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ARBITRATION AND ADR REFORMS IN ITALY

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1. The Commission for the Reform of Arbitration and ADR. — 2. Some premises for a reform of Arbitration law in Italy. — 3. Proposal in the matter of arbitration in labour disputes. — 4. Proposal in the matter of the appeal the arbitration award, introducing the possibility of immediate appeal before the Supreme Court of Cassation on the grounds of invalidity. — 5. Proposal in the matter of arbitration for disputes between shareholders, or between shareholders and the company. — 6. Proposal in the matter of paying arbitration expenses and fees. — 7. Proposal in the matter of attachment measures in arbitration. — 8. Proposal in the matter of *traslatio iudicii* in arbitration. — 9. Proposal in the matter of public contracts. — 10. Proposal in the matter of Alternative Dispute Resolution (ADR) with decision-making powers in the field of public services and in the matter of arbitration on public administration disputes.

1. *The Commission for the Reform of Arbitration and ADR.*

Just a few months ago the Commission for the Reform of Arbitration and ADR in Italy created by the Minister of Justice Andrea Orlando, and chaired by me, presented the results of a wide research on field of mediation, conciliation, arbitration, mediation with the Public Administration, mediation in contracts for public works and services. All in the perspective to reduce the number of pending proceedings in civil matters (actually 1.5 millions), reduce the length of proceedings (3 years for the fist degree, 3 or 4 for the appeal, 2 years for the proceeding of the Supreme Court), assure foreign investors on credit recovery. This was one of the main concern of the Government, considering the evaluations of CEPEJ, OECD, and particularly the reports of the World Bank of Investments, which, in its publications, entitled *Doing Business*, each year is monitoring the situation of the administration of civil justice in Italy.

The Commission has collected data, documents, proposals, contributions of scholars, and organized hearings with the Institutions (public and private bodies) who have competence to treat these kind of proceedings: e.g. the Administrative Agency of Communications, the Administrative Agency for Electricity and Gas, the Banking Arbitration (ABF) runned by

the Bank of Italy in collaboration with the Italian Banking Association (ABI), Financial Services Arbitration (ACF) in collaboration with CONSOB, the Association of Insurance Companies (ANIA) and the Administrative Body of Regulation of Insurance Companies (IVASS), Consumers Associations et alia.

The Commission started its works in March 2016, and ended it in January 2017. Its task was: coordinating the national laws with the EU law (Regulation n.861/2007 on small claims, Regulation on ODR n. 524/2013, Directive n.22./2009 and Directive n.11 /2013 on ADR in general and consumers ADR), ameliorating the regulation of compulsory mediation enacted with Legislative Decree n.28/2010 and ameliorating the regulation of arbitration in general, provided by the Italian Code of Civil Procedure (arts. 803-840) (1) and arbitration of conflicts between shareholders and corporations in special, with reference to the Law n.5/2003.

2. *Some premises for a reform of Arbitration law in Italy.*

With regard to arbitration, the Commission has sought to bring the internal regulation in line with the international one and, taking into account the suggestions of the Milan Arbitration Chamber and of Associazione Italiana per l'Arbitrato (Italian arbitration association), has proposed to the Minister to introduce certain modifications to the current regulatory system, in such a way as to make arbitration justice more secure in Italy. This is done starting from the premise that that the function of arbitrators is now thought, in Italy as well, wholly identical to that of the ordinary judge, which is to say that it has jurisdictional nature, and their decisions are held as equivalent to the judicial decision.

As Luigi Rovelli, one of the judges most competent in the matter, wrote in the order issued by the United Sections of Corte di Cassazione (Supreme Court of Cassation) "the parties' autonomy, in the sector of negotiable rights, operates as the presupposition of the power attributed to them of having disputes decided by private arbitrators, in the forms and in accordance with the procedures established by the legal system". "Based on this premise of constitutional compatibility, for recourse to arbitration to be considered legitimate, the following are necessary: *a*) for the exception,

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(1) Arbitration is an institute well known in Italy, since we find many references to arbitration in Roman jurists and in the Justinian's Digest. Roman Law distinguished *arbiters* from *arbitrators.* Arbiters solved conflicts founding their decision on law (*ius strictum*) *while arbitrators* in equity (*composition amicabilis*). During the Middle Ages arbiters and arbitrators had only the power to ascertain the situation in law (*notio*), without having the power to decide (*iurisdictio*). During the Nineteen Century arbitration was included in Codes of Civil Procedure and the award by arbitrators could become binding for the parties after the exequatur of the ordinary judge. According to Cass. civ. Sez. Unite, Ord., 25-10-2013, n. 24153.

enshrined by the parties' agreed-upon will with regard to available rights, to operate with regard to a dispute knowable by the ordinary judge; *b*) for arbitration to be governed by regulations of law that ensure suitable trial guarantees, on the level not only of the impartiality of the judging body, but also of respect for cross-examination; *c*) the possibility of appeal (within the limits in which the trial system characterizes cases of invalidity) before the bodies of ordinary jurisdiction. These characteristics appear, for binding arbitration, such as to meet the requirements (the body's aptitude, even though different from a judicial structure, to carry out a judicial function, ensuring the parties of a "jurisdictional solution of the dispute") required by the European Court of Human Rights in order to comply with Art. 6 of the Rome Convention of 04 November 1950." (Cass. Unified Civil Sections, Order no. 24153 of 25 October 2013).

Arbitration is no longer considered in Italy as a procedure reserved for the select few, or as a procedure that must be used only for issues of considerable economic amount, but is seen as one of the ADR to which the parties may make recourse with confidence, given that the oversight provided for by law over the arbitrators' behaviour, and over the result of their work — and that is to say the award and compliance with the award — are all elements that boost the confidence of the parties, including foreign ones, with regard to this mode of dispute resolution.

In this perspective the Commission felt itself free to submit a variety of proposals to the Minister of Justice.

3. *Proposal in the matter of arbitration in labour disputes*.

The Italian Parliament, most recently with law no. 183 of 04 November 2010, has enriched the regulation of non-binding arbitration as an agile tool for an alternative resolution of labour disputes. The possibility of resorting to non-binding arbitration in labour disputes was considerably expanded by providing for a multiplicity of cases it may be invoked for: arbitration before conciliation commissions pursuant to art. 412 of the code of civil procedure; arbitration provided for (and regulated) by the collective bargaining pursuant to art. 412 *ter*; arbitration before a conciliation board, and arbitration constituted ad hoc pursuant to art. 412 quarter; arbitration before arbitration chambers at certification bodies pursuant to art. 31, paragraph 12, of Law no. 183 of 2010; arbitration provided for, *ante litem*, by arbitration clauses pursuant to art. 31, paragraph 10, of the above law.

In parallel with these legislative efforts, and with the same underlying reason of fostering the possibility of settling disputes by means of out-of-court instruments in lieu of litigation, a regulatory modification is now proposed — overcoming a long-held and no longer current suspicion of binding arbitration — precisely in the area of binding arbitration, which

offers the advantage over non-binding arbitration of rendering an arbitration award with the value of a decision handed down by the court authority, with a special regime of action for annulment.

The development, in law and case law, of binding arbitration as a trial instrument placed at the same level as court jurisdiction leads to favouring its use in the area of labour disputes as well, albeit with limitations and precautions dictated by the specific features of these disputes, which involve particular needs in terms of protecting the worker, who is the weak party in the relationship.

Towards this end, the provisions of the arbitration code for which changes are proposed are the following:

(*a*) art. 806 Code of Civil Procedure. This change removes the general limitation on access to binding arbitration in labour matters, and the limits on resorting to binding arbitration for these disputes may instead be found, distinctly modulated, in the regulations on the arbitration agreement and the arbitration clause.

(*b*) art. 807 (Arbitration agreement): the introduction of a third paragraph to regulate the binding arbitration agreement in labour disputes. Therefore there is a dual precaution. Not only is certification of the arbitration agreement required; but also, the arbitration agreement is possible only for a specific dispute that is about to arise between the parties — a dispute, then, well identified in its purpose, that cannot regard subjective future situations, but must concern rights that have already arisen and that the parties are in disagreement over. Since the parties to the employment relationship are not, as a rule, in a condition of parity, it is necessary to prevent an agreement from being entered into prematurely, when the weak party in the relationship is more vulnerable in accepting certification of the agreement.

(*c*) art. 829 (Cases of annulment): If the goal is for binding arbitration in labour disputes to have actual and effective room to work, it would be necessary to eliminate the rigidity of the general, mandatory rule that, where dealing with disputes provided for by art. 409 of the code of civil procedure, holds as always possible the appeal for violation of the rules of law regarding the merit of the dispute. It is in fact necessary to bring the arbitration award appeal regime in labour disputes closer to the common one, if not to make it equal to that regime altogether. It is thus proposed that the arbitration award appeal regime in the event of labour disputes be redrawn, providing — of course — for appeal for violation of the rules of law regarding the merit of the dispute and of the rules of the national collective bargaining agreements, but also without prejudice to the express will to the contrary of the parties declared in the arbitration agreement. At any rate, the maintained validity of the appeal of the arbitration award on the grounds of going against public order remains unchanged.

4. *Proposal in the matter of the appeal the arbitration award, introducing the possibility of immediate appeal before the Supreme Court of Cassation on the grounds of invalidity.*

In order to make the arbitration award more stable, and therefore more suited to the final resolution in arbitration of the dispute, art. 24 of Law no. 40 of 02 February 2006, emending the arbitration regulations, has, among other things, overturned the rule already put in place by art. 829, second paragraph, of the code of civil procedure, as resulting from the changes made by Law no. 25 of 05 January 1994. Previously, it was generally possible to appeal, on the grounds of invalidity, for failure to comply with the rules of law, and, only as an exception, the parties were allowed to authorize the arbitrators to decide in accordance with fairness or to declare the award not subject to appeal, with the consequence of excluding this appeal on the grounds of invalidity, thereby limiting it to the cases of the first paragraph of said provision (art. 829, second paragraph, earlier Law no. 40/2006). To the contrary, after the 2006 reform, the third paragraph of art. 829 provides that the appeal on the grounds of violation of the rules of law with regard to the merit of the dispute is admitted only if expressly ordered by the parties or by law, with the consequence that this appeal on the grounds of invalidity is, as a rule, excluded, as it remains limited to the cases as per the first paragraph of said provision and the parties are permitted to provide for it only as an exception, and then only if it is not provided for by law, without prejudice at any event to the appeal on the grounds of being contrary to public order.

Where the parties do not have this exception power, and provided that the above-mentioned cases ruled out by law have not occurred, the arbitration award currently has a greater tendency for stability, as the appeal for reasons of invalidity provided for by the first paragraph of art. 829 exists only on procedural grounds.

Although the ability to appeal the award where the parties' choice is that of privileging arbitration over the courts is thus limited, there is still the provision of art. 828 — which in this part has not changed with respect to the formulation of Law no. 25/1994 — according to which the appeal is brought before the court of appeal, whose decision may go to Corte di cassazione (supreme court of cassation). Therefore, the definitive nature of the award is at any rate conditioned upon this dual possibility of appeal: that on the grounds of invalidity before the court of appeal, and the ordinary one of the possible subsequent appeal to Corte di cassazione. Thus, the albeit greater tendency for stability of the award, as resulting from the new rule of the aforementioned third paragraph of art. 829, must at any rate come to terms with the times necessary for exhausting this possible dual level of appeal: before the court of appeal and before Corte di cassazione.

To accelerate the proceeding phase in the possible appeal of the award, the Commission proposes to provide for the parties' right to choose a faster lane for accelerating the finality of the award: a sort of appeal on the grounds of invalidity *per saltum*, by way of direct appeal to Corte di cassazione. Unlike the appeal before the court of appeal, this appeal must be reviewed by virtue of the constitutional guarantee of the seventh paragraph of art. 111 of the Constitution. In this way, the proceeding time would likely be halved, a doubtless benefit for the parties wishing to entrust arbitrators more with settling their dispute.

Towards this end, it is proposed that a new paragraph be inserted into art. 828 of the code of civil procedure, which provides, in favour of the parties that have not already ordered the appeal on the grounds of violation of the rules of law pertaining to the merit of the dispute, the right to agree by written document, even before the award, that the appeal on the grounds of invalidity be proposed immediately to Corte di cassazione *omisso medio*, which is to say omitting the appeal before the court of appeal pursuant to the first paragraph of art. 828. It appeared in line with the reasoning of the proposal to limit this right to the parties that, with the fact of not providing expressly that the appeal of the award may also be extended to violation of the rules of law pertaining to the merit of the dispute, in addition to violation of the rules of procedure pursuant to the first paragraph of art. 829, have shown that they privilege arbitration over the courts, and that they wish to reduce to an indispensable minimum the judgment of ordinary jurisdiction over arbitration. The parties already oriented in this direction are offered the possibility of also reducing the deadlines for attaining the res judicata.

There are also consequential or at any rate connected modifications as a corollary to this proposal: *a*) reduction to sixty days of the deadline for the appeal before the court of appeal, in order to bring this deadline in line with that for bringing the possible appeal *per saltum* of the (proposed) second paragraph of art. 828 with appeal to Corte di cassazione; *b*) reduction from one year to six months as the final deadline for appealing the award, in order to bring this deadline in line with that of the amended art. 327, first paragraph, of the code of civil procedure; *c*) regulation of the proceedings for appealing the award before the Supreme Court through application, to the extent compatible, of certain provisions regarding the ordinary judgment in the Corte di cassazione; *d*) regulation of the injunction phase in the case of an *omisso medio* appeal before Corte di cassazione; *e*) regulation, in art. 830 of the code of civil procedure, of the termination phase in the event of the upholding of the *per saltum* appeal pursuant to the (proposed) second paragraph of art. 828.

5. *Proposal in the matter of arbitration for disputes between shareholders, or between shareholders and the company.*

The proposal concerning articles 832 *bis* - 832 *quinquies* of the code

of civil procedure comprises the idea of bringing into the code and, lastly, enabling the complete abrogation of, the special source constituted by Legislative Decree no. 5/2003, which remained in force limited to the part dedicated to corporate arbitration.

It appeared appropriate — also to prevent an imbalance between supervening common law (by Legislative Decree no. 40/2006) and special law previously in force, from yielding unpredictable interpretative outcomes — to bring the matter of corporate arbitration within the code of procedure, with homologous placement with other figures of special arbitration (such as the figures provided for in the matter of labour disputes: articles 412 and following), and practicable without particular difficulties given the void of the provisions that under articles 833 and following was determined upon the result of the lapsing of the section dedicated to international arbitration (Legislative Decree no. 40/2006).

The collection of special regulations within Book IV of the code of civil procedure imposes adjustments of different levels of importance, at times formal and required, and at times substantial and implying discretionary options: of the latter, the following are noted:

— extension of the regulation to all companies entered in the company register, without prejudice to the long-standing exception for those that rely on the capital market;

— the automatic hetero-integration of statutory clauses not in compliance with the standard of neutrality required for the subject designing the arbitration board or the sole arbitrator (the residual attribution to the president of the section specialized in corporate law within the sphere of the discipline of common law appeared to be the most consistent for the final maintenance of effectiveness of the parties' will to reach an arbitration agreement);

— lastly, the coordination of the power of precarious suspension of the effectiveness of the appealed decision with the more general recognition accorded to the arbitrators, in accordance with the Commission's further proposal (cf. art. 832, paragraph 5), of exercising precautionary powers when they are agents in the setting of institutions for the administration of proceedings in accordance with preconstituted regulations.

No amendment regarded the regulation on the resolution of conflicts on company management already dealt with by art. 37 of Legislative Decree no. 5/2003, given the fact that it objectively lies outside the matter of arbitration and, by virtue of the context of origin, it is connected only with the regulation concerning arbitration judgments, without prejudice to the possibility of detaching it into the code of substantive law, as the corresponding regulation appears that of a form of corporate administration — the "*board.*"

6. *Proposal in the matter of paying arbitration expenses and fees.*

Given the terse formulation of article 816 *septies* of the code of civil

procedure regarding the expenses for the arbitration proceedings and taking note of the conflicting case law in this matter, the Commission proposes that the text of the aforementioned article be modified to allow the arbitrators to subordinate the prosecution of the proceedings to the advance payment of the foreseeable expenses and, taking into account the proceedings' initiation phase, also of one half of the foreseeable compensation, calculated in accordance with parameters determined in compliance with the law. Since the responsibility for default derived therefrom is jointly held, it is proposed that the arbitrators be entrusted with determining the amount of the advance borne by each party, unless the parties agree otherwise.

7. *Proposal in the matter of attachment measures in arbitration.*

By collecting indications of various origin and adjusting the internal arrangement to the internationally widespread practice of according, to arbitrators as well, the power to order, by way of precaution, those measures entrusted to them by the parties, the Commission — having examined the various models through which the principle is put into practice — deemed it appropriate to propose the highly innovative change through the possibility that only a preconstituted regulation for institutional arbitration might bring about the exception to the otherwise permanent prohibition of the precautionary exercise of the arbitrators' power: a prohibition that therefore remains, according to national tradition, intact, and that only in the context of administration of the arbitration with institutions, may be derogated from, thereby permitting — in a framework of consistent reinforcement of institutional arbitration in place of ad hoc arbitration (cf. also the proposed modification of art. 33 of the consumer code) — a solution of transition and of gradual functional equivalency of private justice with that administered by the State.

The regulatory technique follows interpretative options that had already been authoritatively advanced to generate the solution that is lastly being proposed here, and in line with the choices made in the recent past (cf. Legislative Decree no. 5/2003) the exclusion is maintained — for cases of access to arbitration for the assurance of the precaution (in and of itself a matter of concurrent court jurisdiction) — of any remedy in appeal of the precautionary measure issued by the arbitrators. Lastly, its implementation will follow by way of ordinary enforcement of the awards, even should the form of the measure governed by the applicable arbitration regulation not correspond with that of the award.

8. *Proposal in the matter of* translatio iudicii *in arbitration.*

The possibility of transferring the proceedings before the ordinary

judge to an arbitrator or an arbitration board in order to accelerate their conclusion was not expressly contemplated by the code of civil procedure or by the special laws regarding the administration of justice. It was theoretically admissible that the parties, facing a long wait due to procedural delays and postponements due to the burdensome work load, might decide to abandon the suit in order to separately resolve their dispute before an arbitrator; but the activity already carried out at trial was hard to save. This gives rise to the opportunity, offered to the parties, of transferring pending proceedings to arbitration, while safeguarding, for the sake of economy in proceedings, the activity already carried out, provided that the case had not already been taken for decision.

The Commission noted that the innovation introduced with Legislative Decree no. 132 of 12 September 2014, converted into Law no. 162 of 10 November 2014, does not appear to have been upheld in convincing fashion by attorneys, nor are there cases in which the parties have taken advantage of this opportunity. Obviously, the defendant in a situation of debt that has not filed counterclaims as creditor or appeals of varying nature has no interest in bringing the trial to a quick conclusion, but rather tends to grasp the advantage offered by the slowness of the system and by the possibility that fate may provide some beneficial utility.

It is also true that the brief time that has passed since the introduction of the regulation, and the difficulty of obtaining certain data, do not allow a judgment aimed at suppressing the provisions in question to be formulated. Rather, the Commission, taking into account the observations of a technical nature formulated by authoritative doctrine, decided, first of all, to extend this opportunity to all lower-court pending proceedings, to extend it also to the disputes pursuant to art. 409 of the code of civil procedure, and instead to suppress it for cases in appeal, given the difficulties of application of the regulations and the complications this might have led to. Some modifications were also made to make the text more precise.

9. *Proposal in the matter of public contracts.*

Already within the sphere of the power of producing corrective decrees of the Code of public contracts, the regulations of the recent Legislative Decree no. 50 of 2016 on the ways of resolving disputes as an alternative to going before the judicial authority appears susceptible to specific improvements.

Above all, the amicable agreement could be even more broadly reassessed (which is the option clearly already upheld by the Code with respect to the state previously in force) in the event — after carrying out the activity of the impartial third party promoting the understanding — of each party's arbitrarily refusing to challenge it. Indeed, on the adjudication

model in force for the resolution of disputes in the matter of construction law, it appears appropriate to introduce the communication regulation according to which the party that has formulated reservations declares its possible acceptance of the third-party proposal. After a mandatory deadline by which the contracting authority has the burden of bringing an ordinary suit of merit, the third-party proposal may in the meantime be understood as having executive effectiveness limited to the sums of money paid with it to the accepting party.

As for the arbitration administered by the Chamber for public contracts at ANAC, an implication of it is promoted in a manner to a further extent under public law and of disciplinary speciality, starting from the qualification that may be given to arbitrators and consultants in terms other than as currently exists for arbitrators under common law, whom the statute actually does not treat differently from even the public service employee.

The discipline's increased speciality, and its intimate rigour along with monopoly in the administration of the proceedings by the public party constituted within the sectoral authority, also make it possible to introduce the figure of sole arbitrator for disputes of lesser amount — a figure in fact more in line with the limits of remuneration that are applied to the parties charged with settling disputes at arbitration.

An additional profile to be accommodated from the regulatory standpoint into the changed setting of the necessary administration/administrativization of all the arbitration judgments, a figure functional to the actual monitoring of the dispute in question, regards the regulation of access to arbitrators by virtue of clauses not already conformed, *ratione temporis*, to the dictates of Law no. 190/2012 (the so-called "Severino Law"). Therefore, in the logic of restoring accessibility to arbitrators operating on the basis of these prior clauses, it appears possible and useful now to borrow the established scheme of the public administration's tacit assent to the arbitration opted for by the private party that has introduced the application on the strength of a contractual clause prior to Law no. 190/2012, with resolution at any rate explicitly followed in legislation for the so-called court arbitration (*arbitrato forense*) for the purposes of the *translatio iudicii* to arbitration (Law no. 134/2012).

Lastly, in the logic of the discharge of non-jurisdictional obligations — in France, this is referred to as the "dejudicialization" of business — it appears urgently necessary to endow the acts of the arbitration Chamber with effects that make going before the court authority a possibility and not a necessity: this is the case, for example, in which the Council has paid the debts that may be collected from the parties by arbitrators and experts, which as things stand are not currently enforcement orders that may be acted upon as such.

Following the same logic, it appears in effect superfluous for the court

authority as an individual. such as the albeit authoritative figure of the president of the court of the place of arbitration (and, for the most part, Rome), to necessarily have to be compelled to try the case for reasons of bare assistance to the effectiveness of arbitration; conversely, a board of public officials, such as the arbitration Chamber, might more appropriately perform this role of assistance to arbitration through the exercise of all the enforcement powers over the measures ordered by the arbitrators, or of full control over their doings (this is the emblematic case of extending the deadline for pronouncing the award). It is a matter of measures for which the magistrate's substitutive contribution is currently required, albeit without much in the way of constitutional necessity.

Lastly, what appears to be functional to the growth, and one may say optimization, of the role of the arbitration Chamber, is its being endowed, like chambers of both public and private origin, with a specific regulatory power to be exercised within the mechanics of production of the sources reserved for ANAC.

10. *Proposal in the matter of Alternative Dispute Resolution (ADR) with decision-making powers in the field of public services and in the matter of arbitration on public administration disputes.*

The regulations introduce a model of Alternative Dispute Resolution (ADR) in disputes between economic operators and customers in the field of public utilities. In this regard, the provision uses the equivalent EC notion of service of general economic interest. The regulation provides for an ADR system with binding effects on the parties, and that is inspired, as parameter of reference, by the out-of-court definition of the disputes as successfully applied in the sectors overseen by the communications authority AGCOM, through the doings of the so-called CORECOMs (regional communications committees) (see art. 11, Law no. 249 of 1997; AGCOM decision no. 173/07/CONS). A similar system is also active for the disputes between operators and customers regarding electricity, gas, and water, under the coordination and decision-making power of the authority for electricity and gas and for the water system (AEEGSI).

It is established that the public authority, after taking on a service of general economic interest and having decided to promote a tender for choosing the operator, includes such a mechanism directly in the tender documents. Each participant in the tender is thus acquainted with the bidding conditions, also including the activation of this ADR system as well as the incurring of the costs by the future operator.

The regulation, also for the purpose of reinforcing its independence, provides that the body called upon to exercise the ADR award functions is appointed by the judicial leadership with jurisdiction over the territory. There are two phases: the first one, strictly conciliatory, is seen to by the

chairman of the board; the second, at the impetus of both parties or the customer, adjudicative in nature, is entrusted to the board, and closes with a binding provision. The utility contract may supplement the regulation with additional provisions regarding cross-examination, deadlines, and other procedural elements. This is a decision of an administrative nature, as takes place in the experience of AGCOM and AEEGSI, and that therefore leads this institution to in-court administrative remedies. This is without prejudice to appeal of the decision before the regional administrative court (TAR). Any dismissal, however, brings consequences in terms of expenses, in accordance with a model already present with regard to the so-called pre-dispute opinions pronounced by ANAC pursuant to art. 211, paragraph 1, of Legislative Decree no. 50 of 18 April 2016.

Given the provisions of article 12 of Legislative Decree no. 104 of 02 July 2010, which permits devolving upon the jurisdiction of the administrative courts the disputes concerning subjective rights through binding arbitration, the Commission, to prevent dubious interpretations, proposes including, among the matters that are the object of dispute, the claims for compensation of the damage derived from illegitimate exercise of the administrative activity, or from the failure to exercise the obligatory one.