ABSTRACT

The phrase “links between arbitration and litigation” is very broad and can embrace a multitude of different phenomena: from the judge’s intervention during the creation of the board, to the dismissal and replacement of the arbitrator, *interim* injunctions, assistance during the evidentiary phase, an *exequatur* judgement, right down to a challenge to the award. However, in current use, this phrase has a more limited interpretation and includes the various matters that are covered by the arbitration convention and the applicable discipline when, during arbitration or litigation proceedings, their existence, validity or effectiveness are disputed; in other words, the pathological moment of the arbitration clause.

Now, in the last three decades, the institution of arbitration has been the subject of a number of legislative changes, which have contributed to the creation of an increasingly exhaustive discipline, gradually causing the process to closely resemble litigation (today we could even describe it as a process of ‘judicialisation’). As a result of these changes, the issues mentioned earlier have found an almost definitive solution. There are different considerations to be made regarding the links between arbitration and litigation in the interpretation given above – which is also the interpretation adopted by the lawmakers in the reform of 2006, whose discipline, in spite of the reform, still has a number of obscure points. This explains the interest in an investigation of these links which, starting from an examination of the questions unanswered before the reform, proposes to verify whether, and to what extent, they have been solved by the reforms put in place.

Having said that, we cannot but point out that, as an effect of Bill no. 132 of 2014 becoming law, the issue of the link between arbitrators and judges also summons up that particular institution regulated by art. 1 of the aforesaid bill, in which, in order to reduce the number of first instance and appeal cases pending, lawmakers envisaged the possibility of referring the latter to an arbitration court. This paper does not examine this new institution; however, we will have an opportunity to examine a few aspects of it in our analysis when we consider the best tools to make some form of communication possible between the arbitration process and the litigation process.

The examination of the links between arbitration and litigation obliges us to tackle the broader and more complex issue of the nature of arbitration. This issue has

occupied scholars of civil law for many decades, contrasting the so-called private theory on one hand with the so-called jurisdictional theory on the other, in a dispute that is basically a debate on the very concept of jurisdiction. However, whereas in the past this debate did contribute significantly to solving problems arising from the loopholes that beset the positive process of arbitration, today its impact has been scaled down to some extent: first of all, because the last government modified this process, eliminating many of these loopholes; and secondly, because the choices made during this reform reveal a determination to solve the dilemma of the private or jurisdictional nature of arbitration in a manner favourable to the second option. Which enables scholars to tackle the problems of arbitration on the basis of positive law. This issue will therefore be analysed not in detail.

Our analysis is divided into six chapters.

The first chapter takes a general look at the classification of the links between arbitration and litigation.

In the second chapter we will tackle and examines the way, under the exception rule, in litigation or arbitration proceedings, the competence of an arbitrator or a judge to decide a dispute is challenged and the problems regarding cognisance of this exception on the part of the judge and the arbitrators.

The third chapter takes a look at the challenges to the judgment and the award pronounced by the judge and the arbitrators on the abovementioned exception.

The fourth chapter will consider the consequences of the ruling with which the arbitrators and the judge declare themselves to be without *potestas iudicandi* (power to decide) for the dispute under consideration.

The fifth chapter focuses on the issue of the effectiveness of the rulings that arbitrators and judges pronounce regarding the existence (or non-existence) of their own *potestas iudicandi*.

And finally, in the sixth chapter we will analyse the particular case in which, during arbitration and litigation, there are two procedures pending regarding the same dispute, or related disputes, and we will analyse the tools that can guarantee coordination between the two processes.

However, there are two points to be made.

The first regards the purpose of the analysis. We felt that it was opportune to limit our investigation to binding arbitration, which is equipollent to the judicial process

and preparatory to the production of a result comparable to the one that the parties might obtain by applying to the legal authorities. As we will be able to verify during our analysis, the debate about the nature of arbitration has also been presented as a debate about the unitary or dual nature of the institution. Although over the years the two approaches have enjoyed different fortunes, during the last reform, lawmakers appeared to favour the second. The choices made so far have in fact cancelled any doubts regarding the purely contractual nature of non-binding arbitration and the result has been to marginalise the institution. Hence the opportuneness of limiting our analysis to binding arbitration. Non-binding arbitration will therefore be the subject of brief references when we deem it necessary.

The second regards the perspective from which we examine the links between arbitration and litigation, which is that of civil litigation. Indeed, having considered the possibility of submitting to arbitration even disputes attributed to the exclusive jurisdiction of administrative justice, the problems regarding the allocation of the power to adjudicate can regard both relations with an ordinary judge and those with a special judge. In the paper we have adopted the traditional viewpoint in our study of these relations, i.e. that of civil litigation. However, without prejudice to the points that we will make in the paper, the problems that we will consider and the conclusions that we reach must be considered valid independently of the judicial organ involved.