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A CONFERENCE ON THE LAW GOVERNING  
THE ARBITRATION AGREEMENT  
AND THE VALIDITY OF ASYMMETRICAL CLAUSES:  
OLD PROBLEMS AND NEW PERSPECTIVES

(ArbIt; AIA; CAM; Arbitration Certificate – AIA-CAM Rome Pre-Moot  
Opening Conference, Rome, 20<sup>th</sup> February 2020)

On 20 February 2020 the Department of Law of Università degli Studi di Roma Tre hosted a conference on “The Law Governing the Arbitration Agreement and the Validity of Asymmetrical Clauses”. The Italian Forum for Arbitration and ADR (ArbIt) organized the event with the support of the *Associazione Italiana Arbitri* (AIA), together with the Certificate for International Commercial and Investment Arbitration (Arbitration Certificate) and the Milan Chamber of Arbitration (CAM).

The opening ceremony of the AIA-CAM Rome Willem C. Vis International Commercial Arbitration Pre-Moot was the opportunity to the conference and a chance to deepen one of the issues related to the 27<sup>th</sup> VisMoot Problem: the asymmetrical arbitration clauses.

Professor Giovanni Serges, Dean of the Roma Tre University’s Law Department, opened the conference and expressed his gratitude to Professor Maria Beatrice Deli for her commitment to the Vis Moot project and for the organization of the event at the University.

The session began with the introduction by Benedetta Coppo, Head of the

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Rome Branch Office of the Milan Chamber of Arbitration (CAM). She recalled the Vis Moot organization as a tradition and underlined the importance for all the arbitration institutions to be proactive.

The floor was left to Professor Maria Beatrice Deli, Secretary General of the *Associazione Italiana Arbitri* (AIA), who remarked the importance of the conference to gain new perspectives on the problem of asymmetrical arbitration agreements. She also reminded the next-day conference “An insight view on the LCIA Rules” held by Luca Radicati di Brozolo, Vice President of the London Court of International Arbitration.

Gianluca Benedetti, Co-Chair of ArbIt and Partner of BridgeLaw, moderated the debate related to the possible scenarios of different governing laws of an arbitration clause. Gustav Flecke-Giammarco, Founder of Seven Summits Arbitration, and Andrea Carlevaris, Partner of BonelliErede, participated to the debate.

The first issue faced during the conference was concerning the law applicable to the arbitration clause, which, according to the International Arbitration principles, is to be considered separate and independent from the contract in which it is contained. Gianluca Benedetti firstly illustrated the overarching problem of having more than one applicable state law in International Arbitration and specified that the doctrine of separability can be considered a milestone of International Arbitration.

The floor was left to Andrea Carlevaris who stated that problems arise when different solutions are adopted by a variety of jurisdictions regarding the validity of arbitration agreements. The doctrine of separability may rise concerns as the parties generally draft the contract as a whole and do not expect that the arbitration agreement could be interpreted by an arbitral court through different regulations. An additional problem arises when considering applicable laws: in the absence of choice-of-law clauses in the arbitration agreements, the formal and the substantial requirements of the agreement can be ruled by different laws. Dr. Carlevaris offered an overview of the different approaches to the problem. The majority of scholars believes that the applicable law should be the law of the place of arbitration, whereas others tend to apply the contract law. Dr. Carlevaris pointed out that, in the *Sulamerica Case* decision, the English Court of Appeal used the closest connection principle, which led to the application of the law of the place of arbitration. However, he stressed the fact that even the application of the closest connection principle does not lead to a harmonization of

the present matter. In fact, in France there has been an evolution concerning substantive rules governing the issue: it was decided to investigate the parties' real intention, which can be limited only by public policy and mandatory rules. Instead the United States courts found that, in the light of articles 2 and 5 of the NYC, an analysis of the validity of the resolution clauses can be exhaustive considering the domestic law and international standards, seeing the principle of estoppel and the general principle of validation as well.

The following speech was delivered by Gustav Flecke-Giammarco, who provided an overview of four different approaches to determine the validity of an arbitration agreement. Firstly, Dr. Flecke-Giammarco addressed the *lex contractus* approach, mostly used by the English courts. According to this approach, arbitrators must apply the contract law provisions to all the substantive disputes, including those concerning arbitration agreement. He stressed the importance of the safeguard of the arbitration agreement, as its validity might affect the enforcement of the award. In order to perform this purpose, Dr. Flecke-Giammarco and the majority of the German doctrine prefer the *lex arbitri* approach. Arguing this solution, the contract law cannot be applied to the arbitration clause since it has a different scope from the rest of the contract. The application of the *lex fori* constitutes the third approach described, which is criticized as the majority of arbitral institutions do not indicate a certain and specific condition for the identification of the forum. The fourth and last approach involves the applicability of the pro-validation principle, which was underlined in the decision of the *Sulamerica Case* as well. Finally, Dr. Flecke-Giammarco described a new trend on the validity of arbitration agreements: many practitioners have held that questions regarding the arbitration agreement may be resolved through an analysis under the light of the CISG.

The second topic faced during the conference was the scope and validity of the asymmetrical arbitration clauses. This second part was moderated by Andrew G. Paton, Partner of the *Studio Legale De Berti Jacchia*. Santtu Turunen, Secretary General of the Finland Arbitration Institute (FAI), and Niccolò Landi, Partner of the *Studio Legale Landi* in association with Beechey Arbitration, participated in the debate. The discussion began with a short definition given by Andrew G. Paton of an asymmetrical arbitration clause. He defined it as an arbitration clause that allows a party to have an option to unilaterally refer a dispute to courts or to arbitral tribunals. Afterwards, he interviewed

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the speakers on the validity of those clauses and the possible objections.

Santtu Turunen discussed the need to be aware of the variety of case laws, as only some countries developed solid ground for the validation of this kind of clauses. Additionally, Santtu Turunen explained that the principle of equality has to be deemed as the core of the problem and needs to be considered in its procedural sense: both parties have the right to present their perspectives and to be in front of an impartial tribunal. He underpinned that the impact of this principle but clarified that just being unbalanced does not make a contract invalid, even the procedural idea of equal treatment does not lead to the necessary invalidation of the asymmetric resolution clause.

Niccolò Landi, as second speaker, argued that in transactions one party always holds a stronger position and attempts to impose a clause on the other parties in order to gain an advantage, as there are strong commercial reasons behind these choices. The validity of asymmetric dispute resolution clauses remains the subject of an intense debate. Dr. Landi argued that inserting an asymmetric dispute resolution clause may create a risk for the enforcement of the award. There is a possibility for the clause not to be accepted by the Arbitral Tribunal, depending on the legal system one deals with and how the jurisdiction considers the equal treatment of the parties. Dr. Landi gave the example of the approach undertaken by the French courts, which declared the invalidity of asymmetric clauses by considering them *clauses potestatives*, that is, clauses that can be unilaterally activated. Contrarily, in the Dyna-Jet award, the Singapore Arbitral Tribunal recognized the clause as asymmetric and, despite of this classification, stated that this characteristic did not compromise the validity and the nature of the arbitration agreement.