

ARBITRATION PROCEEDING IN CONTRACTS CONCLUDED WITH THE PUBLIC ADMINISTRATION

Abstract

This study concerns the arbitration proceeding with regard to contracts concluded with the public administration. Such arbitration proceeding has been the subject of several amendments by the Italian lawmaker in the past few years, amendments influenced by contrasting views which, at some points, almost led to the suppression of the above mentioned arbitration proceeding.

The main reasons lying under the proposal of suppression of the proceeding were both the high costs deriving from it to the Public Administration and the risks connected to the possibility for the parties involved to ally in order to bribe the arbitrator and obtain illicit advantages in prejudice of the fair and efficient management of the Public Administration.

Notwithstanding the above, it must be kept in mind that the arbitration proceedings represent an ordinary means of resolution of disputes between the public customer and the private contractor, which has been used for more than 150 years. The first provision providing for the arbitration proceeding was, in fact, article 349 of Annex F to the Law 2248 of 1865.

That choice has been recently confirmed by the Italian lawmaker with the Legislative Decree No. 53 of 2010, which is just the last of the many provisions of law concerning the matter.

It must, nevertheless, be pointed out that during the years the use of the arbitration proceeding has evolved, and nowadays the optional nature of the recourse to the proceeding has been definitively confirmed by the unanimous case-law of the Constitutional Court.

Furthermore, the issue in 2006 of the Legislative Decree No. 163, so called *Codice dei Contratti Pubblici*, which overtook the many and disjointed provisions existing providing for a unitary discipline of the contracts concluded with the Public Administration, involved the use of

Doctoral Thesis "Arbitration proceeding in contracts concluded with the Public Administration"

Giovanni Battista De Luca exposed at the Luiss Guido Carli University.

All rights reserved.

the arbitration proceeding with regard to contracts concluded with the Public Administration as a general rule, offering an alternative to the judicial in-court proceedings.

Article 241 of the above mentioned Legislative Decree No.163/2006 makes an express reference to certain provisions of the Italian Code of Civil Procedure, references that make this arbitration proceeding fall within the category of binding arbitration (*arbitrato rituale*), subject to some of the rules provided for judicial proceedings and decisions.

The complete regulation of the arbitration proceeding is contained in articles from 241 to 243 of the Legislative Decree No. 163/2006, which provide for, respectively, the general overview of the subject, the chamber (*Camera arbitrale*) purposely established to facilitate the choice of the third arbitrator and certain procedural features to apply in case the chairman of the board of arbitrators is appointed by the above mentioned chamber. The latter provision, in particular, implies the creation of two different kinds of arbitration proceeding, depending on whether the chairman of the board has been appointed by the parties or by the chamber: in this case, in fact, instead of the “standard” procedure an administered procedure before a body purposely established at the chamber, shall apply.

Finally, it appears that the arbitration proceeding represents one of the main expressions of the principle of the self-government of the parties in legal transactions, since it allows to freely regulate the interests involved to the extent of avoiding, in certain cases and with the adoption of special formalities, a proceeding before a Court, by means of the assignment of the dispute to a panel of trusted arbitrators.