Legance

What's up in the Italian courts?

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The Editorial

The legal world is in constant and rapid change, reflecting the complex dynamics of the political and economic context in which we operate. Litigation and arbitration continue to attract unprecedented interest, not only from professionals in the field but also from investors and businesses, who must constantly adapt their corporate strategies to the increasingly intricate regulatory framework, considering both the risks and opportunities arising from the tools at their disposal.

In this context, and with reference to issues of substantive civil law, this new project of the Litigation, Arbitration, and ADR Department of Legance is born. Its goal is to gather legislative and jurisprudential developments of greatest interest to all economic entities assisted by the firm.

In this second issue, corporate arbitration, as reformed by the well-known Cartabia Reform, takes on a primary importance. The newsletter will highlight how the peculiarities of this type of arbitration must be coordinated with the general framework outlined in Articles 806 and following of the Code of Civil Procedure. Furthermore, we will delve into internationally relevant topics, such as INCOTERMS clauses, and analyse some case law on "Put option", a widely used instrument in corporate relationships.

Hoping that this second release of the Legance Dispute Resolution Bulletin, will also be an opportunity for both you and us to compare notes, we remain at your disposal at disputeresolutionbulletin@legance.it

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Chapter 1

The Incoterms "Ex Works" clause and competent jurisdiction

The United Chambers of the Supreme Court of Cassation (*Sezioni Unite*) have settled the interpretation contrast regarding the scope of the **Incoterms "Ex Works"** ("**EXW**") **clause** and have ruled that such clause, when included in an international sale and purchase agreement, identifies both **the place of delivery of the goods** and the **jurisdiction in cases of legal dispute** (see Judgment No. 11346/2023).

The case submitted to the Supreme Court concerned an international contract for the sale and purchase of goods between an Italian manufacturing company and a French purchasing company. The contract specified that the delivery was to be made "ex works", on other words, the title and risk of loss passed on to the purchaser at the time the goods would be picked up at the Italian seller's warehouse.

Referring to and endorsing two precedents of the European Court of Justice – *i.e.*, the "*Electrosteel Europe SA*" judgment (Case C-87/10) and the "*Granarolo*" judgment (Case C-196/15) – the Supreme Court has moved away from the previous approach adopted by Italian case law and has ruled that Incoterms clauses determine the place of delivery of goods and also **derogate from the general principle of the defendant's jurisdiction as provided by Article 4 of EU Regulation 1215/2012**.

The Supreme Court has therefore overturned the decision by the Court of Appeal, stating that in the case of an international contract for the sale and purchase of goods providing for an EXW clause, the court of the selling party's State will have jurisdiction, pursuant to and for the purposes of Article 7(b) of EU Regulation 1215/2012.

Chapter 2

Focus on corporate arbitration

CORPORATE ARBITRATION IN THE AFTERMATH OF THE "CARTABIA REFORM"

The amendments of the Cartabia Reform also affect corporate arbitration (*arbitrato societario*, Legislative Decree No. 5/2003). In particular:

a. corporate arbitration is a special, but not exceptional, form of ordinary arbitration;

b. the arbitrators' order suspending the effects of shareholders' resolutions can be challenged (this is quite a significant change **as compared to the previous regulatory framework**, under which suspension was granted "by an order that cannot be appealed").

As a consequence of *a)* above, **any gaps or uncertainties in the regulation of corporate arbitration** will have to be filled by applying the provisions of **the previous chapters of the civil procedure code** that regulate ordinary arbitration, as well as the general principles on jurisdiction.

On this same point, it is also interesting to note that Article 838-*ter* of the Code of Civil Procedure (governing corporate arbitration) refers to Article 818 (applicable to ordinary arbitration). Depending on how the provision could be interpreted by the courts, such cross-reference could potentially allow:

- on the one hand, to submit a petition to the ordinary judge for the suspension of the shareholders' resolution before the Arbitral Tribunal is constituted (otherwise, the constitutional right of defence would be jeopardized), and,
- on the other hand, to extend the scope of the precautionary power of corporate arbitrators to include possible urgent measures.

With respect to point *b)* above, the possibility to challenge the order suspending the effects of shareholders' resolution has now been introduced, but the appeal judge will have review powers **limited solely to the grounds of appeal provided by the first paragraph of Article 829 of the Code of Civil Procedure** (these are the same grounds on which awards can be challenged), as well as to the grounds relating to violations of public policy.

Chapter 2

CORPORATE ARBITRATION AND AMENDMENTS OF THE ARTICLES OF INCORPORATION

The Supreme Court has ruled on the binding nature, as well as the enforceability – towards the directors and the supervisory bodies of the company – of the arbitration clause included in the company's articles of incorporation in relation to disputes between them and the company (see Judgment No. 621/ 2023).

In that context the Court of Cassation has affirmed the contractual nature of the arbitration clause inserted in the by-laws, between the company and its directors. Therefore, the termination/repeal of the arbitration clause, taking place after the expiry of the term, is not relevant (in fact, that termination cannot apply to the previous contractual relationship between the company and its directors, which remains subject to the by-laws then in force).

However, according to the Supreme Court's reconstruction, the former shareholder (as well as the former director, the former liquidator or the former statutory auditor) may voluntarily adhere to any modifications to the jurisdiction clause.

Chapter 3

Interrelations between arbitration clause and price determination clause

The Supreme Court has also ruled on the interrelations between arbitration and price determination clause (see Judgment No. 16648/2022).

The case at hand concerned a share purchase agreement containing ***(i)*** a price determination clause pursuant to which a third party expert had to determine the share price under Article 1349 of the Civil Code and ***(ii)*** an arbitration clause pursuant to which an arbitration panel had jurisdiction on any disputes originating from the agreement.

Due to the parties' failure to agree on the third party expert to be appointed for price determination, the parties initiated arbitration proceedings and the arbitration panel so appointed determined the final sale price of the shares. Nonetheless, one of the parties challenged the arbitration award on the grounds that the arbitration panel could not replace the contractual mechanism intended by the parties for price determination (*i.e.*, the decision of an expert) and the arbitration panel's decision was clearly erroneous and contradictory.

The Supreme Court acknowledged the possibility, in principle, of challenging the arbitrators' decision, including when they decide on the share price pursuant to a sale and purchase agreement. However, the S.C. also clarified that such a challenge is determined by the special regulations governing the challenge of arbitration awards (which only allow for an appeal on specific and limited grounds). Consequently, given the limited scope of appeal review, the challenge cannot concern alleged "clear unfairness and erroneousness" of the price determination. Hence, the Supreme Court rejected the appeal.

Chapter 4

Shareholders' Agreements and Put Option

Put options at a fixed price have been repeatedly examined by Italian courts over the last decade.

In its new decision, the Court of Rome has recognised that put and call options over shares are often associated with private equity transactions, where the PE investor needs a way out from the investment within a certain time frame and at a price which is predetermined at the time of the original investment.

In the case at hand, the shareholders' agreement stipulated that "between the *forty-eighth month and the sixtieth month after the signing of this agreement, the shareholders* [...] *are jointly obligated to repurchase, at Beta's simple request, the entire shareholding held by Beta itself in the target company*". However, the defendants had contested the validity of said shareholders' agreement. Their allegation was that the clause equated to a lion's pact, pursuant to which Beta could exit from the investment in the target company (at the cost of the other shareholders) without suffering from any of the target company's losses (the fixed price to be paid to Beta, in fact, was the same that Beta originally paid in order to acquire the shares).

The Court of Rome, however, noted that the put option:

i. had been conveyed in the shareholders' agreement– and not in the articles of incorporation or the bylaws; and

ii. deserved legal protection in view of the reciprocal advantage of the PE transaction, since "*the entry of* [the plaintiff company, ed.] *into the shareholding structure of the* [target company, ed.] *had a purpose of financing the company through public funds, made available by the Lazio region. It was, therefore, a crowdfunding related to a strategic operation of strengthening and increasing the value of the company, which can also be considered in accordance with the general interest of economic incentive pursued by the legislature*".

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