

ABSTRACT

Law n.80 of 14 May 2005 empowers the Italian government to amend the Italian Code of Civil proceedings in matters regarding decisions of the high court and arbitration. Under article 1, third paragraph, letter b), among other directive principles and criteria that are aimed at “*reforms of rationalisation of the discipline of arbitration*”, it provides that the government should prepare “*a discipline regarding multi-party arbitration proceedings, which guarantees the original or subsequent will of the parties in the nomination of the arbitrator, as well as regarding right to substitution in the litigation process and participation of third parties in arbitration proceedings, in compliance with the fundamental principals of this institution*”.

As one may clearly assume from this legislative provision, the empowered legislator was not simply required to re-organise existing laws, which would have been impossible, seeing as no provisions regarding multi-party arbitration had been made in the existing procedure in force until 2006, but to make innovative and generalised provisions for an arbitration system which, on the one hand, should be able to govern controversies among more than only two parties, and to manage controversies that originally only involved two parties but that subsequently involve further parties on the other. Briefly, a flexible system was required, allowing for the entry of new participants even when arbitration proceedings have already begun (and, therefore, once the body that decides on the controversy has already been nominated).

The legislator of the reform satisfied the request for which it was empowered by introducing, among other provisions, the new articles 816 paragraph four and 816 paragraph five in the Italian Code of Civil Proceedings, via the approval of article 22 of Legislative Decree n.40 of 2 February 2006. The first among the two provisions regulates scenarios that involve more than two parties at the beginning of the controversy in arbitration, and the second provision

provides a discipline for cases in which more than two parties are involved following the commencement of the proceedings.

As we know, art. 816 *quater*, c.p.c., reads: “Should more than two parties be bound to the same arbitration convention, each party may include all or some of the other parties in the same arbitration proceeding if the arbitration convention assigns the nomination of the arbitrators to a third party, if the arbitrators are nominated with the agreement of all parties, or, if the other parties, once the first party has nominated the arbitrator or the arbitrators, agree on the nomination of the same number of arbitrators or they assign the nomination of the latter to a third party. In cases that differ from the previous paragraph, the proceeding that has been initiated by one party against other parties shall be divided into as many proceedings as the parties. If the conditions under the first paragraph are not satisfied, and the proceeding necessarily proceeds with a joinder of parties, then the arbitration may not proceed.”

Art. 816, *quinquies* c.p.c., provides: “The voluntary intervention or invitation of a third party into arbitration proceedings may only be admitted with the consent of such a third party or parties and with the consent of the arbitrators. The intervention provided for by paragraph two of article 105 and the intervention of the necessary joinder party is always admitted. Article 111 applies”.

In other terms, whereas article 816 paragraph four of the Italian Code of Civil Proceedings provides regulations that apply to cases of (initial) necessary or elective joinder parties, adopting a parallel procedure to as much that has been established for generally recognised procedures before a judicial authority of the State by articles 102 and 103 of the Italian Code of Civil Proceedings; article 816 paragraph 5 of the Italian Code of Civil Proceedings regulates all cases of *subjective complications* of the arbitration proceedings, meaning all the possible cases of involvement of more parties in the proceeding after the proceeding has been initiated before the arbitrator or the board of arbitrators. These cases may be attributable to voluntary intervention, to summons or to substitution rights in the claim. These are scenarios which, although they all find a solution in this

provision, do not appear to us as having much in common, other than the apparent and objective fact of involving a higher number of parties rather than the usual two in the proceedings after some of the parties have been subjected to arbitration at the same time.

The novelty is more and more apparent as one focuses on the state of the relevant legislation before the reform under discussion.

Before, the Italian Code of Civil Procedure of 1865, and then the one in force as of 1942 had not ever provided for the problem of multi-party arbitration, and had maintained silence on the matter, which, as the years went by, and as new and modern social and economic dynamics evolved, came to become more and more inadequate in guaranteeing the efficiency of the arbitration tool compared to those that were (and are) the material needs of operators of the Law. Suffice to think, by way of example, of the increasing importance corporate groups have acquired on the economic scene, therefore of the increasing importance of litigation among shareholders or among directors and shareholders or among auditors and companies, to understand how strongly needed an adjustment of the arbitration system was in the events of modern economy.

The relationship of arbitration with third parties (and one should verify if, on the basis of the new regulations, third parties exclusively to the arbitration proceeding, or, further upstream, third parties to the arbitration agreement; and one will observe that, according to the institution that implies the plurality of the parties, the answer to the question may vary) has been the subject of an actual legislative progression.

It began with the silence on the part of the legislator in 1942 (and before in from 1865), which we have acknowledged, and proceeded with the introduction of the possibility of a third party to advance claims by arbitral decision, with law n.25 of 5 January 1994, which amended articles 827 and 831 of the Italian Code of Civil Proceedings. The evolution then continued with the regulation of arbitration in corporate litigation ex articles 34 and 35 of Legislative Decree 5/2003, before it arrived to the present day conformation of arbitration law.

Without claiming to confront the unexplainable mystery, or, as it has been properly described, “that inconclusive trap”, which, truthfully, all too often gives one the impression of implying underlying choices of a generally philosophical rather than juridical nature of arbitration, one can in any case recall the statements of the best doctrine on the matter. Referring to the applicable regulations before the reform of 2006, regardless of everyone’s convictions on the matter, by highlighting the attempts of the legislator to move the institution towards a more defined jurisdiction, this doctrine had stated the fact that *beyond the structural differences that exist between ordinary trials and arbitration, which are, by nature*, linked to two types of protection of substantial rights that are contemplated in our jurisdiction, the macroscopic regulatory difference between arbitration and ordinary trial procedures was due to the total, or almost total, absence of regulations for the multi-party arbitration proceedings.

However, a complete analysis of multi-party arbitration proceedings cannot be limited to the examination of the regulations specifically under chapter III of heading VIII of book IV of the Italian Code of Civil Proceedings, seeing as one must necessarily depart from the state of the doctrine and jurisprudence regarding the corresponding phenomenon of the generally recognised trial with more than two parties. This is not only due to the explicit references contained in article 816 paragraph five and in the regulations in book I of the Italian Code of Civil Proceedings, but because of the fact that, beyond the structural differences between arbitration and state trials, the institutions at the base of the two types of procedures are necessarily the same, just as the same general principles and instances inspire them, is a statement one can take for granted.

Therefore, after a first chapter of a general nature, which reports the results that scientific studies on multi-party proceedings before state judges have obtained, the analysis will shift onto the specific discipline of multi-party arbitration proceedings and a further study of the two new articles 816 *quater* and *quinquies* of the Italian Code of Civil Proceedings.

Then the second chapter will focus on the problems that relate to the original participation of more than two parties in arbitration proceedings (and therefore, in particular, on the problems in nominating a board of arbitrators when there are more than two parties) and on the solutions adopted by the Italian legislator, and will provide an evaluation of their use and adequacy in the system of civil proceeding legislation in force and in the development of the relevant doctrine and jurisprudence.

Finally, the third chapter will illustrate all cases where more than two parties have been “added” during trial, as provided for in article 816 *quinquies* of the Italian Code of Civil Proceedings. Such an analysis will also focus on problems of the most relevant parts of general arbitration theory, as well as deal with the single mechanisms that allow for the access of third parties in pending arbitration proceedings (voluntary intervention (main or associated parties), summoned (by a party or by order of the judge), substitution in litigation).