



Faculty of Law

PhD Thesis in Internal and International Arbitration Law

**PROBLEMS RELATING TO THE NATURE AND EFFECT OF
ARBITRATION AWARDS HANDED DOWN IN SPORTS**

SUMMARY

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The examination of issues relating to the nature and effectiveness of praise pronounced the outcome of the arbitration proceedings conducted with the sports PhD Thesis, of which this paper is a quick guide, prefacing a discussion of the historical-legal evolution of sports, as well as under a detailed analysis of the cultural experiences and foreign laws (Western Europe and the United States of America), has allowed to find answers to important questions that doctrine and jurisprudence have always placed themselves *in subiecta materia*.

In particular, the question was raised:

- a) if the Arbitration for Sport was part of the sports law in the strict sense that is understood as the institutional activities of sports judges;
- b) if the arbitration referred to Federal Statutes and Regulations and *C.O.N.I.* had mandatory or optional;
- c) such subjective legal situations they could be the subject of arbitration and sports, in particular, if possible, in this regard, design exceptions to the model into state-operated arbitration;
- d) if it were possible to link the various forms of arbitration, as outlined by federal legislation and *C.O.N.I.*, dogmatic to a single category, so give it a unique character and a single effect.

The first question was solved in the sense of the arbitration can not fall into the stream of so-called sports law, strictly speaking, in favor of a more consistent inclusion in the system of sports justice in the broadest sense: such a result must necessarily reach us from a logical point of view so that we consider the function exercised in the field of arbitration courts esofederale as typically, what you want to believe that the essentially administrative.

As we have had occasion to define the specific chapter, a key role in finding a solution to the question under consideration is played by the legal nature to be awarded (and attributed) to the Federation and Olympic Committee: on the one hand, the qualification subject of public law and public character of the functions exercised by the W.T.O. summit in the Italian sport does not allow you to rebuild the sports arbitration as the degree of domestic justice, the other membership arbitration to ensure justice conciliatory originating from a choice private one, but still operating outside the court institutionalized short, it so that even within the same federal and "*endofederale*" (it means into the Federation) escape a simplistic reconciliation to proper justice system made available by micro-ordination of Sports. The Arbitration

for Sport, therefore, once disproved the theory that he would like an expression of an administrative function, shown to pose as a means of resolving disputes “other”; compared to those regulated directions, so that, even within the sport phenomenon, carries out its function within the judicial system in a broad sense, alongside courts and courts of “*autodichia*” (it means internal or domestic justice) institutionalized expression. The established nature of the subject under private law in favor of Federations, as well as the absence, for the benefit of the latter, the exercise of public function of proxies for the conduct of internal court, have also allowed to exclude that the federal or sports arbitration “*endofederale*” can somehow be traced in an administrative proceeding, including the award would be the final expression, as well as in the past but is majority held by the ordinary law of legitimacy about the award and administration pronounced by the “*Camera di Conciliazione ed Arbitrato per lo Sport*” of *C.O.N.I.* In confirmation of what has been argued here to be taken into due account also that the organs “*normopoietici*” order of the sport sector have now been definitively clarified, without possibility of misunderstanding on this point, that the arbitrator does not belong to the system extra-federation justicialism internal sense: the *T.N.A.S.*, in fact, despite the name, is not an organ of sports justice, at least in this sense that the activities it carries is not the courts governing the application of the rules of the sport before the court, because only the High Court is expressly described as capable of Justice home and, more precisely, as the last instance of sports justice. In reality, then, the *T.N.A.S.* an arbitration board is not even in the strict sense, since it is only indirectly involved in the arbitration proceedings themselves, merely arrange them, but never personally received the settlement of disputes referred to the arbitrators, only real subjects which is due the merit of the solution of the case. The tasks of *T.N.A.S.*, indeed, are typical of the institutions that administer arbitration: in particular, remember that it is for the President of the Arbitration Court the appointment of arbitrators in cases provided by articles 7, paragraph I (“*Se la controversia proposta comporta, per il suo carattere inscindibile, l’instaurazione di un litisconsorzio necessario e tutti i soggetti coinvolti risultano sottoposti alla disciplina arbitrale, spetta al Presidente del Tribunale la composizione del collegio e l’individuazione del suo presidente*”) and 17 (entitled their own “*Nomina degli arbitri da parte del Presidente del Tribunale in caso di omissione delle parti*”) of its rules (the objection, on the contrary, it is the High Court under article 12-b, paragraph VII, *Statuto C.O.N.I.* and article 18 *Regolamento*

T.N.A.S.). Very eloquent, therefore, also appears on this choice of special judicial system to exclude from its proper institution of arbitration, still, however, an integral part of sports justice in the broadest sense. As to the second question, that of compulsory or voluntary arbitration procedures sports, the solution considered desirable in these pages was found to be in line with the doctrinal and jurisprudential orientation of the most prevalent. More correctly, given the nature of sports arbitration statutes and regulations outlined by the exo and endo-federal, and considered the practical operation of the arbitration clauses contained in them, we can only reach a conclusion favorable to the hypothesis of optionality, all This, of course, whereas in most cases it is still administered procedures, which, although though proceduralisation (the reference is primarily to arbitration), are never imposed, and never produce the effect of excluding the use of state judicial protection when you are in the presence of subjective legal situations also relevant to the Republic. Do not tax, in fact, can and must speak when joining a social group to voluntary participation, expression of interests worthy of protection by the general order (this is the sort sports), is conditional upon certain rules, including those which concern the protection of subjective legal positions available. With regard to the identification of legal situations that may allow the use of arbitration to resolve disputes that the underlying (third question), research has not had to deal with the simple task of verifying the correctness and tightness of being rooted and established doctrinal guidelines and case law substantially sign “*compromettibilità*” unfavorable to the referees for most sports *res controversae* pertinent defined positions of legitimate interest. Given that the current legal Italian scientific community there is absolute harmony in considering the situations referred to arbitration of individual right to be involved querelles sports available, so that in case of simple property rights, being viewed as such in all respects within the rights available under article 806 *Codice di Procedura Civile*, but that it is subjective rights originating from the “*materia pubblicistica*”, the latter within the limits of legal provisions that need to void an arbitration and law, the real question involved, and concerns are still likely to consider the possibility of cognition and decision arbitration those disputes in the world of sports that underlie the so-called legitimate interests: that, given a traditional displeasure expressed by the prevailing doctrine and jurisprudence of all levels, because, in a nutshell, considered the inability of the public power, against which the said legal situations arise and are fulfilled.

Applying the realm purely sporting achievement for the general regulation (absence of significant and profound obstacles to the legitimate interests “*transigibilità-compromettibilità*”) must be reasonably claim, regardless of the nature of the Olympic Committee and its joints, and the functions exercised and from one to the other, the ability to think abstractly and generically similar arbitration legal positions, even if you configured in relation to a case previously decided by the sports sector-order internal organs. Thus the arbitration administered by the W.T.O. summit of Italian sport should always be conceived as an alternative judicial proceedings or derogating from the jurisdiction institutionalized (in this case the state) and as such likely to end with an act making absolutely substantially different from a measure administrative and coincident in every respect, with a real award. The consequence of (correctly) that act as a qualification of an arbitration award would be the application of the legal regime stipulated by the Republic for such a measure, with particular reference to the regulation of appeals: an ordinary court of law can appeal to the proceedings rescindente, with continuation for the (possible) phase rescissory before the administrative judge, more appropriately identified in the *T.A.R.* responsible for the area, namely the *T.A.R. Lazio*, the Rome Office. On the issue of arbitrability of these particular legal positions, the search in question, expressing its reasoned and argued for the theory of deferibilità arbitrators, believed to be able to process two alternatives, but have in common the effect of reducing the excessive orientation scale developed and followed by the *Consiglio di Stato*, drastically “*compromettibilità*” deployed against the legitimate interests in general (which is well down the necessary qualifications, 6 on the one hand, esofederale sports arbitration as a phase of a larger administrative procedure and, secondly, as an act of praise for essentially administrative). The first is that it proposes to assume, in virtue of considerations based on normative data and coherent and in-depth hermeneutic analysis about the intrinsic elements of the legal position under consideration, that the legitimate interests are, by their nature, generally arbitration, unless otherwise expressly provision to the contrary (which is currently not possible to find). To the “*arbitrabilità*” of the legitimate interests affected by questions of origin, sporting clear, therefore, can be reached in two ways, seemingly antithetical to the premise, namely:

- a) in the non-application of the precept of sport in which article 6, paragraph II, *Legge 205/2000* (and now article 12 *Codice del processo Amministrativo*),

whose inability to produce effects in the narrower range order structure of the sport, would result in a regulatory gap that, according to a systematic and coherent liberal reading standards, could never be interpreted as the presence of prohibitions tacit or implied. Such a legal vacuum could be interpreted in a restrictive or negative, only where it was possible to discern the ontological justifications, or where the effect that a ban would prevent non-expressed, find the reasons for its exclusion in a logical and systematic inconsistencies (inherent or extrinsic) and / or incompatible with other provisions or contrary to law. It in the present case this can not happen, because you tried to show that the legitimate interest can be considered to compromise in the primary on the assumption that there is no valid reason to allow this type natural to assert the contrary;

b) considering the applicable standard in article 6, paragraph II, *Legge 205/2000* (and now article 12 *Codice del processo Amministrativo*), provided that you read, as it seems only right, in the key once more liberal grain of salt. This means, if you give a reading of that provision in the sense of acknowledging that the legislature has referred only to personal rights within the exclusive jurisdiction, by providing them the opportunity to arbitration and specifying the type. Nothing said the Legislature over the legitimate interests, which, by virtue of their natural “*compromettibilità*” in arbitration proceedings and the absence of prohibitions expressed aliunde 7, could be arbitrator (or rather: the more so) when originating from the ordered derive from querelles sport.

The second solution, however, is that which passes indeed for the application of article 6, paragraph II, *Legge 205/2000* (read more about: article 12 *Decreto Legislativo 104/2010*), but that requires a broader reading of the standard, a reading, then, that allows to derive implicitly from the text exclusion from the legitimate interests of potential arbitrators subjective legal situations. Where you want to follow such an interpretation, however, could not reach, as does the majority, if not unanimous, administrative law, in indiscriminate and apodictic conclusion of all the sporting “*incompromettibilità*” pertinet not irrelevant to the legal positions of state order or do not qualify as a subjective property rights or legal positions of all those referred to in article 3 *Decreto Legge 220/2003* and led back to the exclusive jurisdiction of administrative courts. If you truly legitimate interests are inherently inarbitrabili and this feature must also be inferred article 6, paragraph II, *Legge 205/2000*, then the scope of such a “*incompromettibilità*” should be excluded for all

individual rights, thus qualifying award (and not essentially administrative act!) of all those arbitration decisions issued following a private judicial proceeding, relating to disputes concerning personal rights, even if potentially attributable to the exclusive jurisdiction of administrative courts. Exclusion could significantly expand the boundaries of which, where, by virtue of a more modern concept of *Pubblica Amministrazione*, supported by reading article 1, paragraph I *bis* of *Legge 241/1990*, we conceive the activities and responsibilities of the summit of Italian sport mainly as not public, rather tends to private law, unless expressly exceptions. The trail of logic and ordinary and constitutional legislation in force does not seem to be able to get to other solutions equally compelling.

With regard to the question under consideration and can envisage two alternatives more or less saving the arbitrability of the issues public sports, one can also mention what has been said about the *Tribunale Nazionale di Arbitrato per lo Sport*. As known, the *Tribunale Nazionale* shall be referred, with the exceptions and material scope *quoad valorem* indicated in the opening of this writing, all disputes of their sport (regardless of whether the dispute concerns, in subjects also relevant to the state order), provided it does not involve rights unavailable (*ex* article 3, paragraph I *Regolamento T.N.A.S.*) are used also for disputes concerning relevant issues for the State, the provisions of *Libro IV, Titolo VIII del Codice di Procedura Civile*, so as the rules and principles of the state. While, in fact, article 806 *Codice di procedura Civile* is explicitly invoked in conjunction with all the legal codes of the arbitration, also article 6, paragraph II, *Legge 205/2000* (aka: article 12 *Codice del Processo Amministrativo*) is deemed applicable by virtue of the appeal to the norms and principles of the Republic of the (not so for matters covered by the bond of the so-called justice, but not as well known sport into legal situations are found relevant to the State) pursuant to article 4, *Regolamento T.N.A.S.*.

To this point, nothing really *quaestio*, whether you want to continue to consider the legitimate interests unavailable, either, as even the author deemed preferable to the Ph.D. Thesis into question, can you believe qualify intransigent as available-arbitration- well these legal positions. Following the approach favored by the research in question, in fact, article 3, *Regolamento T.N.A.S.*. The Regulation does not give the Court jurisdiction on the rights available, but more generally thought to exclude the potestas *esofederale* cognitive organ in question on a more restricted category, that of inalienable rights: that you, as postulated above the trend

availability of legitimate interests and given a liberal reading article 6, paragraph II, *Legge 205/2000*, to bring to the ranks of legal arbitration through the clearing house of the same *T.N.A.S.* legitimate interests, just as legal positions not related to the field of “inalienable rights”, without causing no violation of the principles and rules of the general, without being distorted the meaning of the autonomy of sport, even in the same way his vision of a more restrictive (independently as irrelevant). On the other hand, the same effect on the nature of salvation actually resolving the dispute arbitration procedure carried out by *C.O.N.I.* is obtained by considering the article 6, paragraph II, *Legge 205/2000* as a standard suitable for devolution in the arbitration of disputes relating to personal rights only, provided that the arbitration law. The application of the principles and provisions of the State pursuant to article 4 *Regolamento T.N.A.S.* available and the character of individual rights (of course, those governed by public law) are used to qualify the award given by the arbitrators award of *T.N.A.S.* as real, since in this context would be averted prior hypothesis of arbitration rulings regarding issues pertinent legitimate interests, legitimate interests, according to a this approach would be the responsibility of the High Court of Sports Justice, which, as far as the topic under consideration, would be in the same position it was in the *Camera di Conciliazione e di Arbitrato per lo Sport*. In both cases, therefore, the arbitration at the arbitration *T.N.A.S.* will certainly (at least with regard to matters of state also) ritual, pursuant to article 12 *ter*, paragraph III, *Statuto C.O.N.I.* Statute and article 28 *Regolamento T.N.A.S.*, where it is expected that the final act of the arbitration procedure is open to challenge under article 828 *Codice di procedura Civile*: which do you mean that the appeal must necessarily be the proposal to the ordinary courts (Court of Appeals of jurisdiction), even if the dispute is placed among those attributed to the exclusive jurisdiction of the administrative law judge, as established by the *Corte di Cassazione*. In the case of praise pronounced on issues *T.N.A.S.* pertinent legitimate interests, however, there would be a fundamental difference between the two theories just mentioned: in the event of arbitrability of such legal positions held, the appeal could take place as suggested in the paragraph relating to the availability of legitimate interests, namely the phase separate into rescindente (ordinary courts) and rescissory (administrative law judge, preferably *T.A.R.*), in the contrary case, however, any praise should be considered non-existent for lack of subject matter of arbitration, resulting in actionability of the same before the administrative judge, who, in his capacity as

judge of the *P.A.*, may still know the provision of federal or *C.O.N.I.*, which has given rise to the dispute.

In conclusion, confirming as well as in arbitration “*compromettibilità*” argued about the sport in general so-called journalistic issues of Sport, it was considered appropriate to classify the award given by the Clearing House of the National Court of Arbitration for Sport in the way follows:

a) when the dispute will cover sports a situation attributed to the substantial law only sport (technical-sports and disciplines covered by the so-called bond of justice), the decision will not be challenged, given its own irrelevance into the Republic. The non-actionability of the award *in subiecta materia* pronounced is also provided by article 12 *ter*, paragraph III *Statuto C.O.N.I.*, where it provides that the appeal of the decision making is possible only “*ove la controversia sia rilevante per l’ordinamento giuridico dello Stato*”, but the inability to appeal should derive from the shape of the arbitration and the resulting award, since the arbitration may esofederale to be irregular and, therefore, by its very nature insusceptible of appeal for nullity under article 828 *Codice di Procedura Civile*. Without prejudice to the identity of result, such a conclusion seems more consistent with the regulatory data, since with it you can rule out any possible conflict between the general state law (articles 806 *et seq.* *Codice Procedura Civile*) and sport (article 12 *ter*, paragraph III *Statuto C.O.N.I.*), in so far as it would seem unduly narrow the scope of issues to be proposed to the *Corte di Appello*, as an appeal court for revocation;

b) if the dispute, however, cover a legal position qualifies as a right, (whether governed by public law or private law) and, therefore, all issues of jurisdiction of the *A.G.O.* and part of the *A.G.A.*, the ruling will be appealed in accordance with the rules laid down article 827 *Codice Procedura Civile*. The new statute Olympic Committee, therefore, seems to realize how minimally hoped by this point in the PhD Thesis the possibility of referral, however, issues of individual rights pertinent (also public) arbitrators;

c) when the dispute will be pertinent, on the contrary, legitimate interest, would necessarily affect the administrative jurisdiction, then you can have two solutions, depending on whether you support or “*non compromettibilità*” of legal positions on the subject. If we exclude such a possibility, as already said, the award must necessarily be considered non-existent, but if you might come to the

desirable result of the “*arbitrabilità-transigibilità-compremettibilità*” legitimate interests, then nothing could justify a different treatment than the praises of the case *sub b*) if the need for structural reasons, and logical consistency, to share the appeal stage between *iudicium rescindens* and *iudicium rescissorium* and with attribution to the ordinary courts of the first (no doubt the *Corte di Appello*) and the second to the administrative law judge (preferably but when supported by minority: Regional Administrative Court), as mentioned earlier.

As regards the last question, whose answer is a kind of compendium of solutions to the questions posed in this research, it seems logical and correct to affirm the impossibility of having a *reductio ad unum* of the various types of arbitration abstractly configurable reference the sports phenomenon. First, this effect should lead to the existence of a reserve established absolute jurisdiction (or rather: *potestas decidendi*) provided pursuant to Law on the part of judges with regard to domestic matters technical and sporting regulations. The distinction between the arbitration proceedings as proposed in the pages of the Ph.D. Thesis into question, in fact, not a purely formal or nominal, but finds its *ratio* in a difference of a substantive nature. First it must be remembered, in fact, that the existence of a constraint on the matter of justice and discipline *tecnicosportiva* (the boundaries of which, unfortunately, are not the subject of agreement within the scientific community legal) means that there are issues very special for the resolution of which, beyond the jurisdiction of federal courts and extra-federation individual, it is necessary to resort to arbitration equally peculiar: procedures, they are certainly true arbitration, in accordance with the principle of reasonableness have a discipline partially differentiated from that provided in the code of civil ceremony. It so that it is relevant that singular arbitration (in areas called “*riservate*”) than in the past could only have informal basis to avoid any form of attraction of the state justice in the appeal stage, but now (if we refer only to cases arbitration administered *esofederale*), with the establishment of the new *Tribunale Nazionale di Arbitrato per lo Sport* and Olympic Committee of the Statute reform occurred in 2008 (cf. article 12 *ter*), the ritual can also imagine, given that in such cases the most legitimate preventive inapplicability of articles 827, 828 and 829 *Codice Procedura Civile*. Beside such a judicial proceeding raises the classic figure of “*arbitrato codicistico*”, arbitration governed by the general regulation by the *Codice Procedura Civile*. The second type of Arbitration for Sport, therefore, is likely to occur for the purposes of dispute

resolution from a purely economic and legal situations as this involves subjective (*diritti soggettivi*) certainly relevant to the Republic. Arbitration in Sport has all economic matters, without exception, the hallmarks of arbitration operating within the legislation generally, so that the same may be so abstract ritual, how clear, both in law as in equity, deferring the choice between one type and the other two parts of the sovereign will of the micro-laws of the sport, as this is made explicit in the various federal Statutes and Regulations and *C.O.N.I.*. The award will emerge who will, therefore, always a real award, which the plan will be subject to the rules of appeal, depending on their nature, by the articles 827 *et seq.* *Codice Procedura Civile*, or article 808 *ter* *Codice Procedura Civile*, which means that in case of dispute or failure to perform its will arrive before the ordinary courts state, respectively, in the role of the *Corte di Appello* or the *Tribunale* for your jurisdiction. In short, can be superimposed, in the matter of arbitration laburistico-sheet the disciplines “state”; and the arbitration sport, which will, therefore, as the only benchmark standards dictated by order of the Republic. Last configurable type of arbitration in the world of sports is what could be called residual, as feasible in order to settle disputes pertinent relevant legal positions for the Republic (and, therefore, is not unique to justice home) and do not have purely economic (and, therefore, excluded from the jurisdiction of the *A.G.O.*) is, in hindsight, that the arbitration procedure used for the definition of querelles related legal situations of legitimate interest, and for that because, in the middle of a prolonged debate, doctrinal and jurisprudential historically ended with the prevalence of the thesis denying the nature of arbitration and award, in favor of a reconstruction of the entire process and his final act as essentially administrative. Without repeating what just above stated as to the arbitrability of the various legal positions, research on the subject in question has only expressed his belief that the recent amendment of the Statute of *C.O.N.I.* and the replacement of the *Camera di Conciliazione e di Arbitrato per lo Sport* with the *Tribunale Nazionale di Arbitrato per lo Sport* (ie with the drafting of a clearer regulatory document founding the current sports agency responsible for administering arbitrations extra-federation sports) enlighten those authors and those judges who, by virtue of alleged and believed to be reasons of order and systematic ideology, always flew over those elements of logical and legal induced to prefer reconstructions of arbitrations extra-federation more in line with the literal data, with the intention of the parties of the sporting world, as spelled out in statutes and

regulations, and regulatory elements found within the legislation *aliunde* sectoral and general. Elements of all non-direct subtraction facts and acts in the world of sports to the legitimate control by the state structure, but a precise hinge side of the sports facilities within the intended sense of the Republic, because of and in compliance autonomy recognized by the sports phenomenon of the *Costituzione*.

Research in summarized these pages has come, in a nutshell, the conclusion that, although almost every scientific computing Legal is subject to regulatory changes in the legislation, case law *revirements*, different employees and different interpretations of human evolution, social, economic, legal and cultural, there seems to be able to legitimately call into question now that the micro-ordination sport has among its means of dispute resolution (which more or less closely concern him and regardless of the nature and type of the latter) that processualciviltistico particular institute is governed arbitration in all its forms by the *Codice di Procedura Civile* is doubtful whether or not in compliance with current *regulae iuris* (State and Sport) disputes in the sports world can find the poem through the act (essentially judicial and non-administrative) which takes the name of the award.