

LUISS - LIBERA UNIVERSITA' INTERNAZIONALE DEGLI STUDI SOCIALI

PHD ON INTERNATIONAL AND INTERNAL ARBITRATION

“RESISTENCE TO ARBITRATION

THE ARBITRATION FOR PUBLIC COMPANIES BETWEEN ADHESION AND CONSENT”

- CHIARA ORTAGGI -

ABSTRACT

The paper analyses the exclusion of the public companies from the scope of application of the rules set forth by the Legislative Decree 5/2003 concerning company arbitration.

The exclusion contrasts with recent initiatives adopted by the Internal Organisation for Economic Cooperation and Development (OECD) for favouring the use arbitration by public companies as well as with the opposite solutions adopted by some emerging countries which introduced rules aimed at allowing (China), encouraging (Chile and Argentina) or mandating (Brazil) arbitration for the internal disputes of public companies. On the other side, in U.S. the arbitration of publicly held companies internal controversies is still reserved to the exclusive competence of the Courts, notwithstanding the favour expressed by the doctrine.

The paper analyses the characteristics and the diffusion of public companies in Italy and the nature of the shareholders of publicly held companies, whose rational ignorance of the shareholders' agreement is generally indicated, by the doctrine, as the main reason for the exclusion of arbitration. The ignorant shareholder of a public company is deemed not able to give an adequate and conscious consent to the arbitral clause included in the company documents. Therefore, admitting the effectiveness of the arbitral clause toward public shareholders risks to infringe the contractual-consensual basis of arbitration.

Indeed, with reference to the company arbitration, the issue of the consent to the arbitral clause has to be solved considering the principles governing the effectiveness of the rules of the company, as inserted in the shareholders agreement. These rules are effective toward all the shareholders and third parties. It follows that the adherence to the companies means approval of the rules of the shareholders agreement, thus including the rules on the competence over the internal disputes, and that any further consent is not required to be expressed with regard to the arbitral clause.

This solution is confirmed by the rules provided by the Legislative Decree 6/2003 on the effectiveness of the arbitral clause toward the company, its shareholders as well as toward directors and auditors.