The Company as Institutional Arbitrator in Italian Law—Setting an International Trend?

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THE COMPANY AS INSTITUTIONAL ARBITRATOR IN ITALIAN LAW—SETTING AN INTERNATIONAL TREND?

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1. Introduction

In international practice, arbitrations are mostly conducted before an arbitrator who is a natural person, rather than a company.[1] This might also explain why the United Nations Commission on International Trade Law (UNCITRAL) Model Law, being the single most important legislative instrument in the field of international arbitration, does not—at least not explicitly—deal with the issue of appointing a legal entity as an arbitrator. At the same time the UNCITRAL Model Law does not seem to restrict party autonomy in this regard. As a matter of fact, UNCITRAL Model Law neither defines the term ''arbitrator'' nor its Ch.II limits the capacity to be an arbitrator to natural persons. This leaves room for the proposition of this article that for the purpose of efficiently and professionally administrating a high number of commercial arbitrations, the optimal solution is to appoint a legal entity under private law, namely a co-operative.

The idea of appointing a legal entity as an arbitrator is to open commercial arbitration,[2] developing it from an elitist instrument for the resolution of disputes to an economic activity available to all entrepreneurs in their businesses and dedicated to improving the entrepreneur's organisation from the outside.[3]

Thus, taking into consideration that arbitration is constantly in evolution, the arguments and ideas expressed in this article (mainly based on Italian Law) may invite the international arbitration community to reconsider this often overlooked approach.

2. The problem of appointing legal entities as arbitrator

In order to bring about this change of mind (as well as, and perhaps before all, of cultural traditions), it is necessary to understand the functions usually carried out by arbitral institutions in a much broader sense, also including the activities usually exercised by the arbitrators themselves and most importantly encompassing the rendering of awards. Thus, for the purposes of this article the ''activity of institutional arbitration'' is conceived as a complex service dedicated to answer to the need of entrepreneurs

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1. G. Born, *International Commercial Arbitration*, (The Netherlands: Kluwer Law, 2009), pp.254 and 1448.

2. In this article the term ''arbitration'' refers to *arbitrato rituale* under Italian law, corresponding to arbitration *tout court* outside Italy. The *arbitrato irrituale* is a legal figure particular to Italian law (cf. M. Marinelli, *La natura dell'arbitrato irrituale. Profili compartistici e processuali* (Torino: Giappichelli, 2002) nowadays expressly settled in art.808-*ter* (''*Arbitrato irrituale*'') of the Italian Code of Civil Procedure (hereinafter referred to as CPC): ''1. The parties may establish in writing that the dispute be settled by arbitrators through a contractual determination as an exception to the provision of Article 824-*bis*. ... 3. Article 825 is not applicable to the contractual award''. The peculiarities of *arbitrato irrituale* may be better understood by looking at CPC art.824-*bis* (*Efficacy of the award*) (''Except as provided by Article 825, as from the date of its last signature the award shall have the same effects as a judgment rendered by the judicial authority'') and CPC art.825 (*Deposit of the award*) (''1. The party wishing to have the award enforced in the territory of the Republic shall file a request to that effect by depositing an original or a certified copy of the award, together with the original or a certified copy of the arbitration agreement, with the registry of the tribunal of the district in which the arbitration has its seat. The tribunal, after ascertaining that the award meets all formal requirements, shall declare the same enforceable by decree. The award which has been declared enforceable may be registered [*trascritto*] or annotated in all cases where a judgment of the same content would be subject to registration or annotation'').

3. Despite the painful state of the civil justice system in Italy and notwithstanding the conclusion of this article, the author does not share the opinion of those—M.N. Rothbard, *For a New Liberty. The Libertarian Manifesto*, (Alabama: Ludwig von Mises Institute, 2006), especially p.307 ff. (quoted from the Italian edition *Per una nuova libertà. Il manifesto libertario* (Macerata: Liberilibri, 1996) and D. Friedman, *The machinery of Freedom: Guide to a Radical Capitalism,* (Illinois: Open Court, 1995), pp.123–127 and 169–177 (quoted from the Italian edition *L'ingranaggio della libertà. Guida a un capitalismo radicale,* (Macerata: Liberilibri, 1997)—who propose to have an arbitration company in order to totally replace the inefficient judicial system.On this topic see also E. Cusa, ''La società di arbitrato amministrato'' in (2007) *Rivista trimestrale di diritto e procedura civile* pp.779–810 and E. Cusa, ''Arbitrati amministrati ed imprese arbitrali'', in Aida 2006 (Milano: Sufficè, 2007), p.158 ff.

to have their commercial disputes resolved via arbitration in a quick, professional way, and at affordable and previously fixed prices.

The activity of institutional arbitration (administering and arbitrating at the same time) shall therefore be exercised by a legal entity. However, as a first step it is necessary to answer a central legal question: can a legal entity be appointed as an arbitrator?

In general the arbitral institution—whether Italian or foreign, normally in the form of an association, but also in the form of a foundation,[4] or a company[5]—is not appointed arbitrator, and is restricted to administer the arbitration proceedings. The arbitrators are appointed by the parties (although in some cases also by the same institution). Perhaps therefore, the problem of a legal entity acting as an arbitrator has so far been mainly discussed in theory.

The problem just mentioned has a twofold importance. On the one hand, should it really be impossible to appoint arbitrators other than a natural person, it would be necessary to consider as null and void, due to violation of art.812 of the Italian Code of Civil Procedure (hereinafter referred to as CPC)[6]:

(i) the ouster of ordinary jurisdiction foreseeing such appointment[7];
(ii) the appointment of a legal entity as arbitrator;
(iii) the eventual arbitral proceedings managed by the above mentioned arbitrator;
(iv) the final act of this proceedings (according to CPC art.829 para.1 n.3).[7a]

On the other hand, should such an appointment be considered as acceptable, and should all parties of the arbitral proceedings appoint the arbitral institution (not only as simple appointing authority, but) as the sole arbitrator competent to decide the dispute and to make the award, the proceedings itself could be improved both

(i) through the rationalisation of the arbitral institution, and
(ii) through a better and faster choice of persons actually called upon to render the awards.

Concerning the benefit *sub* (*i*), the arbitral institution being the sole contractual counterpart of the parties to the arbitral proceedings could simplify the appointment of the persons who are called upon to render the award and who, especially in small claims, may correspond to employees of the institution. Another possibility to rationalise administration is for the institution to collect fees and expenses of the arbitral proceedings for itself and not on behalf of the externally appointed arbitrators. As for the benefit *sub* (*ii*), the necessity of the appointment of arbitrators by the parties could simply be eliminated; this would reduce the dependence of the arbitrators to the latter, reduce the time necessary to choose the people called upon to solve the dispute, and, if the institution were specialised, ensure the objective appointment of people professionally competent in the subject matter of the dispute.

2.1. The law

The first rule of Italian law to be taken into account when verifying whether an arbitral institution can be directly appointed as arbitrator is CPC art.812.

This article, if separately read, does not suffice to preclude the appointment of a legal entity as an arbitrator, as such a legal entity may have a general capability of acting.[8]

This would be different if, under Italian law, there was a rule similar to that in other countries, such as Spain,[9] France,[10] or the Netherlands,[11] in which the legislator

4. As in the case of the *Fondazione dei Dottori Commercialisti di Milano*, that has a body, the *Camera Arbitrale e di Conciliazione*, which is disciplined by regulations approved by the Board of Directors of the foundation and which may be considered as an arbitral institution.
5. For example, the Singapore International Arbitrational Centre, a non-profit company limited by guarantee in accordance with the company law of the Republic of Singapore.
6. CPC art.812: ''A person who, in whole or in part, has no legal capacity to act cannot be arbitrator''.
7. However, it may be possible to have the appointment in examination notwithstanding such an agreement, whenever the legal entity is chosen by one of the parties of the arbitral proceedings.
7a. CPC art.829 para.1 n. 3: ''Notwithstanding any prior waiver, recourse for nullity may be filed in the following cases: . . . if the award has been rendered by a person who could not be appointed as arbitrator, according to Article 812''.
8. There are also no specific criminal provisions that preclude the appointment of a legal entity as an arbitrator, because there are no crimes specific to arbitrators alone. Such provisions would have implied a restriction of the capacity of a legal entity to be an arbitrator. In fact, the appointment of a legal entity as arbitrator could then even be a means of avoiding criminal sanction.
9. With art.13 *ley* 60/2003, *de* 23 *de diciembre, de Arbitraje*: *''Pueden ser árbitros las personas naturales que se hallen en el pleno ejercisio de sus derechos civiles, siempre que no se lo impida la legislación a la que pueden estar sometidos en el ejercisio de su profesión. Salvo acuerdo en contrario de las partes, la nacionalidad de una persona no será obstaculo para que actúe como árbitro*''.
10. With art.1451 of the French Code of Civil Procedure (''1. *La mission d'arbitre ne peut être confiée q'à une personne physique; celle—ci doit avoir le plein exercise de ses droits civils. 2. Si la convention d'arbitrage désigne une personne morale, celle-ci ne dispose que du pouvoir d'organiser l'arbitrage*''), as elaborated by, for example, Devolvé, Rouche and Pointon, *French Arbitration Law and Practise,* (The Hague: Kluwer Law International, 2003), p.90. Nevertheless, M. de Boisséson, *Le droit Français de l'arbitrage,* (Paris: Joly, 1990), pp.154, 552 and 553, writes that the above mentioned text, reformed in 1981, merely no longer allows the appointment of a legal entity as arbitrator in domestic arbitration, but does not preclude such an appointment regarding international arbitration.
11. With art.1023 of the Dutch Code of Civil Procedure (Who may be Appointed as an Arbitrator): ''Any natural person of legal capacity may be appointed as arbitrator. Unless the parties have agreed otherwise, no person shall be precluded from appointment by reason of his nationality''.

explicitly forbids the parties to appoint an arbitrator other than a natural person.[12]

Moreover, recently legislators have begun to explicitly grant legal entities some special capacities in connection to jurisdictional functions exercised by others. I refer, for example, to the possibility that:

(i) the appointment as lawyer may be conferred to a lawyers' company according to art.16 and following Legislative Decree February 2, 2001, n.96;
(ii) the appointment as expert witness in an arbitral proceedings may be conferred to a legal entity according to CPC art.816-*ter* para.5[13] ;
(iii) the appointment as official receiver (*curatore fallimentare*) may be conferred to a professional company, whose associates are lawyers or certified accountants according to Royal Decree March 16, 1942 n.267 (hereafter the Italian Bankruptcy Law) art.28 para.1, letter *b*.

In addition, it is already possible today that a legal entity renders professional services (although not adjudication); for example, a legal entity may render a contractual award according to CPC art.808-*ter*,[14] or may become nominated as a conciliator (*arbitratore*, i.e. as the third person determining the subject matter of the contract). These legal entities must have a (neutral) third party position (*terzietà*); statutory audit, for example, can and sometimes must be undertaken by a legal entity and this is a service that necessarily requires the independence of the person fulfilling this function.

2.2. Scholarly opinions and decisions of the courts

After several amendments, the wording of the text of CPC art.812 is non-decisive, leaving much room for interpretation, and dividing current legal science on the permissibility of appointing a legal entity as arbitrator.

Most authorities consider the provision to speak against the appointment of a legal entity as an arbitrator, either because this could be considered a ''strictly personal assignment (*intuitu personae*)'',[15] or as the activity of judging is ''particular to the human being''.[16] A more open approach interprets the appointment of a legal entity similar to an appointment *per relationem*, the appointment in fact referring ''to the organ which represents the legal entity, so to say to the natural persons who collectively make it up''.[17] Therefore, according to this theory,[18] the appointed arbitrator would correspond to the natural persons who are the legal entity's persons and not to the legal entity represented by them.

The contrary approach considers the appointment of a legal entity as an arbitrator (normally as a sole arbitrator[19]) to be admissible, at least under the condition that the entity has legal personality and does not pursue a for-profit purpose. Following this approach, recognised non-profit associations or foundations may be appointed arbitrators. Practically, the activity of the arbitral institution will be carried out by the persons of such legal entities. These persons could agree to distinguish the psychological attribution of the acts in which the activity of arbitration is expressed, to be always referred to the natural person (the legal entity's executive), who brings into being such acts, from the legal attribution

12. In Germany and in Austria, as well as in Italy, there are no particular prerequisites in order to be appointed arbitrator. Nevertheless, German (K.H. Schwab, G. Walter, *Schiedsgerichtsbarkeit*, 7th edn (München: CHBeck, 2005), p.72; W. Voit, in H.- J. Musielak, *Kommentar zur Zivilprozeßordnung*, 4th edn (München: CHBeck, 2005), para.1035 fn.16) and Austrian legal science (H.W. Fasching, *Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht* (Wien: Manz, 1973), pp.56 and 57, G. Zeiler, *Schiedsverfahren* (Wien, 2006), para.586, fnn.4 and 5) consider the appointment of a legal entity as arbitrator to be inadmissible; however should such an appointment be made, the same authors assume that (where interpretation could allow the understanding) the parties wanted to appoint the natural person (as legal representative of the legal person).The opinion is different in Switzerland: according to R. Briner, former secretary of the International Court of Arbitration at the International Chamber of Commerce of Paris, in J. Paulsson, *International Handbook on Commercial Arbitration*, (The Hague: Kluwer, 1998), p.15, the parties may appoint a legal entity as arbitrator. This is also permissible under British law, at least according to D.S.J. Sutton and J. Gill, *Russell on Arbitration*, 22nd edn (London: Sweet and Maxwell, 2003), p.102, provided that the appointed legal entity selects qualified arbitrators from its members.
In the USA 13 states have adopted the Uniform Arbitration Act, in the version of 2000, under which companies should not be appointed arbitrators because the meaning of ''*arbitrator*'' corresponds (according to s.1(2) of the Act) to ''an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate'', and because (according to the official commentary of the definition) the term '''individual' rather than 'person' is used because business entities or organisations do not function as 'arbitrators'''.
13. CPC art.816-*ter* para.5: ''Both natural persons and entities may be appointed expert witnesses.''
14. According to the Court of Cassation (*Corte di Cassazione*), August 17, 1962, n.2587, in (1963) *Foro italiano*, I, c.58, and followed by the legal science, most recently by M. Rubino-Sammartano, *Il diritto dell'arbitrato,* 5th edn (Padova: CEDAM, 2006), p.464.
15. Cf. E. Redenti, ''Compromesso (diritto processuale civile)'' in *Novissimo Digesto italiano,* III, (Torino: UTET, 1959), p.796.
16. G. Verde, *Lineamenti di diritto dell'arbitrato*, 2nd edn (Torino: Giappichelli, 2006), p.79 and Rubino-Sammartano, *il diritto dell'arbitrato* (2006), pp.463 and 464, who observe that the act of arbitrating is personal and cannot ''undergo changes owing to modifications in the company organs or even by a manager of the company''. I will come back to this argument and the supposedly unchangeable nature of the subjects called to carry out jurisdictional offices at the end of point 6.1 below.
17. C. Cecchella, ''Il processo e il giudizio arbitrale'', in C. Cecchella (ed.) *L'arbitrato* (Torino: UTET 2005), p.113.
18. Supported, by Verde, *Lineamenti di diritto dell'arbitrato* (2006), p.80.
19. ''Being still merely theoretical and really of arduous realization the possibility of the appointment of the same legal entities as components of arbitral tribunal'' (C. Punzi, *Disegno sistematico dell'arbitrato*, (Padova: CEDAM, 2000), Vol.I, p.333).

of the same acts, to be referred on the contrary to the legal entity which has been appointed as arbitrator.[20]

The decisions of the courts, of which there are very few on this point of law,[21] have always denied the legitimacy of an arbitrator other than a natural person; unfortunately these decisions lack detailed or concise reasoning.[22]

2.3. Criticism of scholarly opinions

This article aims to show that the academic opinion and case law that consider the appointment of an arbitrator other than a natural person to be inadmissible, are not conclusive at all. Furthermore, that this issue is presently evolving and thus only in the process of being finally resolved.

The argument on which the appointment as an arbitrator should be strictly personal, and is therefore incompatible with the appointment of a legal entity, has already been sufficiently refuted, as the parties are free to transfer their right to appoint an arbitrator to a third party.[23] Today this concept is explicitly to be found in the Italian Law (CPC art.810, last paragraph, and CPC art.816-*quarter* para.1).[24]

The same reasoning applies to the argument that the activity of judging should be ''peculiar of a human being''. This argument overlooks the necessity of distinguishing the appointment of the professional to perform an assignment from the execution of the assignment itself. Recognising that these are two separate steps would allow a legal entity to be appointed as an arbitrator, provided that it has the human resources necessary for the execution of the concerned activities.

In order to demonstrate this distinction between appointment and execution, the best example is a lawyer's activity, which may be approximated to that of an arbitrator. A company able to carry out ''the professional activity of agency, assistance and defence during the trial'', provided that the concerned assignments will be performed by ''one or more members [of the same company, who shall be natural persons] in possession of the requirements to carry out the requested professional activity'' (Legislative Decree n.96/2001 art.24 para.1), can accept the assignment as a lawyer. This means that, at least on the contractual level, it is the company which is appointed as lawyer, even if the activity contained in its company objective shall be carried out by specified natural persons.

The example of a law firm also contravenes the argument that an arbitral institution, were it to be appointed arbitrator, has to be a non-profit undertaking.[25] Perhaps this idea is based on an idealistic conviction that jurisdictional activity is incompatible with financial gain. It seems suffice to point out that natural persons appointed as arbitrators by the parties also generally receive payment for their services.

Therefore, in the light of the legal literature on the distinction between legal persons and unincorporated legal entities and taking into account that the Supreme Court has held in several occasions that companies without legal personality are subjects having rights fully independent from their members,[26] the theory that a legal entity cannot be appointed as an arbitrator seems contradictory. Especially considering that a law firm, an entity distinct from its members, takes up professional assignments in its own name, even though it does not enjoy legal personality due to its legal nature as a general partnership (Legislative Decree n.96/2001 art.16 para.2).

3. New approach and reformulation of the problem

The question of whether a legal entity can be party to legal relationships cannot be decided by applying the principle of the full capacity of the legal persons.[27] This issue was exhaustively discussed by an authoritative company lawyer,[28] in regard to a similar problem, that of the appointment of a legal entity as a member of

20. To sum up the conclusions of Punzi, *Disegno sistematico dell'arbitrato* (2000), pp.320–334.

21. Cited, for example, by S. Lariccia, ''Sul riconoscimento in Italia di un lodo arbitrale emesso dalla Congregazione per il clero nella Città del Vaticano'', in (1995) *Rivista dell'arbitrato*, pp.279 and 280; finally, see Court of Cassation , November 5, 1999, n.12336, in (2000) *Giustizia civile* p.1439, where an arbitral award was declared null and void because the controversies were not submitted to arbitration conducted by natural persons and, furthermore, these had not been sufficiently determined; in the case concerned, the agreement to arbitrate literally stated: ''in case of a controversy ... the controversy itself shall be submitted to the concerned organisations of category acting as arbitrator''.

22. Cf. the decision of the county court (*Pretura*) Roma (Decree), March 30, 1994, in (1995) *Rivista dell'arbitrato*, p.273, where the *exequatur* of an award rendered by a legal entity was denied, because the appointment of a legal entity as arbitrator was ''in conflict with the *ratio* of Article 812 CPC''.

23. G. Schizzerotto, *Dell'arbitrato*, 3rd edn (Milano: Giuffrè, 1988), pp.374 and 375.

24. CPC art.810 last para: ''The same provisions shall apply in case the arbitration agreement has entrusted the appointment of one or more arbitrators to the judicial authority or where, if entrusted to a third person, that third person has failed to act.''
CPC art.816-*quarter* para.1: ''Should more than two parties be bound by the same arbitration agreement, each party may request that all or some of them be summoned in the same arbitral proceedings, if the arbitration agreement defers to a third party for the appointment of the arbitrators, if the arbitrator are appointed by agreement of all parties or if the other parties, following the appointment of the first party of an arbitrator or the arbitrators, appoint by common agreement an equal number of arbitrators or entrust to a third party their appointment.''

25. Obviously this matter is not dealt with under Spanish law, where *Ley* 60/2003, art.14 that the arbitral institutions, definitely not entitled to be appointed arbitrators, may only be ''*corporaciones de derecho public*'' or ''*asociaciones y entitades sin ánimo de lucro*''.

26. For the appropriate citations cf. G. F. Campobasso, *Diritto commerciale. 2. Diritto delle società*, fifth edn (Torino: UTET, 2006), p.49, fn.86.

27. But the same principle may also be upheld today in respect of the unincorporated legal entities.

28. E. Gliozzi, ''Società di capitali amministratore di società per azioni'' in (1968) *Rivista delle società*, p.93 ff.

the managing board of a company limited by shares. This became a hot topic in Italy again after the reform of corporate law in 2003. The conclusion is that legal persons can enjoy a capacity fundamentally congruent with that of natural persons, with the exception of relationships incompatible with the natural limitations of legal persons and restrictions established by law. This means that a particular activity taken up by the legal entity would be exercised by their executive (i.e. a natural person who is part of the legal entity).

Note that the term ''executive'' blurs the differences existing between the hypothesis of appointing a natural person and the hypothesis of appointing a legal person. Of course, talking about legal entities different from natural persons means using expressions which have to be translated ''into propositions of equivalent meaning in which only expressions concerning human individuals appear''.[29] Nevertheless, this translation, in order not to be generic and then substantially useless in evaluating whether a particular situation actually is or is not legitimate, must occur by using the rules specific to the type of the legal entity concerned.[30]

In addition, to avoid ambiguity, it is necessary to examine the law specific to the activity which is to be exercised by the legal entity—in this case the activity of institutional arbitration—and to compare it with the specific law of the specified legal entity. The Italian legal system has developed several types of legal entities, each of which are governed by equally specific provisions.

Considering that complex economic activities require sophisticated organisational structures, an arbitral institution intending to carry out the activity of institutional arbitration on a large scale will organise itself as a company with legal personality, choosing among one of the company types regulated under Italian law.

Therefore, as a next step it is necessary to verify the compatibility between the law of companies with legal personality and the law of the arbitration in order to find a legitimate basis for a company to be appointed as an arbitrator.

4. The nature of arbitration

Before ascertaining whether a company can be appointed arbitrator, mandatory provisions in Italian arbitration law which might limit private autonomy must be identified; these may concern the appointment of arbitrators in general, as well as the appointment of a specific arbitrator to decide a particular controversy.

The first rules of relevance are to be found in the CPC: ''the agreement to arbitrate'', which encompasses either an arbitration agreement or an arbitration clause.[31] The latter is mainly used when opting for institutional arbitration, usually via a clause referring to the chosen institution's rules inserted into the contract.

On the other hand, the contract with the arbitrators is generally a further transaction,[32] necessarily subsequent to the first one and with several contracting parties with respect to the precedent one[33] that could be named ''contract of arbitration'',[34] which is governed by the Italian Code of Civil Law (hereafter CC) and by the CPC.[35]

The activity of arbitrator can be classified as private[36] and jurisdictional[37] in nature:

(i) Private, because—according to continuous case law of the Italian Constitutional Court—the arbitrator's judging power finds its main expression ''in the free choice of the parties''[38]; it is an important matter, moreover, that according to CPC art.813 para.2 ''the arbitrators are not public officials, or person entrusted with a public service'' [39] not even when they can concede distraints or other interim measures.[40]

29. Gliozzi, ''Società di capitali'' in (1968) *Rivista delle società*, p.115.
30. Gliozzi, ''Società di capitali'' in (1968) *Rivista delle società*, pp.109 and 110.
31. To be distinguished according to their different object: determined in the arbitration agreement (if referring to lawsuits already arisen), to be determined in the arbitration clause (if referring to future lawsuits).
32. This article therefore follows the presumption of the majority opinion (here represented by C. Cecchella, ''Il contratto di mandato agli arbitri'', in C. Cecchella (ed.), *L'arbitrato* (Torino: UTET, 2005), pp.95–97), that arbitration activity depends on two autonomous contracts.
33. The agreement to arbitrate is actually provided by those which may be (in the case of the arbitration clause) or actually are (in the case of the arbitration agreement) the parties of the arbitral proceedings, whilst the agreement of the arbitration is provided between the parties of the arbitration proceedings and the arbitral tribunal.
34. I will not dwell upon the fact that there are two relationships subject to the arbitration: one concerning a contractual relationship, ruled by the contract of arbitration, and the other, the proceedings one, that is governed by the CPC (with rules directly applied or others as compatible or anyway deducible from the proceedings principles valid even for the arbitration) and arises with the petition for arbitration (*domanda di arbitrato*) (so much so that the arbitrator, before his acceptance, may be already challenged).
35. More precisely—according to the convincing theory of Cecchella, ''Il contratto di mandato agli arbitri'' in (2005) *L'arbitrato*, p.97 ff.—governed by the body of rules contained in Title VIII of the CPC and in the rules of CC concerning both the contract of mandate (*contratto di mandato*) and the contract of professional activity (*contratto d'opera intellettuale*).
36. Followed by the absolute majority of legal science, for example by Punzi, *Disegno sistematico dell'arbitrato,* 2000, p.292 ff.
37. Some authorities follow this opinion, even prior to the last reform of the Italian arbitration law in 2006, for example Verde, *''Pubblico e privato nel processo arbitrale''* in (2002) *Rivista dell'arbitrato*, p.633 ff.
38. Thus the judgment n.221 of June 8, 2005.
39. Although arbitrator liability is modelled on that of a judge, according to CPC art.813-*ter*.
40. As it may occur in company law matters, according to Legislative Decree 5/2003 art.35 para.5.
The new CPC art.818 precisely defines the relationship between rule and exception for interim measures granted by an arbitrator (''The arbitrators may not grant attachments or other interim measures of protection, except if otherwise provided by the law'').

(ii) Jurisdictional, as clearly shown by the text of the CPC, which recognises, for instance, the arbitrator's right/duty to defer a question of constitutional legitimacy (CPC art.819-*bis* para.1, n.3) to the Constitutional Court[41] or where it states that an awards rendered by the arbitrators have ''the same effects as a judgement rendered by judicial authority'' (CC art.824-*bis*), and ''have res judicata effect on the parties, their heirs, or successors to the right concerned'' (CC art.2909).[42]

5. Mandatory rules concerning the appointment of the arbitral tribunal

5.1. Standards that the arbitral tribunal must fulfil

CPC art.809 para.1[43] imposes the sanction of nullity on an arbitration clause, if the arbitral tribunal is not composed of an uneven number of members[44] and these do not possess the required capacity of acting (CPC art.812).

The arbitral tribunal shall, moreover, be constituted in such way to avoid anonymity of the arbitrators, in order to ensure not only that they may be challenged if one of the scenarios listed in CPC art.815 para.1[45] apply; but also due to the fact that under CPC art.832 para.5[46] they are personally and unlimitedly liable for damages, resulting from conduct as arbitrators that can be individually ascribed to them (CPC art.813-*ter*).[47]

The arbitral tribunal must, in addition, fulfil the standard of a third party position as a body as well as in each of its members, irrespective of whether or not they are appointed by the parties.[48]

The peculiarity of the third party position deserves a few words of explanation.

The equidistance of the arbitrators to the parties is additionally safeguarded under Italian law. According to Italian Constitution art.111 para.2[49] —as interpreted by the Constitutional Court[50]—this principle applies to whoever executes a jurisdictional activity and, therefore, to arbitrators too.

However, this principle is not guaranteed by the supposedly mandatory right of each party to appoint an arbitrator, but by the principle of equal treatment, i.e.

41. CPC art.819-*bis* para.1, n.3: ''The arbitrators shall suspend arbitral proceedings with a reasoned order in the following case: . . .when an issue of constitutional legitimacy according to Article 23 of Law n. 87 of 11 March 1953 is submitted to the Constitutional Court''.

42. Of the same opinion: F. Galgano, ''Il lodo arbitrale vale, dunque, come sentenza'' in (2006) *Contratto e impresa*, p.297, who furthermore underlines (at pp.298 and 299) that in following the new law of arbitration, the state lost its monopoly on jurisdiction.

43. CPC art.809 para.1: ''There may be one or more arbitrators, provided their number is uneven.''

44. Different from other legal systems, such as in Great Britain, which provide the institution of the umpire.

45. CPC art.815 para.1: ''An arbitrator may be challenged:
1) if he or she does not have the qualification expressly agreed by the parties;
2) if he or she or an entity, association or company of which she or he is the director, has an interest in the case;
3) if he or she or his or her spouse is a relative up to the fourth degree or a cohabitant or a habitual table-companion of the party, one of its legal representatives or counsel;
4) If he or she or his or her spouse has a pending suit against or a serious enmity to one of the parties, one of its legal representatives or counsel;
5) If he or she is linked to one of the parties, to a company controlled by that party, to its controlling entity or to a company subject to common control by a subordinate labour relationship or by a continuous consulting relationship or by a relationship for the performance of remunerated activity or by other relationships of a patrimonial or associative nature which may affect his or her independence; furthermore, if he or she is a guardian or a curator of one of the parties;
6) If he or she has given advice, assistance, or acted as legal counsel to one of the parties in a prior phase of the same case or has testified as a witness''.

46. CPC art.832 para.5: ''The rules [pre-established in the arbitrator agreement] may provide for further cases of replacement or challenge of the arbitrators in addition to those provided by the law.''

47. CPC art.815-*ter* (*liability of arbitrators*):
''1. The arbitrator shall be liable for damages caused to the parties if he or she:
1) has fraudulently [*dolo*] or with gross negligence [*colpa grave*] omitted or delayed acts that he or she was bound to carry out and has been removed for this reason, or has renounced the office without a justified reason;
2) has fraudulently or with gross negligence omitted or prevented the rendering of the award within the time limit fixed according to Articles 820 and 826.
2. Outside these cases, the arbitrators shall be liable only for fraud or gross negligence within the limits foreseen by Article 2, paragraphs 2 and 3, of Law n. 117 of 13 April 1988.
3. An action for liability may be filed during the arbitral proceedings only in the case foreseen by the first paragraph, n. 1).
4. In case the award has been rendered, the action for liability may be filed only after the recourse against the award has been upheld by a final judgment and for the reasons for which the recourse was upheld.
5. If the liability is not due to the arbitrator's fraud, the amount of damages may not exceed a sum equal to three times the agreed fee or, failing an agreed determination, three times the fee established by the applicable tariff.
6. In cases of liability of the arbitrator, neither the fee nor the reimbursement of expenses shall be due to the arbitrator; in case of partial nullity of the award, they shall be subject to reduction.
7. Each arbitrator shall be liable only for his or her own actions.''

48. The arbitrators of the parties may be challenged after their appointment for reasons unknown until then both by the party who appointed them and by the party who did not appoint them (CPC art.815 para.2).

49. Italian Constitution art.111 para.2: ''All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials.''

50. For example, in the judgment July 15, 2003, n.240.

the right of each party to contribute in an equal way to the composition of the arbitral tribunal[51]; so that the arbitrators can also be understood to fulfil the third party position when all the parties unanimously assign the right to appoint the whole arbitral tribunal to a third party. This concept has in fact already found acceptance when there are more than two parties involved in the dispute.

Of course, this delegation to an appointing third party subsequently requires that party to equally fulfil the third party position, as otherwise there would be a risk of indirect prejudice.[52] This rule could be derived from the, perhaps too strict,[53] fourth paragraph of CPC art.832[54] and, regarding company arbitration, from Legislative Decree January 17, 2003, n.5 art.34 para.2.[55]

The appointing third party should be presumed to absolutely fulfil the third party position if it is a legal entity of public law, such as the arbitral institution constituted in form of a public enterprise (*azienda speciale*) by the Chamber of Commerce.[56] This presumption results from the purpose of such a legal entity as a guardian of public interest (that is: general interest) and therefore, by definition, not a party and thus without party interests.

The arbitrators are not merely required to be equidistant to the parties, but also to be impartial, i.e. unbiased and unprejudiced private judges.[57] This is based on the CPC, but first and foremost is guaranteed by Italian Constitution art.111 para.2.

Finally, it is to be pointed out, that there is no mandatory rule imposing a particular qualification or professionalism on arbitrators; this does not mean, however, that the parties are precluded from agreeing on such qualifications or standards. Further, should such a contractual clause not to be fulfilled by an arbitrator, that person may be challenged pursuant to CPC art.815 para.1 n.1.

5.2. *Protecting the standards required of the arbitral tribunal*

The lack of third party status or of impartiality by arbitrators may lead to their challenge as set out under CPC art.815, provided that the petition is brought forward within 10 days upon knowledge of circumstance giving rise to the challenge and prior to the rendering of the award.

Should the arbitrators' appointment be regulated via an individual agreement in order to circumvent the principles of third party status and the impartiality of arbitrators[58] or of their appointer,[59] such an agreement is to be declared null and void[60] and the arbitrator appointed on the basis of that agreement may be challenged. In the scenario that a third party was assigned the right to appoint the arbitrators and it was the appointing party that did not meet the standard of equidistance and impartiality, that party cannot be directly challenged (as the law only refers to arbitrators); however, those arbitrators appointed by that party may be challenged on the basis of that fault.

An award rendered by arbitrators, who are challenged or were appointed on the basis of an arbitration agreement, that was declared void in the part regulating their appointment, may be declared null and void pursuant to CPC art.829 para.1, n.2,[61] provided that the procedural

51. The principle pointed out in the text is discussed *funditus* by L. Salvaneschi, ''Sull'imparzialità dell'arbitro'' in (2004) *Rivista di diritto processuale*, p.428 ff.

52. Of the same opinion: the majority of German legal science as pointed out by V. Sangiovanni, ''La costituzione del tribunale arbitrale nel diritto tedesco'' in (2001) *Rivista dell'arbitrato*, pp.591 and 592.

53. Cf. R. Nobili, *L'arbitrato delle associazioni commerciali*, (Padova: CEDAM, 1957), p.303, who actually points out that ''suspicion of partiality may exist only when the controversy arises between a representative of the entity designed to appoint, and an outsider'', but he also adds that ''in this case the judge shall be very cautious: and recognize the partiality of the third only when the party in the controversy has a special influence on the association, or indirectly participates in the appointment of the arbitrators''.

54. CPC art.832 para.4: ''Institutions in the nature of associations and those set up for the representation of the interests of professional categories may appoint arbitrators in disputes where their own associates or members of the professional category are opposed to third parties.''

55. Legislative Decree 5/2003 art.34 para.2: ''The arbitration clause shall provide the number and the modalities of the arbitrators' appointment, conferring in any way, under sanction of nullity, the power to appoint all arbitrators who are outsiders of the company. In case the designated subject does not provide, the appointment is requested to the president of the tribunal of the place where the company has legal seat.''

56. This applies to the *Camera Arbitrale Nazionale e Internazionale di Milano* and the *Camera Arbitrale di Roma*, established by the *Camera di Commercio* respectively of Milan and of Rome.

57. As for the controversial conceptual distinction between impartiality and independence of the arbitrator cf. the comparative work of E. Zucconi Galli Fonseca, in A. Briguglio, L. Salvaneschi (eds) *Regolamento di arbitrato della Camera di commercio internazionale. Commentario* (Milano: Giuffrè, 2005), p.84 ff. As regards German law, cf. P.F. Schlosser, ''L'impartialité et l'indépendance de l'arbitre en droit allemand'' in (2005) *Rivista dell'arbitrato*, 1.

58. One case could be that the statute of an entity designates an organ of such entity as arbitral tribunal appointed without the agreement of all members of the above mentioned entity (see Cecchella, ''Il contratto di mandato agli arbitri'' in *L'arbitrato*, 2005, p.101 ff.). In the light of Legislative Decree 5/2003 art.34 para.2, this scenario should not occur any longer, even this should be decided unanimously.

59. Legislative Decree 5/2003 art.34 para.2 expressly sanctions with nullity the agreement of arbitration indicating an appointer of arbitrators lacking of third party position.

60. Nevertheless, such nullity shall normally not affect the whole agreement of arbitration, but only those clauses singling out the arbitrators or their appointer who do not possess the necessary characteristics.

61. CPC art.829 para.1 n.2: ''Notwithstanding any prior waiver, a recourse for nullity may be filed in the following cases: . . . if the arbitrators have not been appointed in the form and manner laid down in Chapters II and VI of this Title, provided that this ground for nullity has been raised in the arbitral proceedings.''

mistake was addressed in the course of the arbitral proceedings.

Even though the arbitrator, in the same way as a judge, shall be equidistant and impartial, there may be situations in which it may be legitimate that a controversy be decided by an arbitral tribunal without these characteristics.

In fact, an arbitrator, if he is aware of circumstances that might be considered to impair his equidistance or impartiality, shall not automatically resign from office—as a judge would be obliged to under CPC art.51—but has the duty to reveal those facts which could justify his abstention of accepting the appointment or his withdrawal for good cause (*giusta causa*) once appointed.[62] Therefore, an arbitrator, who makes known all circumstances that may give rise to challenge under CPC art.815, but is nevertheless not challenged by the parties is legitimately entitled to decide the dispute and the subsequent award cannot be declared null and void for that reason.

In order to guarantee the equidistance and the impartiality of arbitrators the procedure followed by countless domestic and international arbitral institutions, and also adopted by numerous arbitration laws has proved to be successful: all arbitrators are contractually required to submit a declaration of independence together with their declaration of acceptance of the appointment. This is transmitted to the arbitral institution and to the parties of the proceedings. Such a duty of disclosure should be expressly imposed by the next amendment to Italian arbitration law, given the additional flux of information, which increases both the awareness of the arbitrators—especially party-appointed arbitrators—of the jurisdictional power they are called to exercise, and the awareness of the parties of their right to challenge arbitrators; altogether *ex ante* reducing the risk of an award that could later be set aside. It is to be emphasised that already today violation of the duty to disclose imposed by arbitration rules can lead to nullity of the award pursuant to CPC art.829 para.1 n.2, which refers to CPC art.832 and thus to the chosen arbitration rules.

5.3. Additional mandatory rules

Two more mandatory rules are to be derived from the Italian arbitration law which are significant to this work.

First, it is to be understood from CPC art.813-*bis*[63] that it is impossible to remove an arbitrator unilaterally without a good cause. This ensures the independence of the arbitrator by protecting him from unfounded actions taken by parties for tactical procedural reasons. The same restrictions apply in institutional arbitration, if the arbitration rules integrated by the arbitration agreement confer the power to remove an arbitrator to the institution's competent body, irrespective of whether the institution was originally assigned to appoint the arbitrator or not.

Secondly, CPC art.813-*ter* as a whole and in its last paragraph in particular, indicates that each arbitrator is subject to unlimited (but, should they be a member of an arbitral tribunal, not joint) liability regarding their performance as arbitrator. This ensures the diligent execution of the office, a principle that is valid for all contracts that have professional services as their object, be it that the appointed party is a natural person or a legal entity. In this context, negligent execution of the office must include those cases in which an arbitrator has acted in a partial manner.

6. A company for institutional arbitration

6.1. Confutation of the thesis followed by the Italian Supreme Court

From all, it may be concluded that Italian arbitration law essentially requires an arbitrator:

(i) to possess legal capacity;
(ii) to be equidistant and independent in relation to the parties of the proceedings; and
(iii) in case of a negligent execution of the office makes the arbitrator personally and unlimitedly liable.

Additionally, Italian arbitration law sets out that an arbitral tribunal must consist of an uneven number of members.

Having identified the crucial cornerstones in Italian arbitration law, the next step is to examine the application of these principles to legal entities, i.e. their compatibility with Italian company law.

According to the Italian Supreme Court,[64] the appointment of a legal person could be impossible for one of the following three reasons:

1. the legal capacity of a legal entity is difficult to assess;
2. the appointment of a legal entity prevents the challenge of the arbitrator; and
3. a legal entity must exercise its jurisdictional power via a natural person who may not be randomly replaced in the course of proceedings.

62. In the USA, the last version of the Uniform Arbitration Act introduced the obligation for any arbitrator, to reveal to the other arbitrators and to all parties of the arbitral proceedings ''any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceedings'' before accepting the office and after having completed a reasonable inquiry.

63. When it allows a ''third party appointed to it by the agreement of arbitration'' to replace ''the arbitrator who omits or delays to carry out an act related to his position''. CPC art.813-*bis* (*Removal of arbitrators*): ''Unless the parties have agreed otherwise, the arbitrator who omits or delays to carry out an act related to his or her office may be replaced by agreement between the parties or by the third party so empowered in the arbitration agreement. Failing this, after a period of fifteen days from a notice requiring action, sent by registered mail to the arbitrator, each of the parties may file a petition addressed to the president of the tribunal according to Article 810, paragraph 2. The president, having heard the arbitrators and the parties, shall issue an order against which there is no recourse and, if he or she finds that there has been such omission or delay, shall declare the arbitrator removed and shall replace him or her.''

64. Court of Cassation, August 17, 1962, n.2587.

Concerning the first objection, it is sufficient to point out that a legal entity is always compelled to act through natural persons. Therefore, if the legal entity has full capacity to contract (as set out by the law), its capacity to act must be assessed via its persons (i.e. the natural persons through whom it acts). In the case of a legal entity appointed as an arbitrator the relevant person to assess is not necessarily a directing executive,[65] instead it should be the person actually acting as an arbitrator in the name of the entity.

The second reason is to be rejected as it seems clear from the practice in multi-party proceedings that it is necessary to apply the rules of challenge of arbitrators[66] not only directly to the legal entity that is appointed arbitrator, but by way of analogy also to the natural persons through which the legal entity executes the office as arbitrator. As a matter of fact, understanding CPC art.815 as a general principle, according to which the deciding body must be equidistant and impartial towards the parties, not only the legal entity as the formally appointed arbitrator, but also the natural person fulfilling the office as the ''material'' arbitrator can be challenged. Resulting in the application of CPC art.811 whereby the substitute shall be chosen by the parties or by a third person chosen by the parties, or by the president of the tribunal if the challenge concerned the formal arbitrator, whilst the substitute shall be chosen by the legal entity if the challenge concerned the material arbitrator.

The third reason is also to be rejected: on the one hand, because an arbitrator could resign from his or her office,[67] even without a good cause,[68] and can also be removed if he defaults in his duties (CPC art.813-*bis*) or can be jointly removed[69] by the parties. On the other hand an arbitrator may die, lose the capacity to be arbitrator and thus be replaced. However, as the Supreme Court points out, if the legal entity appointed were to have the freedom of randomly exchanging the person acting as arbitrator in the course of the arbitral proceedings,[70] this would contravene the mandatory rule under Italian arbitration law according to which the arbitrator cannot unilaterally be removed without good cause.

6.2. *The compatibility of company law with the law of the arbitrator*

Focusing the question of appointing a legal entity as an arbitrator on the compatibility with Italian company law, it is necessary to examine whether Italian company law contains any provisions that contravene the nomination of a company as an arbitrator. As a matter of fact, looking at the specific provisions of some companies, it quickly becomes clear that a company may offer the optimal organisation in order to exercise professional services in an entrepreneurial way, while guaranteeing impartiality and independence.

An excellent example is the rules governing companies of chartered accountants. Due to their function, these legal entities must be independent from those they inspect. By analogy arbitrators must be independent from the parties of the arbitral proceedings, whose dispute they are to decide. Concerning chartered accountants, Italian law contains a number of absolute and case-orientated relative incompatibility and organisational rules in order to safeguard a correct and irreproachable execution of statutory audit (which is an exclusive activity considering the community law Directive 2006/43 [2006] OJ L157/87[71]).

Thus, faced with silence of the law, contractual autonomy shall fill this gap by providing specific rules for the company of institutional arbitration either in the company statutes, or in regulations of the general assembly and of the board of directors, or in the arbitration rules governing the proceedings administrated by such company. These rules should ensure the mandatory rules under Italian arbitration law are respected.

This solution means that contractual rules must warrant the equidistance and the impartiality not just of the company of institutional arbitration, but also of the representatives carrying out the arbitration (however, within the limits of CPC art.812) in the name of the company. It also means that the company of institutional arbitration must appoint as the arbitral tribunal an uneven number of natural persons, who have a full capacity to act, are identifiable, and only replaceable by the company with good cause.

Furthermore, it means that the company of institutional arbitration must designate the natural persons called to execute a specific office permanently. This rule is derived by analogy from similar express provisions of the law

65. Being natural persons allowed to represent the above mentioned legal entity, for example, because of a specific proxy conferred to them by the competent body of such person.

66. In this way it is also possible to verify whether the independence of a legal person arbitrator has been compromised by associative relationships that bound it ''to one of the parties, to a company controlled by the party itself, to the subject who controls it or to a company submitted to a common control'' (CPC art.815 para.1 n.5).

67. About the waiver of the arbitrator *a latere* see Court of Cassation, March 9, 2004, n.4756, in (2005) *Corriere giuridico*, p.835.

68. Such withdrawal would obviously be considered a non-fulfilment of the contract of arbitration, ensuing civil liability, as expressly foreseen by CPC art.813-*ter* para.1 n.1.

69. The joint repeal may even occur without good cause; if the replaced arbitrator shall be allowed to act before the Court with the only purpose of obtaining the fees and the possible damages.

70. Thus a company limited by shares that is nominated as an arbitrator can only replace those natural persons acting in its name according to the rules set out under CPC art.811.

71. Directive 2006/43 on statutory audits of annual accounts and consolidated accounts, amending Directives 78/660 and 83/349 and repealing Directive 84/253 [2006] OJ L157/87.

when a company is appointed as director,[72] lawyer,[73] official receiver (*curatore*),[74] or statutory auditor.[75]

Finally, it means that the company of institutional arbitration may not be misused to evade liability for its arbitral activity. Therefore, the binding rule applicable to the above mentioned company that can be derived from CPC art.813-*ter* and according to which the professional appointed by (and agent of) the company of institutional arbitration shall answer to the parties in a personal and unlimited way (based on tort liability because he is not a party to the contract of arbitration). Similar provisions apply to chartered accountants (CC art.2409-*sexies* para.2) or to law firms (Legislative Decree 96/2001 art.26 para.1). In addition and different from the case in which an arbitral institution merely appoints the arbitrators, without itself becoming party of the contract of arbitration,[76] the company of institutional arbitration shall also be directly and jointly liable (pursuant to CC art.1218) for the damages caused by the representatives appointed by it and acting in its name.

6.3. *The co-operative as the ideal legal entity to act as an institutional arbitrator*

The optimal company structure under Italian law in order to offer institutional arbitration is the co-operative, possibly with a consortium purpose if the members are entrepreneurs. This assumption essentially depends on two aspects.

First, the possibility to focus the purpose of the company activity on offering an efficient service with lowest possible prices and defining the enterprise as a non-profit organisation. However, looking at the lucrative business that law firms and chartered accountants are permitted, it seems that a professional service can also be carry out in an independent way if it is profitable.

The second and more important reason lies in the necessary democratic nature of this entity. Such a company structure prevents the dominance of some members over others and, thus, contributes to a maximum of equidistance and impartiality of the arbitral institution. This is especially important when disputes between members of the co-operative arise and the company of institutional arbitration has to decide who will represent it as an arbitrator. Therefore, the organisation of a company of arbitral institution as a co-operative may reduce the risk of challenge of the institution itself and its representatives acting as arbitrators under CPC art.815.

Thus, the co-operative may be the ideal construction to efficiently administer arbitration under private law, as it is highly suited to carry out a relevant number of arbitration proceedings on a regular basis.

A chiefly functional company structure should aim to facilitate the activity of arbitration, therefore it is crucial that the company statute contains a clause effectively preventing the elective offices of the co-operative from influencing those representatives of the co-operative that perform the company activity (i.e. acting as arbitrators in the name of the company). This would be in line with what European Community law (eleventh recital of Directive 2006/43 [2006] OJ L157/87 and the Italian law (Legislative Decree 58/1998 art.160 para.1-*bis*) prescribe regarding statutory audit.

Of course, the managing body of the co-operative is not precluded from appointing those persons that will act as arbitrator. Given the rule ''one man one vote'' in the co-operative, none of its members (and none of the parties in controversy, if these are also members) can by themselves appoint the majority of the directors. However, it is the majority, that may, as a body, be considered equidistant, that shall appoint its representatives in arbitration. In addition, the managing body when choosing its representatives shall respect CC art.2391 that gives guidance on how to resolve conflicts of interest of directors.

Furthermore, to ensure optimal corporate governance, a specific body assigned with those offices typically performed by the arbitral council of an arbitral institution may be constituted by company statute; thereby separating the co-operatives' economic activity (assigned to the board of directors) from the choice and monitoring of the executors of the arbitral activity (assigned to the arbitral council). Alternatively, the chairman of an appropriate body composed of the arbitrators acting in name of the company single out who will decide a particular dispute.

The persons acting in the name of the company of institutional arbitration need not necessarily be employees of the latter,[77] they may be members (if the co-operative is an association of arbitrators) or self employed.[78]

72. For example, of a European company according to art.471 para.2 of Regulation 2157/2001 on the Statute for a European company [2001] OJ L294/1.
73. According to Legislative Decree 96/2001 art.24 paras 2, 3 and 4.
74. According to the Italian Bankruptcy Law art.28 para.1, letter *b*.
75. Arguing especially on the basis of Legislative Decree February 24, 1998 n.58 art.155 para.3, art.156 para.1, and art.160, para.1-*quarter*.
76. This does not mean that in the traditional supposition of institutional arbitration the arbitral institution is not responsible; on the liability of such institution see, *ex-multis*, R. Caponi, ''L'arbitrato amministrato dalle Camere di commercio'' in (2000) *Rivista dell'arbitrato*, 686 ff.
77. Obviously, when the executor of the arbitration office is an employee of the company of arbitration, he may be subject to pressure or even blackmail by his seniors. Therefore, it will be necessary to evaluate the third party position of the arbitration company with respect to the parties of the arbitral proceedings more rigorously. Furthermore, as guardianship of the concrete independence of the executor of the office, it would be possible to provide in his working contract an appropriate clause, though which the employee, in carrying out the deciding activity in arbitral controversies, not to be submitted to the organisational, hierarchical and disciplinary power of the employer. This provision, obviously, would be without prejudice to the power of intervention by the company of arbitration on its own employee, when the latter violates the arbitration rules.
78. Different to the situation in a law firm (here Legislative Decree 96/2001 art.24 para.1 imposes that the executors of the professional mandate taken on by such company to be

Still, in order to grant the highest level of independence, the managing board of the company of institutional arbitration should previously set out the criteria both to determine the fees, and to assign the offices within the organisation.[79] This would prevent the appointment of a professional who is favoured by either the company's managing board or by one of the parties involved in the dispute. This risk could be further reduced, if those persons acting in the name of the company are also members of the co-operative of arbitrators, because then the managing board (or the body competent to appoint the arbitrators) must respect the principle of equal treatment among members in the nomination and in execution of the mutual exchange (i.e. the working activity to decide controversies subject to arbitration) (CC art.2516).

Finally, the equidistance and the impartiality of a company of institutional arbitration could be reinforced, by restricting itself via the definition of an exclusive company activity[80] and of specified [81] incompatibilities related both to the company of arbitration itself, its executive bodies, and the persons who act as arbitrators in its name. Limitations—with correlated civil sanctions in case of violation—could also be considered if the members of the arbitral tribunal and those appointing them establish business relationships with the parties of the arbitral proceedings after the award has been rendered. This independence could be additionally safeguarded by introducing a declaration of independence into the company's arbitration rules, that encompass both the company and the persons appointed by that company as members of the arbitral tribunal; the duty to disclose should be considered an ongoing obligation during the arbitral proceedings, so that facts which may make questionable the equidistance and the impartiality of the company of arbitration and of the persons appointed by it are promptly communicated.

All these factors would contribute to protect appearance of impartiality, meaning that such factors must be seen to be laid open in order to ensure that justice is also seen to be done.

7. A company for institutional arbitration according to commercial law

The company of institutional arbitration (irrespective of its legal construction and organisational form) certainly exercises an activity which could be defined first of all as economic and possibly as entrepreneurial.

''Economic'' is defined by CC art.2247[82] and corresponds to an organisation of the company activity that is at least compatible with the purpose of balancing the accounts. This is allowed by CPC art.814 para.1,[83] which sets out the usual profitable character of the arbitration activity.

''Entrepreneurial'' because the company offers a service which is composed not only of professional services, but also of commercial activities.[84] For the arbitration companies that are to be established the same must be valid that has previously been argued for engineering companies exercising a commercial enterprise, being the professional services offered by them only a part of a more complex service, as to say the commercial activity.

Examining only the activity of arbitration (resulting in an award), the parties involved in a dispute shall confer with the office to decide their controversies to the arbitration company. Then this company shall designate natural persons to execute the office of arbitrator in their name, including the rendering of the award. As it is

the members only of the company itself) and to the audit firms registered in a special register (to which Legislative Decree 58/1998 art.156 para.1 imposes that the auditing relation, that is to say the final act of the professional activity taken on by the audit firm, must be undersigned only by a member or by a director of this company).
It seems that for the company of institutional arbitration a different rule may be valid (and therefore this company may indicate as executor of the activity of arbitration outsiders to its company or entrepreneurial organisation), because the act of arbitration (different from that of agency, assistance and defence during the trial for the lawyer and from that of statutory audit for the certified accountant) is not restrained to persons having specified qualifications, but to whoever has a full capacity of acting (CPC art.812).

79. For example, the rule providing the non-assignment of the controversy to the same arbitrator who has already decided another controversy concerning a party present in both the controversies. About the compulsory rotation of the auditor see Legislative Decree 58/1998 art.160 para.1-*quarter*.

80. Restricted to the activity of institutional arbitration, with the possible exercise of activity of study and promotion of the activity of institutional arbitration. Concerning the fact that the imposing an exclusive company activity on audit firms may contribute in safeguarding the independence and the professional behaviour of such firms see E. Cusa, *I requisiti delle società abilitate alla revisione legale* (Trento: Università degli Studi di Trento, 1997), p.177 ff.

81. In regard to the particular relationship between the parties of the arbitral proceedings, on the one hand, and the company of institutional arbitration and its agents in carrying out the professional appointment, on the other hand. As a matter of fact, as the relationship of auditing may be harmed by conflicts of interest between the auditor and the entity being audited, in the same way the arbitral relationship may be harmed by similar disputes between the arbitral tribunal and the parties of the arbitral proceedings. For the professional ethics of arbitrators at international level, cf. The Guidelines on Conflicts of Interest in International Arbitration, approved on May 22, 2004 by the Council of the International Bar Association.

82. CC art.2247 (company contract): ''By a company contract two or more persons contribute property or services for the exercise in common of an economic activity for the purpose of sharing the profits thereof.''
This article is applicable to co-operatives, except its last phrase (cf. E. Cusa, *Il socio finanziatore nelle cooperative* (Milano Giuffrè, 2006), pp.53, 114 and 368).

83. CPC art.814 para.1: ''The arbitrators shall be entitled to the reimbursement of their expenses and to a fee for the services rendered, except where they have waived their right thereto at the time of their acceptance or in a subsequent written document. The parties shall be jointly and severally liable for payment, subject to the right of mutual recovery''.

84. According to Italian law (CC art.2238), the professional activity only cannot qualify as enterprise.

the arbitration company which is the parties' contractual partner, the expenses and the fees of the arbitrators shall be due to the company,[85] which will then decide whether, when and how much to pay their own agents for the decisional activity carried out by them. The remuneration paid by the parties shall also contribute to the taxable income of the arbitration company and should therefore be qualified as income from business.[86]

8. The development of institutional arbitration within an economic sector

The company of institutional arbitration, in order to carry out its economic activity, has to be able to administer and decide a certain number of arbitrations. This means that the company should have members who are interested in making use of the company's services: only then is the economic health of the enterprise secure in the long term. Here, the highest synergies could be attained by a company of institutional arbitration that has as its object the administration and the decision of disputes concerning matters of company law or intellectual property law; set up by companies or legal entities representing companies, which impose on or suggest to their affiliates the inclusion in their statutes of an arbitration clause appointing the said arbitration company as arbitrator. Then all disputes (arising from questions of company or intellectual property law) among the members of the arbitration company, or an affiliate and its members, or between directors, auditors (*sindaci*) and official receivers (*liquidatori*) of an affiliate company and that company, or between these company offices and the respective members, etc. would be submitted to the company of institutional arbitration.

It is therefore necessary that the company of institutional arbitration heeds CPC art.832 para.4 and, concerning disputes arising from company law matters, Legislative Decree 5/2003 art.34 para.2. These two provisions have the purpose of safeguarding the principle of equality of the parties in the composition of the arbitral tribunal in common. However, the application of these provisions needs to be adapted to the scenario that a legal entity, the company of institutional arbitration, is appointed as arbitrator (and designates the natural person who will act as arbitrator).

Where more than one entrepreneur possibly through their business associations—find an agreement to set up an organisation of private law exercising the activity of institutional arbitration and in a position to render awards having ''the same effects as a judgment rendered by the judicial authority'' (CPC art.824-*bis*) in a quick, efficient manner and, last but not least, at controlled prices, this will lead to an arbitral institution in charge of managing and deciding institutional arbitrations within the determined group, and be a legal entity able to offer the development of institutional arbitration within an economic sector.

In conclusion, thanks to contractual freedom,[87] entrepreneurs may on the basis of a number of transactions achieve a goal efficiently on a private basis similar to what the legislator could achieve by establishing courts specialised in economic and financial sectors.

85. As a consequence, the arbitrators' fees would constitute some credits for the company, as well as what expressly foresees Legislative Decree 96/2001 art.25 para.1 for the fees coming from the professional activity carried out on behalf of the lawyers' company.

86. As well as the *Agenzia delle entrate* has stated with the resolution May 4, 2006 n.56/E for the companies of *engineering* with legal personality.

87. E.F. Ricci, *''Note sull'arbitrato amministrato''*, (2002) *Rivista di diritto processuale*, pp.19 and 20, already prior to the last reform of the Italian law of arbitration, came to the conclusion that ''institutional arbitration marks ... the moment, in which the private justice creates its own appropriate organisation by proposing its institutional nature: and, if we consider that all this is based on the agreement between the parties, the creation of a fundamental principle of freedom is evident''.

