Regarding the orientation of some decisions on the merit which extend the limits of applicability of the arbitration clauses to corporate disputes

1. – Dominant case law of legitimacy and merit (1) teaches that « disputes that involve the interests of the company or infringe the laws to protect the collective interest of the shareholders or third parties cannot be subject to arbitration because these are ascertainments subtracted from the autonomy of the parties.

The prevalent legal literature is also in the same sense (2).

A principle of the kind has recently stated peremptorily for the objections of Annual Reports by Court of Civil Cassation, All divisions sitting together 21st February 2000 in Giur. It., 2000, I, II, 1210 and ff.

Case law of legitimacy also influences the operability of the arbitration clause, in the presence of a relationship with a plurality of parties, as is the corporate one, to the circumstance that the dispute has a bipolar nature, therefore the parties may be *a posteriori* grouped together in two centres of homogeneous and opposing interests (which is expressed by saying that the clause must have a binary nature) (3).

Corporate disputes, with a plurality of parties, which cannot be reduced to two homogeneous and opposing centres of interest, as a re the

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(1) For the decisions of legitimacy: Court of Civil Cassation 30th March 1998 no. 3322, Court of Civil Cassation 18th February 1988 in 1739 in *Società* 1988, p. 476 and ff.; for those on the merits, of the many, Court of Milan 4th June 1990 in Giur. It., 1991, I, II, 185, Court of Appeal of Milan, 11th February 1997 in *Società* 1997, p. 1149.

(2) SATTA, *Commentario al codice di procedura civile* IV, Milan 1959.1968 p. 206: SILINGARDI, *Il compromesso in arbitri nelle società di capitali*, Milan 1979; JAEGER, *Appunti sull'arbitrato e le società commerciali*, in *Giur. comm.*, 1990, I, p. 299 ff.; ROVELLI, *Competenza degli arbitri nella risoluzione delle controversie sociali in società*, 1991 p. 761; TETI, *L'arbitrato nelle società, Riv. Arbitrato*, 1993, 297 ff.; RUBINO, SANMARTANO in *Diritto dell'arbitrato*, Padua 194 p. 131 and ff,, DE FERRA, *Clausole arbitrali nel diritto delle società* in *Riv. arbitrato* 1995, p. 185 ff.

(3) MANDRIOLI, *Corso diritto procedurale civile*, Turin, 1995, III, 360 and ff. The many decisions include, Court of Civil Cassation 15th April 1998 no. 2983 in *Società* 1988, 585; Court of Civil Cassation 13th April 1998, no. 2940; Court of Naples, 18th December 1987 in *Società* 1999, 591.

« multipolar » proceedings, are not deemed subject to settlement and the clause is invalid and inapplicable.

This also explains the reason why there must be an odd number of arbiters and they are designated by the opposing centres of interest.

For some years, in open contrast with this prevalent case law, the Court of Law of Milan, with the decision of 4th June 1990 in Giur. It, 1991, I, II, 175 and ff., and others by the same Reporting Judge, inaugurated a turning point, which however has to date remained isolated.

The Court of Milan stated that corporate disputes are in general subject to settlement though regulated by rules of general interest ».

According to this orientation, the shareholder would be free to exercise his rights in the forms of law and according to the clauses of arbitration.

The same Court confirmed this turning point with a subsequent decision of 10.1.2000 in Giur. It. 2000, I, on Annual reports. The same Court of Milan, with the last decision 13.11.2001 no. 11132, which is commented here, went further, taking a great step ahead.

It took this isolated orientation to the extreme consequences, establishing the principle that all the disputes referring to rights in the abstract can be subject to settlement, with the exclusion of those that are not available die to the illegal nature of the contract and which, as such, cannot be settled in pursuance of article 1972 Civil Code.

All the corporate disputes would come within, according to this line, the sphere of application of the clause of arbitration, except disputes which cannot be settled due to the illegal nature of the contract.

As a consequence, the Court with the decision under review, declined its competence, as an ordinary judge, to a board of arbitrators, and deemed that the dispute it had been called to decide upon, could be subject to settlement.

It is opportune to specify here that, in the case in point, the plaintiff had impugned because a resolution by the Shareholders, simulated and non-existent, concerning a glaring increase of capital and had objected that the resolution of subsequent placement by the directors was non-existent because they had not met and that the payment of the capital increase was only apparent and had not come about.

The survival of the company depended on the outcome of the lawsuit because in the event of acceptance of the claim, it had to be considered wound up due to the heavy losses that it had encountered, if the capital increase had not been made.

The dispute in any case objected that the equity situation of the company met the principle of truth and this was an important part of the annual reports which in themselves were not subject to settlement by arbitrators, according to the decision shown above of our civil section, all divisions sitting in full no. 27/2000. This decision of the Court of Milan no.

11132/2001, with a contradictory motivation in dismissing the objection of incompetence taken in favour of the arbitration, for the part that concerned a series of impugned annual reports, confirmed that this was a subject of the exclusive competence of an ordinary judge.

A fortiori, by analogy, the same result should have been reached by the orientation that does not consider subject to settlement the disputes on the revocation of a capital increase and shareholders' resolutions on mergers and divisions of a company.

2. – The Court of Milan gives as the grounds of its orientation which generalizes to the majority of corporate disputes the applicability of the arbitration clauses, the need to ensure the greatest speed and efficacy of their definition, with respect to the long time needed today.

This *ratio*, whilst it concerns all civil proceedings, does not justify that the prevalent public interest for impartiality and the necessary consideration of the legal decisions be sacrificed to it (4), in a sector where the respect of the rules in those economic firms that have a corporate form is required.

The public interest sacrificed here with respect to that less important of speed, had motivated the legislator of the recent procedural reform to lay down a bench procedure instead of a judge sitting alone for this type of dispute.

The public interest with respect to the company rules is at the basis of the institution of the Consob (Italian Securities Commission) and its competences.

At a time of globalization of financial markets, which involve increasingly large spheres of savers and investors, the certainty of corporate rules is a primary condition of investments and therefore of the economic development of the country.

From this point of view, the orientation settle disputes by private arbitration appears clearly as a counter-trend and following an involutional line with respect to the objectives of legislative policy as commonly perceived.

The Court of Milan extends the possibility of settlement by arbitration of this type of dispute to the extreme limit under article 1972 Civil Code which lays down that agreements relative to illegal contracts cannot be settled.

This strained interpretation cannot be agreed with because it concerns a marginal and residual hypothesis, which is not susceptible to taking on the value of a principle of law.

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(4) Court of Civil Cassation 30th August 1999 no. 9157; Court of Appeal of Milan 6th November 1992 in *Società* 1993 781 and ff,; Court of Milan 4th June 1990 in *Giur. It.*, 1991 I, II 1175 which qualify impartiality as an essential principle of public order.

The limits of the possibility of settlement by arbitration are generally fixed by articles 806 and 808 Code of Civil Procedure and those they refer to of the impossibility of settlement of the rights by article 1966 Civil Code.

This last rule in the first section establishes the requisite that whoever settles has « the capacity to dispose of the rights the form the object of the dispute » and in the second section establishes « the nullity of the transaction if these rights by their nature or by provision of the law, are withdrawn from the availability of the parties ».

The reference to the non-possibility of settlement of the right in order to settle a dispute by arbitration appears to refer to the clauses of arbitration that provide for amicable composition instead of composition in court as the former configure hypotheses of agreements, the logic and result of which are in common with those of the transaction. From this point of view, the reference of impossibility of settlement of the dispute to the non-settlement of the rights appears inadequate.

The interpretation of article 1966 Civil Code has given rise to serious disputes by the experts of law.

It is well known that for some of them the first section refers to the capacity to act in a technical sense, whilst the second section concerns the legitimization of the settling party (5). For others, the first section also contemplates the legitimization whilst the second section would more properly concern a requisite of the object of settlement (6). Case law follows this line (Court of Civil Cassation 30th January 1990 no. 635 in Giu. It 1990, I, 1, 1102 inter alia). The second section establishes the nullity of the transaction if the rights « by their nature or by specific provision of the law are withdrawn from the availability of the parties ». Disputes on labour and social security, questions of state, personal separation of spouses and in general unavailable rights come under this category of disputes. In any case the circumstance that various hypotheses of the two sections of art. 1966 Civil Code configure cases of nullity, deprives significant from their distinction, for our purposes.

With an evident petition of principle, article 806 Code of Civil Procedure defines the disputes on rights that cannot be settled as not subject to settlement and article 1966 Civil Code the disputes concerning the rights withdrawn from the availability of the parties. It is fairly clear that the requisite for the party who wants to reach settlement by arbitration must have the availability of the right, coincides with his legitimization to be able to dispose of it exhaustively, therefore it is included in the second section.

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(5) PUGLIATTI, *Della transazione*, 1949, p. 466 ff.

(6) CARRESI, Transazione in *Noviss. Digest.*, 1973, 130 and ff., SANTORO PASSARELLI, *La transazione* 1975-1997; in this sense Court of Civil Cassation 16th February 1957 no. 565 in Foro It., 1958 I, 1758; Court of Civil Cassation 5th July 1993 no. 7319 in *Foro It.* 1995, I, 650.

The party who settles or reaches settlement by arbitration on his right, may not damage the same right to impugnment of other shareholders and in this case we see the phenomenon of the diffusion of rights amongst all those who are shareholders. In this hypothesis, they can obtain a profit but not be damaged by a judgement formed b strangers, according to the principle *res iudicata tertiis juvant sed non nocet.*

3. – Conditions of validity and operability of the arbitration clause, as stated above is that it has a binary character, i.e. the dispute is bipolar.

When there is a dispute with a plurality of parties, as is the case of a corporate dispute, the clause of arbitration, operates if *a posteriori* a spontaneous grouping of interests into two homogeneous and opposing groups is determined and therefore we have two parties.

It is not sufficient for the interests to be in abstract groupable into two homogenous poles, but the subjects must spontaneously decide to group together and designate an arbitrator of common trust. Forced grouping cannot be conjectured.

In the case in which different shareholders propose impugnment of shareholders' resolutions, with different arbitrators in their trust, there cannot be a meeting.

Nor can an autonomous intervention by a single shareholder be hypothesized in a pending proceeding, taken by others, if he wants a different arbitrator is to be appointed.

When there are more than two parties and there is not a spontaneous grouping, the arbitration proceedings cannot take place and recourse must be made to an ordinary judge.

The binary clause does not operate either when the company is added to the two opposing parties (alone or grouped together) as an autonomous pole of interest (7).

This is the case in which for example the shareholders' resolutions of incorporation and division (8), capital increases (9), revocation (10), approval of the annual report (11) and so on and so forth.

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(7) Court of Civil Cassation 15.4.1998 no. 2983; Court of Civil Cassation 13.4.1998 no. 2940; Court of Civil Cassation 18.2.1988 no. 1739; Court of Appeal of Milan, 4.6.1990 in *Giur. It.*, 1991, 1, 2, 175; op. cit. loc. cit.

(8) Court of Pescara 17th November 1992 in *Società* 1993, 528; RUBINO-SAMMARTANO, *op. cit.*, 131 and ff: Contra Court of Milan 2nd December 1992 in *Società* 1992, p. 631.

(9) The many include Court of Rome 25.7.1984, 492 with note by A. RORDORF, Deferibilità ad arbitri di controversie relative a deliberazioni assembleari in Società 1985; G. SIRINGARDI, *op. cit. loc. cit.*: Court of Como, 26.5.1989, 951; Court of Naples 6.3.1993, *Società* 1993, 982.

(10) Court of Lecce 3rd July 1997 in *Società* 1988, p. 636.

(11) SALARIA, *Competenza arbitrale controversie di bilancio* in *Società* 1989, p. 951; G.E. COLOMBO, *Bilancio di esercizio e consolidato*, Treatise *Società* VII, Turin 1991, p. 57 and ff.; COTTINO *Le società*, Padua 1999, p. 486 and 487; in case law Court of Civil Cassation, all divisions

This is not the case in the hypothesis in which the dispute has as its object the impugnment of a resolution, adopted by a Shareholders' Meeting, of which the defects objected to concern the convocation (12), the formation and functioning of the Shareholders' Meeting (13) and the formal legitimacy (14).

This occurs a fortiori when the defects determine the legal non-existence of the Shareholders' meeting and therefore of the resolution (15).

Similarly, the clause of arbitration cannot operate in the case in which an impugnment concerns a resolution that took a company action of liability against some directors, because this leads to a multipolar proceeding (16).

The same must be said if the dispute concerns the withdrawal of the exclusion of a partner in a partnership (17) which leads to the dissolution of the company or releases him from his unlimited responsibilities contracts contracted with the company.

4. – The orientation of the Court of Milan as above seems to have recently been taken by the legislator as his own with the law enacted under delegated power no. 366 of 3.10.2001 on the reform of company law.

It extends beyond all proportion the possibility of settlement by arbitration of company disputes.

Under article 12, section 3, the law states « the government must also provide for the possibility that the Memorandums of association of commercial companies contain clauses of arbitration even in departure from articles 806 and 808 of the Code of Civil procedure, for all or some of the company disputes as per section 1. In the event that the dispute concerns questions that cannot form the object of settlement, the clause of arbitration must refer to arbitration according to the law, with it remaining excluded that the judgement of equity and award can be impugned for infringement of the law ».

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sitting together 21st February 2000 in *Giur. It.*, 2000, 1, 2, 1210 ff.; Court of Civil Cassation 10th October 1962 mo. 2910,: Court of Padua 18th December 1986, *Società* 1986, 1092.

(12) Court of Pescara, 17th November 1992 *Società* 1993, 528 Court of Ascoli Piceno 4th October 1993, ibidem.

(13) Court of Appeal, Milan 11th February 1997, Società 1997, 1149; Court of Pavia,7th December 1987, Società 1988, 280; Court of Vicenza 7th October 1982, *Società* 1983, 1888.

(14) MARULLI *Impugnazione di delibere per vizi di forma e competenza degli arbitri in Società* 1993, 356; DE FERRA, *op. cit.*, p. 189; JAEGER, *op. cit.*, 124.

(15) G. VALCAVI in Riv. Dir. Fall. 2001, p. 88 ff., 99 ff.

(16) Court of Civil Cassation 18th February 1988, no. 1739 in *Società* 1988, 476 ff.; Court of Civil Cassation 15th April 1988 no. 2983 amongst others.

(17) Court of Civil Cassation 3rd August 1988 no 7814 *Società* 1988. 1135; Court of Trieste 12th December 1990 *Società* 1991, p. 818; Court of Rome, 26th March 1994 in *Riv. Arbitrato* 1995, p. 457.

Such a radical and hasty reform of the law on this subject arouses serious perplexities that it meets the public interest of the economy of the country.

Recourse to alternative justice in joint stock corporations or partnerships increases out of all proportion the costs and anticipations necessary to establish a proceeding and as such privileges those shareholders who have important interests, whilst it does not offer others (especially the minority shareholders) guarantees of necessary impartiality and an enforceable award, as for example in amicable settlements.

Arbitration still represents today an elitist phenomenon, which has not succeeded in entering the practice of economic contracts between producers, despite the recommendations of the authorities of the Chambers of Commerce.

The class of professional people, from whom to draw arbitrators is not very large and mostly revolves around the same people, who are called to alternate from one arbitration to another.

The clauses of arbitration at present are translated into the forecast of forms of protection which are often flattened on groups and supervising directors of the company, whose influence is exalted.

The normally short length of an arbitration offers little space for the assumption of evidence and for detailed pronouncements, so that under the urgency of the decision and the worry that the deadlines granted by the parties are running out, the normal practice induces summary judgements and confirms that « haste and quality are an ill-matched couple ».

This explains the poor preference of our partners and shareholders for this type of justice and explains the reason which these clauses often end up by disincentivating the choices of investors in the capital of the company.

The law enacted under delegate power also provides for other arbitration clauses, according to the law, extending them to disputes which have as their object rights than cannot form the object of settlement, and this represents a major limit to the general impugnment of company resolutions.

These normative provisions together with the recent reforms of unfair presentation of financial statements, which has become prosecutable with am action at law, and still today, subject to reduced suspension, certainly do not recommend our companies to investors of capital on a globalized financial market.

There is then the almost insolvable problem of reducing to a « binary » model a dispute with a plurality of parties, as is that of a company.

The disputes in which the company is involved, as an autonomous pole of present or potential interests, not having homogenous and conflicting interests or that choose different arbitrators, are « multipolar » and cannot be reduced to a bipolar model, neither can impugnments on divisions, incor-

porations, financial statements, revocation of directors and actions against directors' liability, taken by shareholders' meetings or by individual shareholders, in subrogation of the company.

In hypotheses of this type, the clause of arbitration cannot work.