chosen among those of several possible agencies, most of them being tested times and again in the commercial practice
- formalities are usually limited, and the procedure allows for reasonable duration of the arbitration (it shall be reminded that, in the absence of agreement between the parties in dispute as to the maximum duration of arbitration, the C.P.C. provides for arbitrators to render the award within 240 days from appointment of the last arbitrator, such a term being subject to extension in several circumstances, vide Article 820 C.P.C.)
- arbitrators' and agency's fees may be publicly available with the Administering Agency
- the process of appointment of arbitrators is usually faster than the one set forth in C.P.C.
- further services of the administering agency may further facilitate the carrying out of the arbitration.

The Italian legislator has de facto encouraged the administered arbitration, first by enclosing the administration of arbitration among the possible tasks of Italian Chambers of Commerce (Law 580/1993), then expressly treating this matter in Article 832 C.P.C., introduced by Decree 40/2006.

As per other issues relevant to arbitration, the inspiring principle is the respect for the autonomy of the contracting parties; therefore Article 832 C.P.C. provides (i) that the parties are free to resort to arbitration rules previously drawn up by an administering agency and (ii) that in the event of conflict between the contents of the said rules and the contents of the arbitration covenant, the latter shall prevail.

Of course the same provision specifies that, in the event of the administering agency refusing to administer the arbitration, the procedure set forth in the C.P.C. shall apply; it shall be taken into account that, in order to avoid conflicts of interest, when the administering agency is an association (e.g. a trading association), it must abstain and refuse to administer arbitration in the event of a dispute between one of its members and a third party.

In opting for the use of general Rules drawn up by a third parties, the legal advisor shall take into consideration the Paragraph 3 of Article 832 C.P.C., providing that, unless

agreed to the contrary, the Rules applicable shall be those in force as of the date of the starting of the arbitration.

In the opinion of the author, such provision is questionable: the general rules of arbitration might be amended by the administering agency in the period in between the signature of the contract containing the arbitration clause and the day when arbitration begins- hence the parties in dispute would find themselves bound to rules that might be remarkably different from those known to them as of the date of signature of arbitration covenant .

The strong advice is therefore to specify that the arbitral award shall be rendered in accordance with the rules of the chosen administering agency in force as of the date of the arbitration covenant, without reference to subsequent amendments thereof.

Among the Italian administering agencies, the author wishes to recommend the Camera Arbitrale Nazionale e Internazionale di Milano.

The Arbitrale Nazionale e Internazionale di Milano has proven to be a reliable agency, its Rules (the "Regolamento Arbitrale", available at www.camera-arbitrale.com) are in the opinion of the author clearly drafted, in the official Italian version as well as in several translations. Such Rules provide for the arbitral award to be issued within 6 months from appointment of the arbitrator(s), exceptions to this deadline being limited.

The fees are found in the website being reckoned as usual in proportion to the value of the dispute; it is interesting to be noted that the Rules govern also the determination of the value of the dispute.

In the event that the parties wish to choose the aforementioned "Regolamento", they shall anyway consider that, unlike the C.P.C., unless otherwise agreed upon by the Parties the dispute shall be resolved by a single arbitrator appointed by the Arbitral Council. Such body shall act as the appointing authority practically in all the events when the Chairman of the competent Court shall act as appointing authority as per C.P.C. provisions.

However, according to the "Regolamento", in the event the parties have to agree on the appointment of the arbitrator(s), the Arbitral Council can impose to each one of them to effect the appointment within a deadline, failing which the appointment is effected by the Arbitral Council- which seems to be a good way to speed up the process.

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