UDK 341.63:339.5
DOI: 10.5937/RKSPP2302035F

ALFREDO FERRANTE

BREACH OF THE ARBITRATION AGREEMENT, DEFAULTING DEFENDANT IN LITIGATION AND NEW YORK CONVENTION'S MODEL FLUCTUATIONS: THE ITALIAN AND BRAZILIAN EXAMPLES

The aim of this Article is to assess what is the effectiveness of an arbitration agreement in the face of a plaintiff's will to activate the procedure not before the Arbitral Tribunal, but using legal proceedings before the ordinary courts, in the particular case of the other party failing to enter an appearance and file its response in litigation. The hypothesis of this paper, therefore, refer to situations where the contumacy of the party before the Court (i.e., defaulting defendant in litigation) - in certain cases - is not protected by law, and whether this legislative gap should be filled. The problem relates to the defaulting of defendant in litigation, despite an existing arbitration agreement whose validity is not questioned by the plaintiff. This solution varies depending on the system and does not apply where the legislative gap has been eliminated by national regulation. In order to solve that question will be analysed Article II.3 NY Convention, Art. 8(1) UNCITRAL Model on International Commercial Arbitration and the Italian and Brazilian Legal Systems.

Key words: *arbitration agreement, NY Convention, lack of jurisdiction, italian law, brazilian law, contumacy*

INTRODUCTION AND APPROACH

On the one hand, the role of freedom of contract and autonomy are key factors in both contract negotiation and arbitration. On the other hand, it is crucial that,

Dr. Alfredo Ferrante, Associate Professor of Comparative Private Law, University of Pavia, Italy, e-mail: *alfredo.ferrante@unipv.it.*

in the case of pathological problems, the dispute develops in accordance with proper canons of justice in which adversarial and due process principles are established.

The objective of this paper is to assess how far the freedom of contract and party's autonomy of will and the protection of adversarial process can move within the scheme of international commercial arbitration. The decision to submit to dispute resolution is free and its manifestation is precisely that which is formalised through the arbitration agreement. It is precisely the contractual nature of the arbitration agreement that makes the party decide to go to an arbitral tribunal and not to judicial system. In this context, it is necessary to assess the limits of being able to restructure this volitional act, especially in the possible regressive exercise of the manifestation of the will, i.e., in the appropriate assessment of a possible repentance or waiver of the manifestation of the will. Is it therefore possible to bring the ordinary court action despite the existence of an arbitration agreement?

Can we always go to (ordinary) Court if the parties change their minds? If they do, does this will have to be expressed, or can it be inferred from silence or conclusive conduct? Can a unilateral willingness to go to Court in the face of the other party's inaction and subsequent silence be considered a breach of arbitration agreement?

In concrete terms, the aim is to assess what is the effectiveness of an arbitration agreement in the face of a will to take action not before the Arbitral Tribunal but before the ordinary Court, in the particular in case of defaulting defendant in litigation.

The hypothesis of this paper is whether the hypothesis of contumacy of the party before the Court (defaulting defendant in litigation) - in certain cases - is not protected by an appropriate rule, and this legislative gap should be filled. The problem analysed here focuses on the hypothesis of defaulting defendant in litigation, despite an existing arbitration agreement whose validity is not questioned by the plaintiff. This solution varies depending on the system and does not apply where the legislative gap has been eliminated by national regulation.

Specifically, the aim here is not to analyse when one of the parties fails to appear before the Arbitral Tribunal, but when, in the presence of an arbitration agreement, one of the two parties decides to go before the ordinary courts and the other party fails to appear: i.e., it is a case of contumacy. What is an arbitration agreement worth in case of defaulting defendant in litigation?

The starting point for the analysis is Art. II.3[1] of the 1958 New York Convention.[2] This provision established that in the presence of an arbitration agreement

[1] In relation to Art. II.3, see UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 2016, No. 58, 57 ff.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, New York, 10 June 1958 (forward NY Convention).

the Court of a Contracting State shall refer the parties to arbitration only at the request of one of the parties and never *ex officio.*[3]

This provision is a starting point for several reasons. On the one hand, because this provision would already seem to give a clear answer to the question. On the other hand, because it is precisely this provision that has influenced and recurred in Art. 8 Model Law on International Commercial Arbitration and it has also influenced the drafting of various national laws.[4] Essentially, in civil law systems the solution is to decline jurisdiction, meanwhile in common law it is staying judicial proceedings.[5]

A further reason for the analysis of Art. II.3 NY Convention is that - on the day the NY Convention was approved, i.e., on 10 June 1958 - it was passed unanimously. In fact, if Art. II.3 as a whole provision was generally voted in favour even if some States voted against,[6] the decision to exclude the possibility of the judge to determine *ex officio* the referral to the arbitral tribunal was unanimous.[7]

Thus, *prima facie* this provision appears to be clear and to clarify the issue that this paper wishes to analyse. Nevertheless, a closer reading of what happened leaves room for more careful reasoning regarding the working hypothesis we wish to analyse here.

Therefore, on the one hand, some reflections will be made on the purposes that led to the drafting of the Art. II.3 NY Convention. On the other hand, we will take two antithetical national models, the Italian and the Brazilian, to see how they responded to the question under examination. These two cases are chosen, one because a jurisprudential solution is given to the legislative gap in the legal system, and because in the other case the legislator envisages through a reform of the law to expressly regulate the situation.

---

[3] Art. II.3 NY Convention: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

[4] With particular importance in France and Switzerland (Art. 1448 French Civil Procedure Code; Art. 7 Switzerland's Federal Code on Private International Law).

[5] Cfr. *V.gr.* Uk Arbitration Act 1996, sec. 9-11. For jurisprudential references, including common law ones see UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, No. 60 ff, 59 ff.

[6] United Nations Conference on International Commercial Arbitration, Summary of record of the 24th Meeting, [E/CONF.26/SR.24 - Adoption and signature of the Final Act and Convention (E/CONF.26/8 and 9, E/CONF.26/L.63), Report of the Credentials Committee (E/CONF.26/10)], 10 June 1958, 10:15am, 9 (hereinafter: United Nations Conference, 24th Meeting).

[7] 29 votes favourable to 2, with 4 abstentions: United Nations Conference, 24th Meeting, 10.

LE *COUP DE MAIN* of Art. II.3 NY CONVENTION

Notwithstanding what was stated in the epigraph above, the truth about Art. II.3 NY Convention is another one: it was the provision that most animated the last two meetings of the working group, the 23rd[8] and 24th,[9] held respectively the day before - 9 June 1958 - and the morning before - 10 June 1958 - the final approval of the final text of the NY Convention.

That is to say, until the day before the approval, the last two texts of the NY Convention, those of 6th[10] and 9th[11] June, provided for the opposite hypothesis from the one finally approved. They provided that in the presence of an arbitration agreement[12] the Court of a Contracting State shall refer the parties to arbitration not only at the request of one of the parties but also *ex officio*. This was due to the presence in the text also of the words "of its own motion". In fact, these texts provide that the Court of Contracting States shall, of its own motion or at the request of one of the parties refer the parties to arbitration.

The presence of a provision drafted in this way would solve the problem of defaulting defendant in litigation in the presence of a previous arbitration agreement.

However, the words 'of its own motion' was unanimously[13] removed on the morning of 10 June at Israel's request.[14] The day before, the same request had been made by Turkey[15] - supported by Japan[16] - and had provoked the reopening of the debate despite the Chairman had recalled "that the Conference has already settled

---

[8] United Nation Conference on International Commercial Arbitration, Summary of record of the 23rd Meeting, E/CONF.26/SR.23 - E/CONF.26/L.60; Adoption and signature of the Final Act and Convention (E/CONF.26/8, 9, E/CONF.26/L.28, L.49, L.58, L.61)] 19 June 1958, 3:30pm.

[9] United Nation Conference, United Nations Conference, 24th Meeting.

[10] United Nation Conference on International Commercial Arbitration, Text of Articles Adopted by the Conference: 4-6 June 1958, E/CONF.26/L.59 - Text of new article to be included in the Convention, adopted by the Conference at its 21st meeting.

[11] United Nation Conference on International Commercial Arbitration, Text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as Provisionally Approved by Drafting Committee 6-9 June 1958, E/CONF.26/8 - Text of the Convention as provisionally approved by the Drafting Committee on 9 June 1958.

[12] The "agreement" of Art. III.2 NY Convention.

[13] United Nations Conference, 24th Meeting, 10.

[14] Mr. Cohn (Israel), United Nations Conference, 24th Meeting, 8

[15] Mr. Koral (Turkey), United Nations Conference, 23rd Meeting, 13.

[16] Mr. Urabe (Japan), United Nations Conference, 23rd Meeting, 13.

the matter".[17] So, it came to a new vote - on the afternoon of 9 June - which reiterated that the "of its own motion" was maintained. In fact, during the 23rd meeting, the proposal to remove this clause was rejected by 10 votes to 9, with 8 abstentions.[18] Nevertheless, the next day everything changed, and the approval of the final text was unanimous. Apart from reasoning about the methodology of the re-vote and the agenda, it must be understood the legal reasons behind this change: apparently unexpected and sudden. We will return to these aspects later (*infra*).

THE VALIDATION/CONSOLIDATION OF THE PROVISION IN ART. 8 (1) OF UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

Apart from the above discussion, what is certain is that a provision similar to Art. II.3 NY Convention has been reproduced in the field of international arbitration and specifically by Art. 8(1) UNCITRAL, Model Law on International Commercial Arbitration (1985). The fact that this provision was not amended in 2006 consolidates its position.[19]

Being inserted in a text on the specific issues of International Commercial Arbitration also strengthens the content of its provision: before - being inserted in a text on the Recognition and Enforcement of Foreign Arbitral Awards - it might have been out of place, as was the whole of Art. II NY Convention. In fact, following this line of logic, Guatemala voted against Art. II "because it contained a provision on the validity of arbitrary agreements going beyond the powers of Conference".[20]

Furthermore, Art. 8(2) UNCITRAL Model Law gives the important possibility that "arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court".

In connection with the working group on Art. 8(1), it should be noted that specifically - *mutatis mutandis* - the analysed question of Art. II.3 NY Convention was not dealt with in depth.

---

[17] President, Mr. Schurmann (Netherlands), United Nations Conference, 23rd Meeting, 13.

[18] United Nations Conference, 23rd Meeting, 13.

[19] See UNCITRAL *Digest of Case Law on the Model Law on International Commercial Arbitration*, 2012, 33 ff.

[20] Guatemala also abstained from voting on the Convention as a Whole Mr. Kestler Farnes (Guatemala), United Nations Conference, 24th Meeting, 12.

However, at the 312th meeting, an important aspect was noted: in the face of the silence of the article "the court should have a third possibility, i.e., that of referring the parties to arbitration while keeping its own proceedings open until a later stage".[21]

Thus, it can be seen that the question partly remained open despite the stipulation that the provision should not be changed. In fact, highlighting this possibility is elevated as a requirement for approving this text.[22]

IT IS A PROBLEM OF LOCAL PROCEDURAL LAW

It should be noted that although the working Group retains the text that excludes *ex officio* review by the Court, NY Convention and UNCITRAL Model Law note problems with it. In particular, with regard to both Art. II.3 NY Convention and Art. 8(1) UNCITRAL Model Law, there is a problem of local procedural law. Thus, the Italian delegation initially justified the double possibility of referring the parties to arbitration - of its own motion or at the request of one of the parties - noting that the "paragraph 3 merely stated two possibilities: that the Court could act either of its own motion or at the request of one of the parties. In a State whose domestic law did not recognise the first possibility, the Courts would obviously have only the second open to them".[23]

The Chairman and the delegate of the United Kingdom also pointed out in the work of Art. 8(1)[24] that the problem is to be coordinated with local procedural law.[25]

DEFAULTING DEFENDANT IN LITIGATION IN THE COURT AND ARBITRATION: BRAZIL AND ITALY AS ANTITHETICAL MODELS?

Having established, therefore, that local procedural law also plays an important role in international arbitration, the Italian and Brazilian cases will be

---

[21] Chairman Mr. Loeve (Austria), in United Nation Conference on International Commercial Arbitration, Summary of record 312th Meeting, (A/CN.9/246, Annex A/CN.9/263 add. I-2, A/CN.9/264) 6 June 1985, 2pm, *Yearbook of United Nation Commission on International Trade Law*, Vol. XVI, 1985, 426.

[22] In fact, in the records the Chairman established that "the text should be left unaltered by the report for the present session should state that the course of the judicial proceedings was not described there, so that it was quite possible for a decision to be taken to refer the parties to arbitration, while the case remained open pending a further possible application. If there was no objection, he would tale it that the Commission agreed to that course".

[23] Mr. Matteucci (Italy), United Nations Conference, 23rd Meeting, 13.

[24] Mr. Mustill (United Kingdom), and chairman Mr. Loewe (Austria), Summary of record 312th Meeting, 426.

[25] *Ibidem*.

analysed below. The choice of these two jurisdictions is threefold. On the one hand, because in both cases we are faced with a monist system of arbitration,[26] on the other hand, because they arrive at the identical solution in the presence of an arbitration agreement in the case of a defaulting defendant in litigation. The peculiarity lies, and this is the third reason justifying the comparison, that the legal paths followed are totally different.

THE POWER OF THE JUDGE: THE ITALIAN MODEL

As far as the Italian legal system is concerned, the points of reference for arbitration are to be found in Arts. 806 ff Code of Civil Procedure (CPC) and also in some normative references in the Italian Private International Act (Law No. 218/1995),[27] particularly useful will be, as we shall see, Art. 11 of Law 218/1995 for which "the lack of jurisdiction can be detected, at any stage and level of the trial, only by the constituted defendant who has not expressly or tacitly accepted Italian jurisdiction. It is revealed by the judge *ex officio*, always at any stage and level of the trial, if the defendant is in default, if the hypothesis referred to in Article 5 occurs, or if Italian jurisdiction is excluded as a result of an international law".[28]

Another reference provision must be Art. 819 *ter* CPC according to which it is stated that "the objection of the judge's incompetence pursuant to the arbitration agreement must be raised, under penalty of forfeiture, in the response.

---

[26] Indeed, the transition from the monist to the dualist system tends to occur with the 2006 reform. See Luca Radicati di Brozolo, "Requiem per il regime dualista dell'arbitrato: riflessioni sull'ultima riforma", *Rivista di Diritto Processuale*, Vol. 65, No. 6, 2010, 1267 ff. The monist thesis is also maintained with the 2015 arbitration reform although not free from criticism: Leandro Tripodi, "Arbitragem doméstica e internacional: o que significam monismo e dualismo no terreno da arbitragem?", *Arbitragem. Estudos sobre a Ley n. 13.129, de 26-5-2015* (Eds. Francisco José Cahali, Thiago Rodavalho, Alexandre Freire), Saraiva, *São Paulo*, 329 ff.

See also *v.gr.* Andrea Bonomi, "Monisme et dualisme", *Arbitrage interne et international - Actes du colloque de Lausanne du 2 octobre 2009* (Eds. Andrea Bonomi, David Bochatay), Librairie Droz, Genève, 2010, 167 ff.; Aline Dias Henriques, "Os Sistemas Monista e Dualista na Arbitragem Comercial", *Revista Brasileira de Arbitragem*, Vol. 13, No. 50, 2016, 92 ff.

[27] Legge No. 218/1995, de 31 of May, Riforma del sistema italiano di diritto internazionale privato, *Gazzetta Ufficiale,* No.128 del 03-06-1995 - Suppl. Ordinario n. 68.

[28] Art. 11 Law No. 218/1995, op. cit. "*Il difetto di giurisdizione può essere rilevato, in qualunque stato e grado del processo, soltanto dal convenuto costituito che non abbia espressamente o tacitamente accettato la giurisdizione italiana. È rilevato dal giudice d'ufficio, sempre in qualunque stato e grado del processo, se il convenuto è contumace, se ricorre l'ipotesi di cui all'articolo 5, ovvero se la giurisdizione italiana è esclusa per effetto di una norma internazionale*".

Failure to raise the objection excludes arbitral jurisdiction limited to the dispute decided in that judgment".[29]

To better understand the application of these rules in the arbitration field, take as a starting point an important leading case recently resolved by the Italian Supreme Court.[30]

AN ITALIAN LEADING CASE

In order to be able to show that the problem presented here is not just a theoretical hypothesis, we will present a concrete case and take it as our starting point an interesting ruling by the Italian Supreme Court[31] that will help us along this path.

The case starts from an international sale - between an Italian seller and an Algerian buyer - of a durum wheat grinding machinery with its assembly and installation and also the training of the technicians in charge.

As the UN Convention on Contracts for the International Sale of Goods (CISG) does not apply to this case since Algeria has not ratified it, the parties entered into an arbitration agreement[32] stating that the arbitration will be regulated by the rules of ICC and that the applicable law will be the Algerian Law.

A performance bond issued by an Italian bank[33] in the interest of the seller in case of faults of the good and corresponding to 10% of the price is associated with the contract.

The buyer reported the presence of some faults and the seller - despite stating that they were attributable to faulty maintenance - had sent some spare parts. Since the only repair would have been to return the goods to Italy, faced with the persistence of these faults, the buyer enforced the performance bond.

Since the performance bond is paid, the seller decides to take the ordinary course of action in the Italian courts[34] with the dual purpose of ascertaining the proper functioning of the goods and to ascertain the unlawful enforcement of the warranty.

---

[29] Art. 819 *ter* CPC (omissis): "*L'eccezione di incompetenza del giudice in ragione della convenzione di arbitrato deve essere proposta, a pena di decadenza, nella comparsa di risposta. La mancata proposizione dell'eccezione esclude la competenza arbitrale limitatamente alla controversia decisa in quel giudizio*".

[30] Italian Supreme Court, Joint Civil Chambers No. 17244/2022, dated 27.5.2022.

[31] *Ibidem*.

[32] This is clause No. 25 of the sales contract.

[33] If performance bond was issued by an Algerian bank but is guaranteed by an Italian bank.

[34] By virtue of the joint interpretation of the Art. 6 Brussels Convention, Art. 3 Law No. 218/1995.

As can be observed, despite the fact that the contract provides an arbitration agreement for the resolution of disputes relating thereto, one of the parties unilaterally - and without prior agreement - decides directly to go to ordinary legal proceedings. This concrete case serves as a pretext to realise certain considerations and assess what the consequences are. Since there was no agreement of the parties on one party's decision, the different possibilities in relation to the possible behaviour of the other party have to be evaluated: A) the other party gives itself up and agrees to continue the legal proceedings; B) the other party does not want the ordinary court proceedings. The second hypothesis is divided into two sub-possibilities 1) it activates itself at Court and raises an issue of the lack of jurisdiction; 2) it remains inert: here the value of silence and absence must be identified. How should or can the Court operate in these cases?

Hypothesis A) is not particularly problematic and is therefore excluded from this discussion. If the defendant enters an appearance and manifests an express wish to object to the judge's lack of jurisdiction (hypothesis B.1), it is also not problematic. In this case the express intention is manifested in accordance with the procedural rules laid down by the law.

In the Italian case, this express will is manifested by filing an ordinary civil action and asking for a lack of jurisdiction of the Court[35] and demanding that the dispute be settled before the arbitral tribunal, expressly activating the application of Art. 819 *ter* CPC. This mode is less problematic and follows the normal evidentiary process that will result in the acceptance or rejection of the request regardless of the case.

The most problematic case is hypothesis B.2), i.e. where there is no joint agreement to go before the (ordinary) Court and where therefore one of the parties remains inert by not entering an appearance. Here it must be established whether or not this silence/inaction corresponds to the party's willingness to resolve the problem through the arbitral tribunal. In this regard, the role of the express or tacit manifestation of its will must be assessed.

Thus, if the defendant does not enter an appearance[36] in the proceedings, the Court may, while safeguarding certain rules of cross-examination in advance, declare the "*contumacia*"[37] of the party, i.e., "the situation of the party summoned who does not enter an appearance". It is true that the non-participation of one of the parties in the proceedings - the documents of which have been served on it - is an "anomaly";[38]

---

[35] See Arts. 163 ff CPC.

[36] Cfr. Arts. 166 and 171 CPC.

[37] Cfr. Arts. 171.3, 187, 290 ff CPC.

[38] See Salvatore La Rosa, *Il contumace nel giudizio civile*, Filippo, Catania 1887; Arturo Rispoli, *Il processo civile contumaciale*, Società Editrice Libraria, Milano 1911.

despite this the party is free not to participate in the proceedings. In this sense, the declaration of "contumacy" operates under the rules of the civil trial. However, how does this state of 'contumacy' operate in civil proceedings in the (co-)presence of an arbitration agreement according to which the parties wanted to bring the case not before the judge but before the arbitral tribunal?

Here one perceives that the evaluation of these aspects is problematic in order to understand whether or not this behaviour of the other party also evidences a (tacit) manifestation of the other party's desire or unwillingness to initiate civil proceedings.

Faced with the absence of a precise and express rule in this regard (subject to the considerations that will be made) it must be considered whether there is a precise obligation or duty on the part of the Court, in such silence/absence, to pronounce *ex officio* on the matter. In this sense, two antithetical positions open up: a) a position in favour of the possibility for the judge to pronounce *ex officio* on the possible competence or otherwise of the matter of the judgement and, if he does not consider himself competent, to refer the dispute to the arbitral tribunal; b) a position antithetical to the one just proposed, in which case the questions of competence/incompetence should only be proposed by those who have a legitimate interest, otherwise the trial would have to follow the canons undertaken - i.e. those of legal proceedings - despite the fact that there is an arbitration agreement executed by the parties and ("violated") by one of the parties.

THE JUDGE MAY DECLARE *EX OFFICIO* ITS LACK OF JURISDITION IN PRESENCE OF AN ARBITRATION AGREEMENT (FIRST INSTANCE AND COURT OF APPEAL)

As can be seen, this is not a matter of arbitration with one of the parties being absent, but rather one of assessing what the value of the arbitration agreement is in the face of a change of course by one of the parties. The arbitration agreement is still in force, one party turns to the normal Court and the other, knowing this, deliberately decides not to appear before the Court and not to oppose the (new) proceedings established.

Is the arbitration agreement still in force and in this case the judge could confirm it *ex officio* and declare himself incompetent? This latter position is the one adopted by the first[39] and second instance[40] in the case just outlined (see *supra*).

[39] Tribunale di Modena dated 22.2.2011, unpublished.

[40] Corte di Appello di Bologna dated 13.6.2017, unpublished.

The legal reasoning underlying this position is the application of Art. 11 of the Italian Private International Law Act. This provision is expressly devoted to "lack of jurisdiction" stating that this may be requested by the party and not by a third party. The provision also provides for the possibility that the judge refers the parties to arbitration *ex officio* in certain instances: those of Art. 5 Italian Private International Act[41] or if Italian jurisdiction is excluded by an international rule, aspects that do not apply to the case analysed.

The Court of first instance and the Court of appeal interpret the rule expansively in terms of its factual content and they decide to apply it *ex officio* to the arbitration context in case of a defaulting party. They do not, however, allow the plea of lack of jurisdiction to be filed by the bank, i.e., a third party. Since the bank is a third party, it is not entitled to plead the lack of jurisdiction of the Italian court by virtue of the arbitration agreement in the contract of sale. The bank as a third party is not party to the arbitration agreement and therefore lacks standing to raise it.

The consequence of this position is that the arbitration procedure prevails, and the legal proceeding is blocked. Thus, for this position, the judge, faced with the valid arbitration agreement, decides that the matter must continue before the arbitral tribunal, despite the fact that the other party is absent in the proceedings and has not raised the objection.

THE JUDGE CANNOT DECLARE EX OFFICIO ITS LACK OF JURISDITION IN PRESENCE OF AN ARBITRATION AGREEMENT (ITALIAN SUPREME COURT)

A position contrary to the one previously analysed is to consider that the Court cannot of its own motion declare the lack of jurisdiction if it has not been requested by the party. This was the approach that the Italian Supreme Court adopted (changing the direction of the first and second instances) thus distancing itself from the possible application of the Art. 11 of Law No. 218/1995 but reinforcing the value of the autonomy of the parties and its interaction not only when drafting the arbitration agreement but also during the subsequent phase.

In this case the approach based on the application of the Art.11 of Law 218/1995 is considered wrong, since Art. II(3) NY Convention must be assumed to be relevant to provide that "The Court of a Contracting State, when seized of

[41] This disposition refers to actions in rem relating to immovable property located abroad ("azioni reali aventi ad oggetto beni immobili situati all'estero").

an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

The Italian Supreme Court considers that this disposition would also apply in this case since the Convention refers to both domestic and foreign arbitrations.[42]

To reinforce this aspect, it incorporates the reasoning of a previous case[43] in which, although it referred to a domestic arbitration,[44] it excluded the possibility for the ordinary judge to find *ex officio* that he lacked jurisdiction.

Moreover, it elevates the will of the parties as a fundamental character of any arbitration and therefore it is the parties alone who must choose whether to submit to arbitration and not to the judge. In this sense, it is stated that "it is the will of the parties that constitutes the sole basis of the jurisdiction of the arbitrators, it must necessarily be recognised that the parties, just as they may choose to submit the dispute to the arbitrators rather than to the ordinary judge, may also opt for a decision by the latter, not only expressly, by means of an agreement equal to and contrary to that reached in the compromise, but also tacitly, through the adoption of procedural conduct converging towards the exclusion of the arbitral jurisdiction, and in particular through the introduction of the ordinary procedure, which is counterbalanced by the failure to raise the objection of arbitration".[45]

For this the defendant can only object the lack of jurisdiction and the Law cannot decide the procedure to be carried out. In this sense, the Court fully embraces the importance of Art. 806 CPC, according to which "the parties may have disputes between them that do not concern non-disposable rights decided by arbitration, unless expressly prohibited by law", which takes on the character of a general principle, constitutionally guaranteed, of the whole legal system.[46]

In this sense, the Italian Supreme Court's solution, *mutatis mutandis*, would arrive at the same basic conclusion as Art. II.3 NY Convention: in both cases the judge cannot decide *ex officio*, but only at the request of one of the parties.

---

[42] On the basis of Art. I NY Convention.

[43] Italian Supreme Court, sec. VI, No.22748/2015, dated 6.11.2015.

[44] The same sentence takes care to state that this aspect is not a limitation since the aspects relating to the voluntariness of the arbitration are independent of the characteristics of nationality but must be found in the post-institutional principles (Arts. 102 and 24 of the Italian Constitution).

[45] Italian Supreme Court, Joint Civil Chambers No. 17244/2022.

[46] Confirmed by Italian Supreme Court, sec. II, No. 32720/2022, dated 7.11.2022.

SOME REFLECTIONS

By virtue of what has been analyzed we can highlight some points including: 1) Indispensable voluntary nature of arbitration; 2) (Non) applicability of Arbitration Agreement in case of defaulting defendant in litigation; 3) Interesting comparison between Art. 5, 11 Law 218/1995 vs. Art. II.3 NY Convention.

The Italian Supreme Court's ruling confirms the first two points and gives priority to the position enshrined in the New York Convention. What are the repercussions of these aspects? Undeniable is the role that party autonomy plays in arbitration, yet in the analysed case this factor takes on a peculiar role. Indeed, it is necessary to clarify which reference point to take into consideration at the moment of the volitional act: should one take into consideration the will to be judged by arbitration proceedings (and the refusal to conduct civil proceedings) or the refusal to arbitration proceedings (and the will to conduct legal proceedings)?

Although these two factors are intimately related, some legal nuances in this regard are interesting.

Effectively, at the time of the arbitration agreement, both parties' will coincided and thus there is no major problem: both expressed the will to resolve the potential dispute through arbitration.

In the case at hand, however, these wills diverge and if the plaintiff's will is clear (will to go to civil trial and not to arbitration), the dilemma remains as to what the defendant's will is in case of defaulting defendant in litigation.

Here, it is important to elucidate whether the negative behaviour (defaulting defendant) leads to a positive (will to choose the arbitration or will to choose the legal proceeding) or negative (refusal of the arbitral tribunal or refusal of the legal proceedings) manifestation of the will.

The problem arises because this manifestation of will relates in a different context from the context in which it would manifest itself. Let us attribute Letter A to the (ordinary) legal proceeding at the Court and let us attribute Letter B to the arbitration proceeding: the Italian Supreme Court's solution would lead to say that the fact of not appearing in A, means to choose A (and therefore to reject B): which, if this were the case, might be partly paradoxical in the terms we will see below.

The Supreme Court holds that the fact of being contumacious entails a tacit will to submit to arbitration (otherwise one would have had to appear at the Court and submit the exception of jurisdictional competence). The Court therefore attaches a precise value to the party's silence, a silence due to non-representation in the Court.

In order to understand this, therefore, two factors come into play: a) Attendance at the Court (absent in this case) b) silence with respect to the manifestation of will (absence of a formal complaint at the hearing manifesting voluntariness about something).

Now let us see how these factors operate - and whether there are differences - depending on which manifestation of will comes into play and whether the party wishes to express a positive or negative will. We have these four hypotheses:

Hypothesis No. 1. Positive manifestation: will to carry out the arbitration proceedings

Hypothesis No. 2. Positive manifestation: will to carry out the ordinary legal proceedings

Hypothesis No. 3. Negative manifestation: will not to carry out the ordinary legal proceedings

Hypothesis No. 4. Negative manifestation: will not to carry out the arbitration proceedings.

As can be seen, some positive manifestations of will coincide with negative ones: positive hypothesis No. 1 coincides with negative hypothesis No. 3, and positive hypothesis No. 2 coincides with negative hypothesis No. 4. Although there are equal effects, it must be understood, however, which is the correct starting point in this case. Given that there is already a valid arbitration agreement, and that this remains valid during the silence of the parties, one must start from the assumption that the change of will must be antithetical to the pre-existing situation, on the contrary in the case of silence, the manifestation should coincide with the initial one.

In this sense, if the reasoning carried out is consistent, it means that silence *per se* validates (and does not exclude) hypotheses No. 1 and No. 3: the party's silence already presupposes them.

Notwithstanding this, the Italian Supreme Court arrives at the opposite solution, namely that silence does not validate hypotheses No. 1 and No. 3, but validates hypotheses No. 2 and No. 4.

This would lead to a kind of paradox of freedom of choice and will. In fact, it has been said that there are two factors at play, a) Attendance at the Court (absent in this case) b) silence with respect to the manifestation of will.

In this sense, the Court's reasoning leads to the fact that the (negative) decision not to become a party presupposes the tacit and implicit will to manifest the will of hypotheses No. 2 and No. 4. But note again a double complication.

First complication: according to this view, such a vision/imposition would be paradoxical. In fact, in this context, hypotheses No. 2 and No. 4, which seemed

to have (outside the process) identical values and effects, do not have it here. In fact, the manifestation of the will to carry out the ordinary legal proceedings should be manifested by attendance at Court and not by conduct to the contrary. If this is certain, one must arrive at the consequence that the non-appearance (not attendance) therefore implies the effect of hypotheses No. 2 and No. 4, and thus the party's choice not to attendance itself signifies the opposite intention (that of hypotheses No. 1 and No. 3): that of wanting to assume that the arbitration agreement is still valid.

On the other hand, if one were to follow the reasoning (which is the one adopted by the Italian Supreme Court) whereby one requires the party to attend and enter an appearance at the Court (and then make an objection of jurisdiction) it would mean associating non-participation in the court with the will to attend the Court (and then make the objection). If this were the case, following such abstract reasoning would mean that regardless of the presentation/non-presentation/constitution at the Court of the party, hypothesis No. 2 (will to carry out the ordinary legal proceedings) would be fulfilled when this is not necessarily the case. The inconsistency is due to the procedural requirement that defendant present the lack of jurisdiction motion. But it must be remembered that the starting point is the existence of a valid arbitration agreement, and it is hard to see why a burden should be placed on the party that is resisting the other party's unilateral decision to change the rules at play and bring the case before the ordinary court *sua sponte* when he was obliged to carry out an arbitration proceeding. Validating this position therefore means annihilating the true will of the parties and the choice freely made by the parties (and still valid) to carry out the arbitration proceedings. If one were to follow this approach, one would be employing reasoning that leads to antithetical solutions to the same volitional act: the will to carry out the ordinary legal proceedings would occur either through positive conduct (by attendance at Court) or negative conduct (no attendance at Court and no presentation of the lack of jurisdiction motion). This interpretation would never permit a negative volitional act manifesting a negative intention. It would always presuppose the concept of silent as consent: something that from the point of view of general contract theory is not accepted especially if one wants to elevate the will of the parties to a key factor in arbitration. Such a will must be express and clear: indeed, if one thinks about the arbitration agreement, it is required in writing (requirement of the NY Convention), i.e., through positive conduct. And if one thinks of tacit consent, it is substantially validated by positive, not negative, conclusive conduct. That is, although it is true that precise values and procedural burdens come into play here, one cannot lose sight of the high value of the party's will and thus the role of such a manifestation: an express manifestation of will, formulated in writing and giving rise to the validity of the arbitration agreement, cannot be swept away by the silence of the

party itself, a silence induced by the unilateral volitional change of the counterparty that wished to insert precise procedural obligations, which deviate from the content of the arbitration agreement and arbitration, by the (unilateral) activation of the ordinary legal proceedings. Admitting this would be tantamount to admitting the priority of a unilateral volitional choice over one that arose from the common agreement of both parties.

Second complication: the Italian Supreme Court's solution presupposes that the defense by arbitration has therefore been tacitly waived. Here another perspective opens up from the perspective of contract theory. It is recalled that the starting point of the dispute is the presence of a valid arbitration agreement and thus a right/duty to submit to arbitration proceedings. If one were to validate the reasoning that one cannot declare *ex officio* the lack of arbitral jurisdiction in the case of defaulting party, one would be validating a tacit waiver of a right. A tacit waiver of a right is also possible, but how would it operate in the concrete case?

In this case it must be remembered that the recent Cartabia[47] reform (not present at the time of the facts) validates the impossibility of reproducing for the future a solution like that of the Supreme Court. In fact, the Cartabia reform modifies the *translatio iudiciis* by Art. 819 *quarter* CPC, i.e., the possibility of resuming the arbitration proceedings - or civil proceedings - where the jurisdiction of the authority seized (i.e., of the judge or the arbitration tribunal, respectively) is denied, without the procedural activity carried out in the meantime by the parties being rendered useless.

In the presence of the new provision of the Art. 819 *quater* CPC, allowing a tacit waiver in case of non-attendance at Court and no presentation of an exception of jurisdiction could perhaps mean that the possibility of activating the Art. 819 *quater* would be subsequently barred?

Effectively, the activation of the *translatio iudiciis* requires that one of the parties (in this case, it would be the one who would have tacitly renounced) proceed pursuant to Art. 810 CPC within three months of the judgment denying jurisdiction becoming final. Would the current presence of this provision mean that the tacit waiver could also imply another tacit waiver not to use Art. 819 *quater* CPC? As can be seen, this is puzzling.

In the end, the Italian Supreme Court's effort to counter a glaring legal gap that does not provide for an *ad hoc* hypothesis in the case of contumacy in the legal proceedings in case of a valid arbitration agreement is commendable. The Court seeks to solve the problem by means of a jurisprudential integration of an implicit

[47] See *v. gr.* Maria Carla Giorgetti, "Commento alle novità in materia di arbitrato introdotte dal decreto legislativo 10 ottobre 2022, No. 149", *Judicium*, 2022, 1 ff.

or "unexpressed" rule[48] that establishes how the will of the party in the face of its silence is to be interpreted. In this sense, the Court's conclusion is to assume that such silence implies an implicit waiver of the arbitration process. This jurisprudential construction leads to an implied rule that is used for the purpose of determining the meaning of the parties' express silence as to whether or not to proceed to arbitration in the face of an arbitration agreement whose validity has not been questioned by either party. The court's conclusion is that silence is tantamount to acceptance of the procedure before the judge, but the problem goes deeper, especially in a system where from the point of view of manifestation of will, silence does not mean assent. In the end, we are witnessing a merely theoretical reconstruction by the Supreme Court that allows it to integrate the system of Art. 11 Law No. 218/1995 and momentarily eliminate the legal gap.

However, this initiative does not operate by virtue of a coherent concept of the manifestation of the will and the role of silence according to the canons of the Italian legal system (see *infra*).

THE POWER OF THE LEGISLATOR: THE BRAZILIAN MODEL

In Brazil, the arbitration legislation, which is regulated in the Brazilian Arbitration Act of 1996,[49] takes as reference also the rules of the Civil Procedure Code. Both texts were reformed in 2015 through a reform on arbitration and a broader reform relating to the Civil Procedural Code.[50]

Since 2015, the Brazilian legislator expressly regulates the problem relating to the absence of the defaulting litigant party in the presence of an arbitration agreement by reforming the ancient Art. 301 CPC of 1973 and replacing it with the current Art. 337 CPC.[51]

Before focusing on the reform, it must be highlighted that already for the previous provision (former Art. 301 CPC) there was a specific burden of proving the "*convenção de arbitragem*" on the part of the defendant. Thus, it was established that it is the defendant's responsibility, in the phase of defense and objection

[48] See the theory of "norma implicita" or "inespressa" by Riccardo Guastini, *Interpretare ed argomentare*, Giuffrè Milano, 2011, 155 ff. More extensively, Riccardo Guastini, "Produzione di norme a mezzo norme", *Informatica e diritto*, Vol. 11, No. 1, 1985, 7 ff.

[49] Brazilian Arbitration Act No. 9307/1996 dated 23.9.1996.

[50] This occurred respectively with the Brazilian Law No. 13129/2015, dated 26.5.2015, and the Reform of Civil Procedural Code by Brazilian Law No. 13105/2015 dated 16.3.2015.

[51] By Brazilian Law No. 13105/2015 dated 16.3.2015.

(*Contestação*) and before discussing the merits (*antes de discutir o mérito*) to allege the "*convenção de arbitragem*"[52].

Furthermore Art. 310 §4 of the former CPC expressly stated that the judge could not decide *ex officio* in matters of "*compromisso arbitral*".[53]

As can be observed, this drafting essentially shaped in its contents those of Art. II.3 NY Convention. Thus, the influence on national law of international instruments being transplanted also for national arbitrations is clear here.

In this sense, it is perceived that if the "*convenção de arbitragem*" (and thus the arbitration proceeding) is to be invoked, active conduct on the part of the defendant in a certain part of legal proceedings is required. The Brazilian rule clarified this point in detail, being in this sense clearer than Art. II.3 NY Convention or Art. 8(1) Model Law.

Despite this, the nuances between the "*convenção de arbitragem*" and "*compromisso arbitral*" had left some interpretive doubts. In fact, although both figures are qualified and considered as "Convenção de Arbitragem" in Chapter II of the Brazilian Arbitration Act of 1996,[54] they are essentially categorised into two different volitional moments.[55] Thus, the "*convenção de arbitragem*" *is "a convenção através da qual as partes em um contrato comprometem-se a submeter à arbitragem os litígios que possam vir a surgir, relativamente a tal contrato*",[56] while the "*compromisso arbitral*" is "*a convenção através da qual as partes submetem um litígio à arbitragem de uma ou mais pessoas, podendo ser judicial ou extrajudicial*",[57] having to the latter "*celebrar-se-á por termo nos autos, perante o juízo ou tribunal, onde tem curso a demanda*"[58] and holding some formal requirements.[59] This led the doctrine to be able in some cases to doubt whether the judge could not intervene *ex officio* in the case of "*convenção de arbitragem*".[60]

---

[52] Art. 301 CPC 1973 "Compete-lhe, porém, antes de discutir o mérito, alegar (…) IX: convenção de arbitragem".

[53] Art. 301 §4 CPC 1973: "Com exceção do compromisso arbitral, o juiz conhecerá de ofício da matéria enumerada neste artigo".

[54] Arts. 3-12 Brazilian Arbitration Act.

[55] See *v.gr.* Luis Fernando Guerreiro, *Convenção de arbitragem e processo arbitral*, 4th Edition, Almedina, São Paulo, 2022, 5 ff; Carlos Alberto Carmona Alberto, *Arbitragem e processo: um comentario à Lei No.9307*, 3rd Edition, Atlas, São Paulo, 2009, 16 ff.

[56] Art. 4 Brazilian Arbitration Act.

[57] Art. 9 Brazilian Arbitration Act.

[58] Art. 9 §1º Brazilian Arbitration Act.

[59] Art. 9. §2º Brazilian Arbitration Act: "O compromisso arbitral extrajudicial será celebrado por escrito particular, assinado por duas testemunhas, ou por instrumento público".

[60] See *v.gr.* André Luís Quintas Monteiro, *Princípio da competência-competência na arbitragem comercial: visão a partir do Brasil*, Tese (Doutorado em Direito) – Pontifícia Universidade

This situation is clarified by the legislator who reformed the rule by introducing the current Art. 337 CPC. On the one hand, the obligation to allege the defendant's "*convenção de arbitragem*"[61] is maintained, while on the other hand, it unequivocally eliminates[62] any interpretative doubt that arose under the previous legislation.

In this sense it expressly states that it is "*convenção de arbitragem*" and no longer the "*compromisso arbitral*" that cannot be decided *ex officio.*[63]

Moreover, the legislator expressly states the effects of the absence of an allegation of the "*convenção de arbitragem*": the absence of an allegation of the existence of an arbitration agreement "implies acceptance of state jurisdiction and waiver of arbitration".[64]

The legislator tautologically ratifies the effect due to the no allegation of the arbitration agreement by stating that 1) implies acceptance of state jurisdiction ("implica aceitação da jurisdição estatal") and 2) waiver of arbitration ("renúncia ao juízo arbitral").

The Brazilian solution therefore a) imposes, indirectly, a precise obligation to attendance at Court:[65] in fact, there is a precise burden of annexing the arbitration agreement; b) takes an express solution with respect to negative behaviour and silence: these generate waiver of the arbitral proceeding and imply the will to continue the legal proceeding.

CONSISTENCY BETWEEN THE ITALIAN AND BRAZILIAN SOLUTIONS? THE VALUE OF SILENCE AND WAIVER IN THE ARBITRATION PROCESS

Both the Italian and Brazilian solutions lead to the waiver of the arbitration process. Are they consistent with the appropriate expression of will issued by the parties? To this end we need to understand the value of silence in the relevant legal system.

Católica, São Paulo, 2017, 271 ff; Giovanna Filippi Del Nero, *Arbitragem e litispendência*, Dissertação de Mestrado, Universidade de São Paulo, Faculdade de Direito, São Paulo, 2019, 54 ff.

[61] Art. 337 CPC Incumbe ao réu, antes de discutir o mérito, alegar (…) (…) X: convenção de arbitragem".

[62] Art. 310 §4o §4 was replaced by Art. 337 §5 and §6 CPC.

[63] Art. 337 CPC §5º establishes that: "Excetuadas a convenção de arbitragem e a incompetência relativa, o juiz conhecerá de ofício das matérias enumeradas neste artigo".

[64] Art. 337 CPC §6º.

[65] On the analysis of a failure to appear during the arbitration proceedings, see Flávia Benzatti Tremura Polli Rodrigues *"Contumácia* e revelia na *arbitragem*", *Revista brasileira de arbitragem*, Vol. 11, No. 42, 2014, 15 ff.

From the point of view of Brazilian regulatory evolution, the model seems to be coherent in itself. In fact, a peculiarity of the Brazilian legal system is that according to Art. 111 Brazilian Civil Code "silence means consent, when circumstances or usage authorize it, and a declaration of express will is not necessary".[66]

This precise rule guarantees a silence that implies consent in certain cases and especially when there is a precise authorisation that, in this specific case, is expressly given by Art. 337 of the CPC. In this sense Art. 337 §6 CPC takes the form of an express authorisation by the legislature to treat silence as acceptance. This factor together with the burden of alleging the arbitration agreement of the same provision gives perfect coherence to the system, since in the event of negative behaviour or silence of the defendant the legal solution, by the combination of Art. 337 CPC and Art. 111 Brazilian Civil Code clearly leads to a manifestation of will consistent with the system, which is that of the will to proceed with the ordinary legal proceeding and not the arbitral one.

In this sense, the procedural solution is fully consistent with the private law perspective of the manifestation of the will according to the model adopted, a model that, among other things, is present in other jurisdictions with similar modalities. Thus, as expressly stated in the Brazilian legal system, the silence of the parties is valid as a declaration of will, when this value is attributed to it by law, usage or convention.[67]

The possible inconsistency in the Italian case has already been pointed out (see *supra*); this is reinforced by the fact that for the Italian legal system silence as a general rule is not equivalent to consent. In the Italian case, referring to the value of silence, the solution remains inconsistent since there is no such rule as in Brazil. In fact, the manifestation of the will must be occurred by positive conduct. It is true that the so-called *silenzio circostanziato* also exists in the Italian system, but unlike the Brazilian system, there is no rule that legitimises or authorises such silence to be valid as waiver of arbitration proceedings. In fact, there is an onus to allege the validity of the arbitral agreement, but only in the arbitral proceedings - i.e. before

[66] Art. 111 Brazilian Civil Code: "O silêncio importa anuência, quando as circunstâncias ou os usos o autorizarem, e não for necessária a declaração de vontade expressa". See Eduardo Ribeiro De Oliveira, *Comentários ao novo Código Civil*, Vol. II, 2nd Edition, Forense, Rio de Janeiro, 2012, 236 ff; Miguel Maria de Serpa Lopes, *O silêncio como manifestação de vontade*, Cohelho Branco Fiho, Rio de Janeiro, 1935; Maurício Andere Von Bruck Lacerda, *O silêncio no exercício da autonomçia privada no ambiente contractual privado brasileiro*, Tese de Doutorado, Facultade de Direito da Universiade de São Paulo, 2020.

[67] Artigo 218 Brazilian Civil Code (O silêncio como meio declarativo): "O silêncio vale como declaração negocial, quando esse valor lhe seja atribuído por lei, uso ou convenção".

the arbitrators - pursuant to Art. 817 Italian CPC but not before the ordinary Court (as is the case in Brazil pursuant to Art. 337 Brazilian CPC).

In the Italian legal system, the old debate that had characterised the antithetic positions of Pacchioni[68] and Bonfante[69] in the matter of the conclusion of contracts in the derogated Civil Code of 1865 seems to have come to an end, arriving at the fact that essentially silence corresponds in general terms to an absence of manifestation of the will.[70] Already the first commentators of the Italian civil code of 1942 considered that the canonical principle *qui tacet consente videtur*[71] (who is silent seems to agree) should not be accepted.[72]

It is also true that the maxim *qui tacet consentire videtur* (who is silent seems to agree) must be complemented with "*si loqui debuisset ac potuisset*" (if he should have spoken and could have)". In this case it could be argued that since Art. 819 *ter* CPC provides that the objection of the judge's incompetence pursuant to the arbitration agreement must be raised, under penalty of forfeiture, in the response, in this case there is a kind of duty for the party to allege the Court's lack of jurisdiction. Although it should be noted that this rule is not an ad hoc rule for arbitration but is a general rule. Thus, there is not a specific rule in Italy for which proof of the arbitration agreement must be attached. Nor would it appear that the (voluntary) attendance at Court or the possibility of alleging the lack of jurisdiction under Art. 819 *ter* CPC are precise and substantive obligations in the specific case we are taking into consideration since we are already in the presence of a valid agreement: a valid arbitration agreement in the presence of the default of a party. The case would be different if one of the two parties (in this case the plaintiff had) questioned its validity and it would be the party that should allege its invalidity. Although in the Roman process Paul's maxim existed and stated that

---

[68] Giovanni Pacchioni, "Il silenzio nella conclusione dei contratti. Commento a Corte Cassazione di Torino 25 agosto 1905", *Rivista Diritto Commerciale*, No. 4, II, 1906, 23 ff.

[69] Pietro Bonfante, "Il silenzio nella conclusione dei contratti. Commento a Corte d'appello di torino 10 luglio 1905", *Rivista Diritto Commerciale*, No. 4, II, 1906, 233 ff.

[70] Silvio Perozzi, "Il silenzio nella conclusione dei contratti", *Rivista di Diritto Commerciale*, No. 6, I, 1906, 509. Please refer to Perozzi for a systematization of the antithetical positions relating to the silence of Pacchioni and Bonfante. On the evolution from the Italian civil code of 1865 to that of 1942, see Giovanni Battista Ferri, "Il silenzio e le parole nella cultura del civilista", *Il silenzio e le parole nella cultura del civilista*, Giuffrè Francis Lefebvre, 2021, 480 ff.

[71] The problem of silence has always also affected the French and German legal system in relation to this principle see: G. B. Ferri, op. cit., 474. Also see: Alfred Rieg, *Le role dans l'acte juridique en droit civil français et allemand*, Librairie générale de droit et de jurisprudence, Paris, 1961.

[72] Emilio Betti, *Teoria generale del negozio giuridico*, Utet, Torino, 1943, 93; Giuseppe Stolfi, *Teoria del Negozio Giuridico*, Cedam, Padova, 1962, 167 ss.

"*qui tacet non utique fatetur, sed tantum verum est eum non negare*",[73] the allegation of Art. 819 *ter* CPC is not an obligation as in the Brazilian case but an eventuality. The case of "*non negare*" does not mean admitting the will to participate in the legal proceedings.[74] It is certain that *silenzio circonstaziato* must be assessed according to the circumstances,[75] but the maxim that who is silent seems to agree must be refused by default as a general rule. In the Italian case, however, it will certainly not have the same value in the event that - in case of a valid arbitration agreement - the party has entered an appearance (and decides not to raise the objection) or decides to remain contumacious.

In this sense the Italian jurisprudential reconstruction[76] moves on a certain level of inconsistency with the view of Italian private law *a fortiori* when it evokes the importance of the autonomy of the will and its manifestation.

NEW YORK CONVENTION MODEL: THE JUSTIFICATION ABOUT THE EXCLUSION OF WORDS "OF ITS OWN MOTION" PRESUPPOSED THE PRESENCE OF THE BOTH PARTIES AT THE COURT

What is to be demonstrated below is that the exclusion of words "of its own motion" in the NY Convention working group's reasoning presupposed the presence of the parties before the Court. Consequently, the possibility or consequences that might occur - from the point of view of the manifestation of will - if the party does not decide not to enter an appearance before the Court, i.e., in case of defaulting defendant in litigation where the validity of the arbitration agreement by the plaintiff is not called into question, was not foreseen.

Three arguments will be given: A) The legal reasoning that led to the exclusion "of its own motion" during the 23rd and 24th meetings of the NY Convention

---

[73] "He who is silent certainly does not admit it, but it is only true that he does not deny it": See Maria Sara Goretti, *Il problema giuridico del silenzio*, Milano, Giuffrè, 1982; 158 ff. Per uno studio delle fonti romani vid anche Guido Donatuti, "Il silenzio come manifestazione di volontà", *Studi in onore di Pietro Bonfante*, Vol. 4 Treves, Milano 1930, 459 ff.

[74] In support, remember the reasoning why "*Se il non contradicere fosse una manifestazione di volontá, fosse un consenso, sarebbe oziosa la domanda iniziale e non si comprenderebbe la necessità di un rescritto*". G. Donatuti, op. cit., 471.

[75] On silence and its legal value in detail see M. S. Goretti, op. cit; Fabio Addis, *Lettera di conferma e silenzio*, Giuffrè, Milano, 1999, 256 ff; Cesare Massimo Bianca, *Il Contratto*, 3rd Edition, Giuffrè, Milano, 2019, 188 ff. In relazione al codice civile de 1865 see Pietro Bonfante, "I rapporti continuativi ed il silenzio Commento a Corte di Cassazione Torino 28 novembre 191", *Rivista di Diritto Commerciale*, Vol. XIII, II, 1915, 677 ff.

[76] Supreme Court, Joint Civil Chambers No. 17244/2022.

and its application; B) Jurisprudential application of Art. II.3 NY Convention; C) Some reasoning concerning Art. 8 (1) Model Law

A) The main reason why it was decided to eliminate words "of its own motion" was the possibility that the judge would go against the common will of the parties to no longer want to go before the arbitral tribunal and instead carry out proceedings before the Court. For this reason, it was stated that "a Court should not have the power to impose arbitral procedure when the parties to the arbitration agreement both wished to submit the dispute to the ordinary courts".[77] If they had retained that power for the judge, "the Court would have no discretion whatsoever and would have to refer the parties to arbitration even if they both wished to litigate. Arbitration agreements would thus be indissoluble, regardless of the wish of the parties".[78] It is understood in this case that the prerequisite is that the two parties have a mutual agreement ("both wished"), an aspect which can manifest itself either in the same form in which the arbitration agreement was celebrated (i.e., in writing) or through the attendance in the legal proceedings.

The mutual presence of the parties is thus assumed in stating that "the words 'of its own motion' should therefore be deleted, as parties wishing to rescind an arbitration agreement by mutual consent should be allowed to do so",[79] so "the words under discussion struck at the very roots of contractual freedom. The paramount consideration in arbitration was the will of the two parties, and if they both decided in favour of judicial solution the court should be under an absolute obligation to proceed".[80] All these justifications fail in the case of defaulting party, given that the party is neither constituted nor able to express his desire simultaneously with the other.

B) Part of the jurisprudence shows how the manifestation of the desire to waive the right to arbitrate is manifested with the constitution, i.e., with positive behaviour. Thus, it was established that parties waive their right to arbitrate when they "substantially" participate in litigation, or when they seek to invalidate the arbitration agreement before the courts of another country.[81]

---

[77] Mr. Koral (Turkey), United Nations Conference, 23rd Meeting, 13.

[78] Mr. Cohn (Israel), United Nations Conference, 24th Meeting, 8.

[79] Mr. Urabe (Japan), United Nations Conference, 24th Meeting, 8.

[80] Mr. Urquia (El Salvador), United Nations Conference, 24th Meeting, 9.

[81] *Anna Dockeray v. Carnival Corporation*, District Court, Southern District of Florida, Miami Division, United States of America, 11 May 2010, 10-20799; *Apple & Eve LLC v. Yantai North Andre Juice Co. Ltd*, District Court, Eastern District of New York, United States of America, 27 April 2009, 07-CV-745 (JFB)(WDW).

C) The Digest of Case Law on the Model Law on International Commercial Arbitration clarifies that Art. 8 "only mentions cases where referral to arbitration is requested by a party to the action. It does not explicitly state whether a court can refer an action to arbitration on its own motion". [82] Then it goes on to state that "however, it is clear from the *travaux préparatoires* that Art. 8 implicitly prevents a court from doing so, and courts have confirmed that they may only refer an action to arbitration if a request to that effect has been made by a party".[83] Therefore, despite what the Digest states, there is no express prohibition for the judge to refer the parties to arbitration 'of its own motion'. Remember also that during the 312th meeting, it was established that "the court should have a third possibility, i.e., that of referring the parties to arbitration while keeping its own proceedings open until a later stage". [84]

What has been stated allows us to observe how the hypothesis of defaulting defendant in litigation in case of arbitration agreement whose validity is not questioned by the plaintiff was not expressly contemplated in detail, partly generating a gap within the legislation.

CONCLUSIONS: FOUR MODELS AND PRESENT AND FUTURE CHALLENGES

The problem analysed here focuses on the hypothesis of defaulting defendant in litigation in case of arbitration agreement whose validity is not questioned by the plaintiff.

Since in this case the plaintiff does not contest the validity of the arbitration agreement, it means that he is breaking the principle of *pacta sunt servanda* by deciding to initiate - unilaterally - proceedings before the ordinary judge.

Four models could be observed: 1) Art. II.3 NY Convention; 2) Art. 8 Model Law; 3) Italian model; 4) Brazilian model.

The first model clearly influences the others, notwithstanding this, it seems that only the last model has a clear position with respect to the case analysed, expressly providing an obligation to attach the arbitration agreement and constituting a procedural rule - consistent with the private concept of silence contained in the Brazilian Civil Code - for which expressly inert behaviour or silence means both acceptance of the proceedings before the judge as waiver of the arbitration proceedings.

---

[82] See UNCITRAL *Digest of Case Law on the Model Law*, 36.

[83] *Ibidem*.

[84] Chairman Mr. Loeve (Austria), Summary of record 312th Meeting, 426.

In the other three cases, there is a kind of legal gap, since there is no *ad hoc* rule. The Italian model provides for the possibility of declaring *ex officio* the lack of jurisdiction in certain cases (Art. 5 Ley No. 218/1995) but the arbitration agreement is not included among them. Faced with this, the Italian jurisprudential reconstruction arrives at the same conclusions as the Brazilian system, but through reasoning that is not consistent with the private concept of silence and manifestation of will in the Italian system. Although the jurisprudential solution of the Italian Supreme Court is commendable for its effort, it has a certain legal inconsistency.

Art. II.3 NY Convention - and also Art. 8 Model Law - decide to exclude that the judge refer the parties to arbitration *ex officio* on the ground that the Court could not subvert the will of the parties when they want to change their minds and no longer conduct the arbitration proceeding by mutual agreement. But this approach is based on the assumptions on which the two parties are attending the legal proceeding at the Court (see above). Similarly, they do not think in the event that the arbitration agreement is valid (and its validity is not putted into question) that such unilateral conduct of one of the parties is essentially prejudicing the party relying on the validity of the arbitration agreement.

Art. 8(2) Model Law partly improves the system by providing that arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court. The reform of the Italian Code of Civil Procedure essentially aligns itself with this possibility with similar, but not equal, features with the introduction of Art. 819 *quater* CPC giving the possibility to have the proceedings begun before the court continued before the arbitrators under certain conditions.[85]

On closer inspection, there is an argument that justifies that the Court cannot refer the parties to arbitration *ex officio*. This is what would protect the party that unilaterally decides to attend the Court when it had previously instituted the arbitral proceedings and the other party has not joined nor paid the costs (and so the party does not wish to assume them in their entirety in the arbitral proceedings). In this case, the arbitration proceedings could be considered as withdrawn and the only viable and remaining option (without resubmitting a new arbitration proceeding that would reach the same conclusions) would be to rely on the Court system. In this case, permitting the Court to refer the parties to arbitration

[85] Art. 819 *quater* CPC "*una delle parti deve procedere a norma dell'articolo 810 entro tre mesi dal passaggio in giudicato della sentenza con cui e' negata la competenza in ragione di una convenzione di arbitrato o dell'ordinanza di regolamento*".

ex officio - even though the arbitration agreement was still valid - would go against the interest of the real party who wants to resolve the dispute and who had initially - unsuccessfully - gone to the arbitral tribunal.

Certainly, to avoid some of these problems, an out-of-court solution that works as a preventive measure is to have a penalty clause in the event of a breach of the arbitration agreement where party decides to take legal proceedings without questioning the validity of the arbitration agreement. Indeed, the arbitration agreement is associated *mutatis mutandis* with a contract and the principle of *pacta sunt servanda*. For this reason, the party that unilaterally - in the event of a valid arbitration agreement - decides to break the agreement and take the case to court may be subject to a penalty clause; this would discourage such a possibility.

Ultimately, all of the models analysed are consistent in the event that the other party goes to court. On the other hand, they take on problematic aspects (except for the Brazilian model) in the event of the other party's default because they are assuming by default that both parties attend the legal proceedings. On the other hand, they do not consider the freedom not to enter an appearance and to legitimately rely on a valid arbitration agreement and the role of silence as absence of consent where the plaintiff has commenced the proceedings without questioning the validity of the arbitration agreement.

The Brazilian model cannot be transplanted to systems where the concept of the manifestation of the implicit will takes on different connotations; therefore, certain important aspects must be re-planned if arbitration is to develop into the full development of a theory of the manifestation of the coherent will where it plays a principal role.

Dr ALFREDO FERRANTE
Vanredni profesor, Univerzitet u Paviji, Italija

POVREDA ARBITRAŽNOG SPORAZUMA, IZOSTANAK TUŽENOG SA ROČIŠTA I FLUKTUACIJA MODELA NJUJORŠKE KONVENCIJE: ITALIJANSKI I BRAZILSKI PRIMERI

Rezime

Cilj rada je procena efikasnosti arbitražnog sporazuma onda kad tužilac ne pokrene arbitražni postupak, već tradicionalni sudski spor, pre svega u slučaju kontumacije i nepodnošenja odgovora na tužbu. Hipoteza rada se odnosi na slučajeve u kojima izostanak sa ročišta tuženog nije regulisan, pri čemu se postavlja pitanje da li je ovu pravnu prazninu potrebno popuniti. Pomenuti problem se

odnosi na izostajanje tuženog u parnici, uprkos postojećem arbitražnom sporazumu čiju valjanost tužilac ne dovodi u pitanje. Rešenje varira u zavisnosti od pravnog sistema i ne primenjuje se tamo gde je pravna praznina popunjena postojećom nacionalnom regulativom. U pokušaju odgovora na ova pitanja u radu su analizirani član II.3 Njujorške konvencije, član 8(1) UNCITRAL Model zakona o međunarodnoj trgovinskoj arbitraži, kao i italijanski i brazilski pravni sistem.

Ključne reči: arbitražni sporazum, Njujorška konvencija, nedostatak nadležnosti, italijansko pravo, brazilsko pravo, kontumacija

Bibliography

Addis F., *Lettera di conferma e silenzio*, Giuffrè, Milano, 1999.

Benzatti Tremura Polli Rodrigues F., *"Contumácia* e revelia na *arbitragem"*, *Revista brasileira de arbitragem*, Vol. 11, No. 42, 2014.

Betti E., *Teoria generale del negozio giuridico*, Utet, Torino, 1943.

Bianca C. M., *Il Contratto*, 3rd Edition, Giuffrè, Milano, 2019.

Bonfante P., "Il silenzio nella conclusione dei contratti. Commento a Corte d'appello di torino 10 luglio 1905", *Rivista Diritto Commerciale*, No. 4, II, 1906.

Bonfante O., "I rapporti continuativi ed il silenzio Commento a Corte di Cassazione Torino 28 novembre 191""", *Rivista di Diritto Commerciale*, Vol. XIII, II, 1915.

Bonomi A., "Monisme et dualisme", *Arbitrage interne et international - Actes du colloque de Lausanne du 2 octobre 2009* (Eds. Andrea Bonomi, David Bochatay), Librairie Droz, Genève, 2010.

Carmona C. A., *Arbitragem e processo: um comentario à Lei No.9307*, 3rd Edition, Atlas, São Paulo, 2009.

De Serpa Lopes M. M., *O silêncio como manifestação de vontade*, Cohelho Branco Fiho, Rio de Janeiro, 1935.

Dias Henriques A., "Os Sistemas Monista e Dualista na Arbitragem Comercial", *Revista Brasileira de Arbitragem*, Vol. 13, No. 50, 2016.

Donatuti G., "Il silenzio come manifestazione di volontà", *Studi in onore di Pietro Bonfante*, Vol. 4, Treves, Milano 1930.

Ferri G. B.,"Il silenzio e le parole nella cultura del civilista", *Il silenzio e le parole nella cultura del civilista*, Giuffrè Francis Lefebvre, 2021.

Filippi Del Nero G., *Arbitragem e litispendência*, Dissertação de Mestrado, Universidade de São Paulo, Faculdade de Direito, São Paulo, 2019.

Giorgetti M.C., "Commento alle novità in materia di arbitrato introdotte dal decreto legislativo 10 ottobre 2022, No.149", *Judicium*, 2022.

Goretti M. S., *Il problema giuridico del silenzio*, Giuffrè, Milano, 1982.

Guastini R., "Produzione di norme a mezzo norme", *Informatica e diritto*, Vol. 11, No. 1, 1985.

Guastini R., *Interpretare ed argomentare*, Giuffrè, Milano, 2011.

Guerreiro L. F., *Convenção de arbitragem e processo arbitral*, 4th Edition, Almedina, São Paulo, 2022.

Pacchioni G., "Il silenzio nella conclusione dei contratti. Commento a Corte Cassazione di Torino 25 agosto 1905", *Rivista Diritto Commerciale*, No. 4, II, 1906.

Perozzi S., "Il silenzio nella conclusione dei contratti, *Rivista di Diritto Commerciale*, No. 6, I, 1906.

Quintas Monteiro A. L., *Princípio da competência-competência na arbitragem comercial: visão a partir do Brasil*, Tese (Doutorado em Direito) – Pontifícia Universidade Católica, São Paulo, 2017.

Radicati di Brozolo L., "Requiem per il regime dualista dell'arbitrato: riflessioni sull'ultima riforma", *Rivista di Diritto Processuale*, Vol. 65, No. 6, 2010.

Ribeiro De Oliveira E., *Comentários ao novo Código Civil*, Vol. II, 2nd Edition, Forense, Rio de Janeiro, 2012.

Rieg A., *Le role dans l'acte juridique en droit civil français et allemand*, Librairie générale de droit et de jurisprudence, Paris, 1961.

Rispoli A., *Il processo civile contumaciale*, Società Editrice Libraria, Milano 1911.

Salvatore La Rosa S., *Il contumace nel giudizio civile*, Filippo, Catania 1887.

Stolfi G., *Teoria del Negozio Giuridico*, Cedam, Padova, 1962.

Tripodi L., "Arbitragem doméstica e internacional: o que significam monismo e dualismo no terreno da arbitragem?, *Arbitragem. Estudos sobre a Ley n. 13.129, de 26-5-2015* (Eds. Francisco José Cahali, Thiago Rodavalho, Alexandre Freire), Saraiva, *São Paulo*.

UNCITRAL, *Digest of Case Law on the Model Law on International Commercial Arbitration*, 2012.

UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), 2016.

United Nation Conference on International Commercial Arbitration, Text of Articles Adopted by the Conference: 4-6 June 1958, E/CONF.26/L.59 - Text of new article to be included in the Convention, adopted by the Conference at its 21st meeting.

United Nation Conference on International Commercial Arbitration, Text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as Provisionally Approved by Drafting Committee 6-9 June 1958, E/CONF.26/8 - Text of the Convention as provisionally approved by the Drafting Committee on 9 June 1958.

United Nation Conference on International Commercial Arbitration, Summary of record of the 23th Meeting, E/CONF.26/SR.23 - E/CONF.26/L.60; Adoption and signature of the Final Act and Convention (E/CONF.26/8, 9, E/CONF.26/L.28, L.49, L.58, L.61)] 19.6.1958.

United Nation Conference on International Commercial Arbitration, Summary of record of the 24th Meeting, [E/CONF.26/SR.24 - Adoption and signature of the Final Act and Convention (E/CONF.26/8 and 9, E/CONF.26/L.63), Report of the Credentials Committee (E/CONF.26/10)], 10.6.1958.

United Nation Conference on International Commercial Arbitration, Summary of record 312th Meeting, (A/CN.9/246, Annex A/CN.9/263 add.I-2, A/CN.9/264) 6.6.1985, 2pm, *Yearbook of United Nation Commission on International Trade Law*, Vol. XVI, 1985.

Von Bruck Lacerda M. A., *O silêncio no exercício da autonomçia privada no ambiente contractual privado brasileiro*, Tese de Doutorado, Facultade de Direito da Universiade de São Paulo, 2020.

Article history
Received: 15.10.2023.
Accepted: 06.11.2023.

ORIGINAL SCIENTIFIC PAPER