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**STARE INDECISIS.  
HOW DECISIONS INCONSISTENCY AFFECTS  
THE REGULATORY FUNCTION  
OF THE BANKING OMBUDSMEN**

**ABSTRACT.** *The spread of ADR systems based at the supervisory Authorities (Ombudsmen) is increasing especially in regulated markets (such as banking, financial and insurance market). These Ombudsmen are assigned double functions: immediate (at the micro level), since they aim to settle private disputes (as an instrument of contractual governance); and mediated(at the macro level), they accomplish market regulation. Given this legal context, the predictability of the decisions takes a very specific connotation, since, placed in the more complex framework of banking supervision, this represents the conjunction point between the decision-making and the market regulation carried out by these bodies.*

**CONTENT.** 1.The Italian Ombudsmen: setting the scene – 2. The background – 3. The Hybrid nature of the ABF – 4. The ABF at the intersection of substantive and procedural law – 5. The nomophylactic function

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## **1. The Italian Ombudsmen: setting the scene**

The contemporary movement of multiple paradigms of justice,<sup>1</sup> intended as a tendency to seek alternative methods to the jurisdictional solution of disputes<sup>2</sup> (by virtue of the different perception of the jurisdictional process accrued by virtue of post-modern theories)<sup>3</sup> is a matter acquired in the legal debate. Equally well-known is the proliferation – recurrent in regulated markets, like financial and network services – of ADR systems based at the supervisory authorities.<sup>4</sup>

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<sup>1</sup> A. UZELAC-C.H. VAN RHE, *The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms - Unity and Diversity*, A. UZELAC & C.H. VAN RHE, *Transformation of Civil Justice*, Springer, Cham, 2018, p. 3; B. HESS & M. REQUEJO ISIDRO, *Approaches to Procedural Law - The Pluralism of Methods*, Luxembourg, Nomos, 2017; C.H. CROWNIE, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, *New York Law Rev.*, 76, 2001, p. 1768.

<sup>2</sup> See the Directive on consumer ADR, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. See also P. CORTES, *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford Univ. Press, 2016; N. CREUTZFELDT-BANDA, *The Origins and Evolution of Consumer Dispute Resolution Systems in Europe*, C. HODGES & A. STADLER, *Resolving Mass Disputes: ADR and Settlement of Mass Claims*, Cheltenham, Edward Elgar Pub., 2013, pp. 223 ff.; I. BENOHR & CREUTZFELDT-BANDA, *Consumer ADR in Europe: Civil Justice Systems*, Oxford, Hart Publishing, 2012, p. 396; see also di P.H. LIND-BLOM, *ADR – The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden*, *European Review of Private Law*, 16, 2008, p. 63.

<sup>3</sup> In upholding a perspective that has recently become popular, the promotion of alternative solutions to disputes also comes as part of the transition from the system of rights to the system of remedies: A. GENTILI, *Il diritto come discorso*, Milano, Giuffrè, 2013, p. 384; U. MATTEI, *I rimedi. Diritto soggettivo*, 2, in R. SACCO, *Trattato di diritto civile*, Torino, Utet, 2001, spec. pp. 108-114. On ADRs: C. MENKEL-MEADOW, *What is an appropriate measure of litigation? Quantification, qualification and differentiation of dispute resolution*, 11 *Journal Oñati Socio-legal Series*, 2020, pp. 321 ff.; L. CADIET-TH. CLAY, *Les modes alternatifs de règlement des conflits*, Paris, Dalloz, 3<sup>e</sup> ed., 2019, p. 180; CADIET-HESS & REQUEJO ISIDRO, *Privatizing Dispute Resolution: Trends and Limits*, Baden-Baden, Nomos, 2019; C. HODGES, S. VOET, *Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles*, in HESS & X.E. KRAMER, *From Common Rules to Best Practices in European Civil Procedure*, Oxford, Hart Publishing, 2018, p. 377; G. WAGNER, *Private Law Enforcement Through ADR: Wonder Drug or Snake Oil?*, *Common Market Law Review*, 51, 2014, p. 165; J. RESNIK, *Managerial Judges, Jeremy Bentham and the Privatization of Adjudication*, in J. WALKER & O.G. CHASE, *Common Law and Civil Law and the Future of Categories*, Markham, Ontario, Lexis-Nexis Canada, 2012, p. 205 at 210; B. HESS, *EU Trends in Access to Justice*, in VAN RHEE & UZELAC, *Civil Justice Between Efficiency and Quality: From Ius Commune to the CEPEJ*, Antwerp-Portland, Intersentia, 2008, at 189.

<sup>4</sup> It is a trend that is shared in most systems, that the regulatory authorities adopt a litigation procedure to ascertain compliance with the rules set on a primary and sub-primary level: G. NAPOLITANO, *Regulation and Litigation. La linea continua tra regolazione e soluzione delle controversie*, in A. ZOPPINI, *Tra giurisdizione e regolazione*, Roma, Roma TrE-Press, 2017, p. 141; P. SIRENA, *ADR Systems in the Banking and Financial Markets*, Osservatorio del diritto civile e commerciale, 2018, p. 632; G.L. CARRIERO, *Abfe principali Adr in materia finanziaria: profili comparativi*, Contratto e impr., 2018, p. 35 ss.; S. LUCATTINI, *Modelli di giustizia per i mercati*, Torino, Giappichelli, 2013.

These Ombudsmen (in borrowing the Swedish term generally used to refer to these bodies) comes fully within the third wave of access to justice,<sup>5</sup> which has effectively had some authors constitute a trend of a “divorce” between consumers and process, in lieu of a conflict resolution model, outside the legal system.<sup>6</sup> In the eyes of parties increasingly culturally inclined to perform a cost-benefits analysis,<sup>7</sup> the trial is a risk both in terms of time and the little flexibility in results, as well as for the nature of the dispute.<sup>8</sup>

This type of ADR is where the Banking and Financial Ombudsman (*Arbitro bancario e finanziario* or “ABF”, based at the Bank of Italy), established in 2009,<sup>9</sup> comes into play, along with the Securities and Financial Ombudsman (*Arbitro per le controversie*

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<sup>5</sup> The first two being related to *legal aid* and collective dimension of conflicts: M. CAPPELLETTI, *Alternative Disputes Resolution Processes within the framework of the World-Wide Access-to-Justice Movement*, *Mod. L. Rev.*, 56, 1993, p. 283.

<sup>6</sup> CH. HODGES, *The Private Sector Ombudsman*, in M. HERTOOGH & R. KIRKHAM, *The Research Handbook on Ombudsman*, Cheltenham, Edward Elgar Publishing, 2018, p. 53; R. JAMES, *Private Ombudsmen and Public Law*, Ashgate, Dartmouth Pub Co, 1997.

<sup>7</sup> HODGES-S. VOGENAUER-M. TULIBACKA, *The Costs and Funding of Civil Litigation A Comparative Perspective*, C.H. Beck, Hart Publishing, 2010.

<sup>8</sup> V. FERRARI, *Le parti e il rischio del processo*, in *Accordi di parte e processo. Quaderni della Riv. trim. dir. proc. civ.*, 2008, p. 39.

<sup>9</sup> Art. 128-bis, para. 1, Consolidated Banking Law, introduced by Art. 27 of the Investor Protection Law (Law 262/2005); see CARRIERO, *L'Arbitro Bancario Finanziario presso la Banca d'Italia: genesi, struttura e funzioni*, in *Trattato di diritto dell'arbitrato. Le controversie bancarie e finanziarie – vol. XV*, Esi, Napoli, 2020, pp. 1 at 42; D. DALFINO, *L'Abf e i principi del processo civile: contestazione, “contumacia”, onere della prova*, in *Il Processo*, 2019, pp. 27 ss.; A.F. AULETTA, ... il sole e l'altre stelle: è la giurisdizione quella del “sistema” dell'ABF (*Arbitro Bancario Finanziario*)? in *Banca borsa tit. credito*, 2018, p. 794; M. BIANCO, *L'Arbitro Bancario Finanziario a sette anni dalla nascita*, in R. LENER & A.F. POZZOLO, *I metodi alternativi di risoluzione delle controversie. L'ACF: primi passi e prospettive*, Minerva Bancaria, Roma, 2017, p. 65; I.A. CAGGIANO, *L'arbitro bancario finanziario, esempio virtuoso di degiurisdizionalizzazione*, in *Nuova giur. civ. comm.*, 2015, p. 439; CARRIERO, *Giustizia senza giurisdizione: l'arbitro bancario finanziario*, in *Riv. trim. dir. e proc. civ.*, 2014, p. 161; M. RABITTI, *La relazione banca-clientela nel tempo della crisi economica: la “spinta gentile” dell'ABF*, in G. GRISI, *Le obbligazioni e i contratti nel tempo della crisi economica. Italia e Spagna a confronto*, 2014, Napoli, Jovene Editore, p. 191; E. LUCCHINI GUASTALLA, *Arbitro bancario finanziario*, in *Enc. Dir.*, Annali, VIII, Milano, Giuffrè, 2014, p. 35; S. DELLE MONACHE, *Arbitro bancario finanziario*, in *Banca borsa tit. cred.*, 2013, p. 144; E. CAPOBIANCO, *Arbitro Bancario Finanziario*, in *Dig. disc. priv., Sez. Comm.*, Torino, Utet, 2012, p. 35; A. SCOTTI, *Abf e rapporti bancari*, in *Dig. disc. priv., Sez. comm., Agg.*, Torino, 2012, p. 1; M. MAIONE, *Forma e sostanza delle delibere dell'arbitro bancario finanziario*, in *Società*, 2012, p. 437; B. DE CAROLIS, *L'Arbitro Bancario Finanziario come strumento della trasparenza*, in *Quad. di ricerca giuridica della Banca d'Italia*, n. 70, Roma, 2011; S. RUPERTO, *L'Arbitro Bancario Finanziario*, in *Banca borsa tit. cred.*, 2010, p. 325; E. QUADRI, *L'«arbitro bancario finanziario» nel quadro dei sistemi di risoluzione stragiudiziale delle controversie*, in *Nuova giur. civ. comm.*, 2010, p. 305.

fianziarie or “ACF”, based at the the Italian Financial Authority: Consob) established in 2016,<sup>10</sup> and the Insurance Ombudsman (*Arbitro per le controversie assicurative* or “ACA”, based at the Italian Institute for Insurance Supervision: IVASS),<sup>11</sup> imminently to be established, assigned to solve “small and medium-sized” disputes (and we are therefore outside the logic of mere small claims – the competence, in terms of value, of the various arbitrators ranges from 200.00 euros for the ABF to 500,000 euros for the ACF), involving customers, which, according to the decision-maker before whom the claim is brought, act as investors, savers and insured parties.<sup>12</sup>

While entitlement is not reserved exclusively to consumers, but rather is instead extended to also cover collective entities and/or natural persons, the professional or private scope of the contract is irrelevant,<sup>13</sup> these Ombudsmen represent a form of justice that aims to settle disputes relating to asymmetrical relations, given that the isonomic trial, intended as a dispute between equal parties based on the neutrality of the judge is, in a banking, financial and insurance area, a model that has now been left behind us, considered unable to handle conflicts between parties where there is such a marked imbalance of powers (on the shared assumption that the customer is the weaker party both in the contract and in the trial).<sup>14</sup> Although not formally able to be ascribed to initiatives for exclusive consumer protection, they share the same needs to afford pro-

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<sup>10</sup> Legislative Decree 130/2015 (implementing Directive 2013/11/EU) and Consob Resolution n. 19602, 4 May 2016; on the institution of the “Securities and Financial Ombudsman” see G. AFFERNI, *Remedies available to retail clients of investment firms in the light of the decisions of the Italian Financial Ombudsman (ACF)*, in R. D’AMBROSIO & S. MONTEMAGGI, *Quaderni di ricerca giuridica della Banca d’Italia, Private and public enforcement of EU investor protection regulation*, Roma, 2019, p. 97; V. MIRRA, *Il nuovo sistema Adr in ambito Consob: l’arbitro per le controversie finanziarie, tra alte aspettative e primi riscontri operativi*, in *Riv. Arb.*, 2018, p. 615; A. DOLMETTA-U. MALVAGNA, *Sul nuovo ADR Consob*, in *Banca, borsa, tit. cred.*, 2016, p. 251; A. ANTONUCCI, *Gli strumenti di tutela metaindividuale e collettiva dell’utente finanziario*, in F. CAPRIGLIONE, *I contratti dei risparmiatori*, Milano, Giuffrè, 2014, p. 523.

<sup>11</sup> N. SOLDATI, *La Insurance Distribution Directive: verso un ulteriore sistema di risoluzione delle controversie presso l’IVASS*, *Federalismi.it*, 2019, p. 2.

<sup>12</sup> M. STELLA, *Lineamenti degli arbitri bancari e finanziari. In Italia e in Europa*, Padova, Cedam, 2016.

<sup>13</sup> The customer is «the person who has or who has had a contractual relationship with an intermediary for the provision of banking and financial services»: Art. 1 lett. a, of the Cicr resolution.

<sup>14</sup> See the European Court of Justice *positive action* doctrine: «The imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract»: Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v. Rocío Murciano Quintero and Salvat Editore SA v. José M* [2000] ECR I-4941, I-4973 para. 27); see Arts. 6 and 7 of Council Directive 93/13/ EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95 p. 29.

tection and restore balance to asymmetrical positions, which form the basis and assumption of the regulatory and legislative choices of consumer-type “unequal legislation.” Indeed, they provide a response to the requests most frequently recalled, underlying consumer-type disputes, such as the removal of barriers to accessing justice, the effectiveness of protection and the limitation of the time and costs of the procedure. The attempt to restore balance to asymmetrical positions is confirmed, on a regulatory level, by the provisions relative to the right to act is reserved to the customer alone;<sup>15</sup> there is no obligation to obtain legal assistance;<sup>16</sup> only the defending party is charged for the process, and only if the complaint is upheld;<sup>17</sup> the *forum actoris* rule (consumer contract jurisdiction).<sup>18</sup> It would therefore be overly simplistic to limit the function of these Arbitrators to the mere deflation of the ordinary dispute,<sup>19</sup> as they are assigned to pursue a broader, higher end: one of “delivery justice”<sup>20</sup> and the removal of barriers to accessing justice, making them necessary even in a system whose courts work in the best possible way.<sup>21</sup>

## **2. The background**

Although Italian Ombudsmen offer a virtuous example of efficiency of justice systems (the success of which is borne out by the considerable number of citizen petitions brought to them), they do have some unresolved issues, of merit and method.

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<sup>15</sup> Art. 5, para. 1, of the Cicc Resolution, whose aim is to reserve an alternative remedy for settling economic disputes in banking and credit matters and payments to the customer alone.

<sup>16</sup> Respecting the provisions of Art. 8, letter c, Alternative Dispute Resolution for Consumer Disputes Directive.

<sup>17</sup> Differently by the FOS: *Financial Ombudsman Service v Heather Moor & Edgecomb Ltd*, Court of Appeal (Civil Division) [2008] EWCA Civ 643.

<sup>18</sup> Art. 1, section III, “Provisions on the Systems for the Extrajudicial Settlement of Disputes Concerning Banking and Financial Transactions and Services”.

<sup>19</sup> It is true, in fact, that if, on the one hand, the ABF has removed certain types of dispute from the courts (typically those regarding unlawful reports in risk centres), on the other, it has intercepted new ones, which would not otherwise have been brought (the most paradigmatic example is that of salary-backed loans, but also fraudulent transactions carried out using payment systems); the deflation effect is, therefore, secondary: this point is grasped very clearly by A. TUCCI, *L'arbitro bancario finanziario fra trasparenza bancaria e giurisdizione*, in *Banca Borsa Titoli di Credito*, 2019, p. 623 ff. and in F. CAPRIGLIONE, *Liber amicorum Guido Alpa*, Cedam, Padova, 2019, p. 605.

<sup>20</sup> HODGES, *Delivering Justice*, *International Journal of Procedural Law*, 9, 2019, p. 149.

<sup>21</sup> R. CARLEO, *L'Arbitro Bancario Finanziario: anomalia felice o modello da replicare*, in *Riv. arb.*, 2017, pp. 21 ff.

The matters of method (and, notably, the improvement of function and the speed of the proceedings) have found ideas for solutions in the new provisions adopted by the Bank of Italy in October 2020.<sup>22</sup>

With regards to the merits, the crucial aspect is the uniformity of approach and stability of decisions.

This work aims to address the matter of uniformity of arbitration case law from the standpoint of the conforming effect on the conduct of intermediaries, verifying that the predictability of the decisions is functional to both the preventive alignment of intermediaries with ABF decisions and the legitimization of the justice function of the Regulatory authority.

To fully understand the structure and function of the ABF, and then deal with the issue of the consistency of its decisions, one has to consider the cultural and structural context in which it is placed, with regard to scenarios of both private and public law.

I will take the ABF as paradigmatic example as, since it was the first to be established in our system, it has a more consolidated structure.

As regards private law, one reflection may be made on a point of clear acceptance for which, in the current legal and cultural context, efforts are mainly concentrated on the modification of mixed models of justice (covering different legal experiences) characterized by the effectiveness of the remedy; there is no single cultural reference;<sup>23</sup> the enforceability of the law is a preferential observation point.<sup>24</sup>

As regards public law, particularly banking supervision, in national systems the common path is that of ever greater centrality and instrumentality of customer protection over the objectives of classic prudent supervision; while within the EU the settlement of disputes is considered to be a means of promoting convergence on supervision.<sup>25</sup>

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<sup>22</sup> N. SOLDATI, *La terza riforma dell'Arbitro Bancario Finanziario (ABF)*, in *Contr. Impr.*, 2020, p. 1541; S. COTTERLI, *ABF e tutela del cliente bancario*, *Banca Impresa Società*, 2019, pp. 307 at 311.

<sup>23</sup> R. MICHAELS, *The Functional Method of Comparative Law*, in M. REIMANN & R. ZIMMERMANN, *Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, p. 339.

<sup>24</sup> A. CARRATTA, *Tecniche di attuazione dei diritti e principio di effettività*, in *Riv. trim. dir proc. civ.*, 2019, p. 1; G. BIEHLER, *Procedures in International Law*, Berlin, Heidelberg, Springer, 2008, p. 5; P. ROTT, *Effective Enforcement and Different Enforcement Cultures*, in T. WILHELMSSON-E. PAUNIO & A. POHJOLAINEN, *Private Law and the Many Cultures of Europe*, Deventer, Kluwer, 2007, p. 291 ff.; F. SNYDER, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, *Mod. Law Rev.*, 56, 1993, pp. 19 at 22.

<sup>25</sup> Green paper, Building a Capital Markets Union, 18.2.2015 COM(2015) 63 final.

### **3. The Hybrid nature of the ABF**

Moreover, in terms of banking supervision, a common trajectory is noted, in the domestic legal systems, towards a more central, instrumental role of customer protection with respect to the classic prudential supervision objectives. In Italy, for example, Art. 127 of the Consolidated Banking Law has redesigned the institutional architecture of the banking market regulation, adding an additional purpose to the supervision; it constitutes the viaticum that makes it possible to reconstruct, in terms of coordination, the relationship between the typically publicist protection system with the protection of private law.<sup>26</sup> This cohabitation of “micro” (non-systemic) and “macro” objectives and the shift of the barycentre of legislations in certain regulated segments to retail, would appear to be further confirmed, internally, by legislation that can be traced to contiguous legal segments.<sup>27</sup>

The ABF is an ADR,<sup>28</sup> based at the supervisory authorities,<sup>29</sup> of the adjudicative type<sup>30</sup> which reaches a decision according to the law.<sup>31</sup> The ABF does not have a judicial

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<sup>26</sup> A. ZOPPINI, *Appunti in tema di rapporti tra tutele civilistiche e disciplina della vigilanza bancaria*, in *Banca, borsa, tit. cred.*, 2012, p. 26.

<sup>27</sup> See Art. 1 Dir. 2013/11/UE; Art. 3, d.lgs. 12 May 2015, n. 74 (c.d. *Solvency II*), transposition of Art. 27 (and whereas 16) Dir. 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (*Solvency II*).

<sup>28</sup> G. BOCCUZZI & A. VALSECCHI, *Tutela della clientela e regolamentazione bancaria e finanziaria*, in G. BOCCUZZI, *I sistemi alternativi di risoluzione delle controversie nel settore bancario e finanziario: un'analisi comparata*, *Quaderni di Ricerca giuridica della Consulenza legale della Banca d'Italia*, n. 68, Roma, 2010, p. 17; B. DE CAROLIS, *L'arbitro bancario finanziario come strumento di tutela della trasparenza*, *Quaderni di Ricerca giuridica della Consulenza legale della Banca d'Italia*, n. 70, Roma, 2011, p. 21.

<sup>29</sup> C. TABARRINI, *L'indipendenza delle ADR incardinate nelle Autorità di Vigilanza*, in *Osservatorio del diritto civile e commerciale*, 2018, p. 239.

<sup>30</sup> LUCCHINI GUASTALLA, *Arbitro bancario finanziario*, p. 37.

<sup>31</sup> The Bank of Italy's "Provisions on the Systems for the Extrajudicial Settlement of Disputes Concerning Banking and Financial Transactions and Services" literally stipulate that the decision is passed by the panel based on the documentation collected within the scope of the investigation, applying the legal and regulatory provisions on the subject, as well as any codes of conduct with which the intermediary complies (Section VI, Art. 3). This approach, which therefore provides for the ABF's decision to be fair, must take into account the "guidelines followed by the adjudicating body, by consulting the computer records of the decisions pronounced by the panels published on the Internet" (Section VI, par. 1), the assessment of the aforesaid appeals having to take place "in the light of the aforesaid guidelines as well" (Section VI, par. 1).

nature,<sup>32</sup> and its decisions of investigation and sentencing (not, therefore, constituent decisions, e.g. annulment of the agreement) are not binding.<sup>33</sup> Therefore, it does not deprive intermediaries and customers of the power to have recourse to the legal authorities.<sup>34</sup> The ABF is articulated in 7 regional panels, the structures of which are based at the Bank of Italy, operates as second-instance body (after the complaint), and may be accessed by consumers at a very low cost (€ 20);<sup>35</sup> it hears certain disputes, which are, from the subjective point of view, disputes between “customers” and “intermediaries,” and under the objective point of view, related to banking and financial transactions and services, including loans narrowly defined (for example, mortgage loans), but excluding financial intermediation agreements.

A compliance failure results in the inclusion of the name of the intermediary in the black list of non-complying intermediaries on the website of the Bank of Italy and the ABF.<sup>36</sup> Even without having the binding and enforceable character of a judicial decision, an effective protection is therefore ensured through a reputational enforcement mechanism (the so-called *shame culture*),<sup>37</sup> which, in a sector like the financial one that is based on trust and reliability of the operators, is very effective as sanction and deterrent. The ABF decision, therefore, although not legally binding, is binding at the social level.

Participation in the system is mandatory for the intermediaries authorised to (banking, financial, post office banking, the issue of electronic money, overdraft guarantees, payment services), with regard to the disputes that fall within the area of competence of the ABF;<sup>38</sup> it is a pre-condition for the execution of the activity, and compliance may

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<sup>32</sup> Italian Constitutional Court, ord. no. 218, 11 July 2011.

<sup>33</sup> Art. 6 of the Cicr (The Interministerial Credit Committee) Resolution (issued on 29 July 2008).

<sup>34</sup> Art. 128-*bis*, para. 3, Consolidated Banking Law; on the “Civil Justice Double Helix”, see N. ANDREWS, *The Modern Civil Process in England: Links between Private and Public Forms of Disputes Resolution*, Zzi, 2009, 14, p. 3 ff.- in the sense of support offered by and lack of alternative nature of the co-existing legal system compared to the Bar.

<sup>35</sup> Art. 8, lett. c, Dir. 2013/11.

<sup>36</sup> More specifically, the intermediary’s default is made public via the ABF and Bank of Italy websites and by publication in two widely-circulated national daily newspapers - Art. 6 of the Cicr Resolution.

<sup>37</sup> A. SCHWARTZ-R.E. SCOTT, *Contract Theory and the Limits of Contract Law*, Yale Law Journ., 113, 2003, p. 541.

<sup>38</sup> Art. 128-*bis*, para. 1, Consolidated Banking Law, introduced by Art. 27 of the Investor Protection Law (Law 262/2005) and amended by Art. 40, para. 2, of Legislative Decree no. 11 of 27 January 2010; Circular of 20 April 2011 issued by the Department of Legal and Legislative Affairs.

There is, therefore, no ABF clause, in the sense that the contract between bank and customer, based on the interme-

be assessed by the Bank of Italy in the context of its supervision activity.<sup>39</sup>

The Ombudsmen are appointed by the Bank of Italy, following the directions of the parties involved.<sup>40</sup>

As mentioned, the ABF belongs to the wide *genus* of ADR based at the supervisory authorities. Accreditation of the Authorities as privileged site to which an ADR is brought, already had case law in our system (on striking in essential public services) and is not, in terms of models, absolutely new.<sup>41</sup>

The ABF “statutory relationship” with the regulator in no way jeopardises the impartiality and independence of the deciding body in individual cases,<sup>42</sup> it however represents a key characteristic of the decision-making body, bound to the regulator by a complementary and synergistic relation.

Because of its hybrid nature, therefore, it is not appropriate to assign the ABF to traditional categories, as this might result in forced interpretation and depress or undervalue some specificities: the ABF seems, once again, a lab to test new models of reconstruction in the context of European law, leaving behind the traditional reconstruction processes.<sup>43</sup>

#### **4. The ABF at the intersection of substantive and procedural law**

The ABF is therefore (by way of priority) a tool that regulates contracts and private justice.

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diary's obligation of acceptance, does not have to include an arbitration clause which would otherwise be necessary for all cases of assignment to arbitration, given the intimately voluntaristic and negotiating nature of arbitration.

<sup>39</sup> And punishable with an administrative fine: Art. 144, para. 4, Consolidated Banking Law.

<sup>40</sup> Art. 3 of the CICR Resolution; Bank of Italy, ‘Provisions Governing the ABF Dispute Resolution System’, Section III; see also the European Court of Justice, joined cases C-317/08 to C-320/08 *Rosalba Alassini v Telecom Italia SpA* [2010] ECR I-02213.

<sup>41</sup> Art. 13, para. 1, lett. a), Law 12 June 1990, n. 146; M. CLARICH, *L'attività delle autorità indipendenti in forme semicontenuziose*, in S. CASSESE & C. FRANCHINI, *I garanti delle regole*, Bologna, Il Mulino, 1995, pp. 149, at 159 and 162: the fact that, in that case, the Authority attempted to promote the settlement of the case instead to decide it, changes the issue slightly.

<sup>42</sup> As established by the European Court of Human Rights: *Heather Moor & Edgecomb Ltd v United Kingdom* App no. 1550/09 (ECtHR 26 June 2012).

<sup>43</sup> M. TARUFFO, *Adeguamenti delle tecniche di composizione dei conflitti di interesse*, in *Riv. trim. dir. proc. civ.*, 1999, p. 779.

At the functional level, the ABF is assigned double functions: (i) immediate (at the micro level), since it aims to settle private disputes. It is an instrument of contractual governance;<sup>44</sup> (i) mediated (at the macro level), it accomplishes market regulation (the decisions, although not binding, encourage compliance of conduct among the intermediaries: Art. 5 Consolidated Banking Law. This aspect is the most relevant to the regulators, since it aims to consolidate and increase effectiveness of the regulation.<sup>45</sup>

Public law protection mechanisms and private law remedies coexist, therefore, in the same body.

Moreover, under the point of view of the banking supervision, the co-existence of elements of public and private enforcement does not create a conflict, since the institutional architecture of the regulation of the banking sector has been modified.<sup>46</sup> The protection of the customer must now be added (Art. 127 Consolidated Banking Law) to the objectives of prudential supervision strictly defined (those included in the *Grundnorm* of Art. 5 Consolidated Banking Law).<sup>47</sup> A three-sided model of supervision has, therefore, been adopted (Bank of Italy – intermediary – customer), instead of the traditional two-sided model. Transparency and correctness become the means to increase the trust of investors, which in turn is a precondition for financial stability.<sup>48</sup>

## **5. The nomophylactic function**

At the functional level, the provision establishing the ABF states that this must “ensure a fast and cost-effective dispute resolution process and an effective protection” (Art. 128-bis, para. 2 Consolidated Banking Law). While the first two objectives are an indication of the approach with regard to the governance of the deciding body (that is,

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<sup>44</sup> Art. 127 Consolidated Banking Law.

<sup>45</sup> Art. 5 Consolidated Banking Law; M. PERASSI, *Il ruolo dell'ABF nell'ordinamento bancario: prime riflessioni*, *Analisi Giuridica dell'Economia*, 2011, p. 154.

<sup>46</sup> See M. CLARICH, *Regulation of the Italian Banking Sector: From the 1936 Banking Law to the European Banking Union*, in D. SORACE-L. FERRARA & I. PIAZZA, *The Changing Administrative Law of an EU Member State*, Springer, 2021, pp. 223 ff.

<sup>47</sup> I. VISCO, ‘Governor's Concluding Remarks’ (2010) 8 <[https://www.bancaditalia.it/pubblicazioni/interventi-governatore/integgov2011/en\\_cf\\_2010.pdf?language\\_id=1](https://www.bancaditalia.it/pubblicazioni/interventi-governatore/integgov2011/en_cf_2010.pdf?language_id=1)>.

<sup>48</sup> C. HODGES, *The Consumer as Regulator*, D. LECZYKIEWICZ & S. WEATHERILL, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Oxford, Hart Publishing, 2016, pp. 245 ff.

the provisions regulating the process and its progress),<sup>49</sup> the other objective seems the conceptual basis to be used for the choices in terms of interpretation and reconstruction about the ABF.

It should be mentioned that this rule, which is set by primary legislation, represents a choice of system, reflects the current political approach on consumer protection and, in my opinion, represents both an operational standard and a hermeneutic criterion.

Because of this convergence between public enforcement and private remedies, the private dispute becomes instrumental to the public regulation and to the integrity of the market.<sup>50</sup>

The circumstance that the decision must be hinged on a model of protection characterised in a regulatory manner is not limited to underlying the fact that the decision-maker must, in reasoning, also apply consequentialist assessments, but rather has significant fallout in terms of the stability of decisions.<sup>51</sup>

Given the lack of the principle of *stare decisis* in our legal system, the uniformity of approach would appear, in the context of banking and financial ombudsmen, to be functional: a) to the reliance of operators; b) to legal certainty; 3) to the deflation of internal disputes; 4) to the measurement of regulatory compliance, through the collection and publication of aggregated data on individual disputes in order to obtain a global overview of the violations and market performance; 5) to the consolidation of regulation; and 6) prospectively, to the study of the review of the regulatory framework.<sup>52</sup>

Bank of Italy's "Provisions on the Systems for the Extrajudicial Settlement of Disputes Concerning Banking and Financial Transactions and Services" provide the institution of the coordinating Panel (*Collegio di coordinamento*), which decides on the complaints concerning issues of particular significance or that have given or could give rise to inconsistent decisions by the seven territorial Panels. The coordinating Panel establishes a principle of law that is binding for the territorial Panels in all future disputes

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<sup>49</sup> G. COSTANTINO, *Governance e giustizia. Le regole del processo civile italiano*, in *Riv. trim. dir. proc. civ.*, 2011, pp. 51 at 55.

<sup>50</sup> M. PERASSI, *Ruolo della Banca d'Italia e dell'Autorità Giudiziaria nel preservare l'integrità del sistema economico finanziario*, in *Banca Impresa Società*, 2014, pp. 349 at 356.

<sup>51</sup> T. SOURDIN-A. ZARISKI, *What Is Responsive Judging?*, in T. SOURDIN & A. ZARISKI, *The Responsive Judge. Ius Gentium: Comparative Perspectives on Law and Justice*, Springer, Singapore, 2018, p. 8.

<sup>52</sup> NAPOLITANO, *Regulation and Litigation*, cit., at p. 141.

involving the same issue. Although it is always possible, for a single panel, to deviate from a decision taken by the coordinating Panel, stating the reasons for deciding on a different solution.

The predictability of the decisions takes a very specific connotation, since, placed in the more complex framework of banking supervision, this represents the conjunction point between the decision-making and the market regulation carried out by these bodies.

The consistency issue appears to be even more important in the Italian legal system, given the absence in statutory law systems of the *stare decisis* principle, so decision-making bodies are not requested to conform to decisions reached by previous decision-making bodies.<sup>53</sup>

It is in the guarantee of a significant degree of uniformity that the principle of regulation through the Ombudsmen decisions may ultimately be completed, and the ultimate objective of an effective customer protection may be achieved. The issue of the relationship between regulation and dispute resolution, elaborated in the area of the theory of relations between regulation and litigation and, therefore, in the relationship between agencies and courts, must here be placed within the context of ADR (so regulation through adjudication),<sup>54</sup> relative to the relationship between the dispute resolutions body – Ombudsmen –, agencies and courts.

If upholding the idea of the ABF as an instrument of regulation of the contract with conforming effects, and if taking into account the fact that ABF decisions express general principles and wishes (outlining conduct to be adopted in the future, beyond the individual dispute) and have a high degree of publicity, we can see that the uniformity of approaches, and with it, the legal certainty and predictability of future decisions, take on particular weighting because, in order to fully achieve a regulatory effect, the decision must be perceived as stable.

And although comparative analysis shows a divergence, in civil law systems, between positivist theory and operational practice being observed – for example, the decisions of the Constitutional Court and the existence of legal areas addressed only by

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<sup>53</sup> A. CARLEO, *Il vincolo giudiziale del passato. I precedenti*, Bologna, Il Mulino, 2018; L. PASSANANTE, *Il precedente impossibile Contributo allo studio del diritto giurisprudenziale nel processo civile*, Torino, Giappichelli, 2018.

<sup>54</sup> R.A. POSNER, *Regulation (Agencies) versus Litigation (Courts): An Analytical Framework*, in D.P. KESSLER, *Regulation vs. Litigation: Perspectives from Economics and Law*, Chicago, Chicago University Press, 2009, pp. 11 at 19 ff.

case law, like in the field of damages to health –, there is no provision expressly attributing a regulatory function to Arbitrators, who regulate by correlating the decision of the dispute with the conformity effect, raising the uniform interpretation – and application – of the regulatory framework as a hallmark of the work of Arbitrators.

The instability of decisions therefore disorientates the market (different decisions make it impossible for the users of justice to identify how they should behave in order to be considered compliant with the system), reduces the power of using decisions as an integral part of the information available to the regulatory in going about its supervisory duty, and causes the onset of problems relating to decision acceptance (with the consequent risk that those supervised do not abide by the Arbitrator's decisions and instead seek ordinary justice).

The need for monophilia to be assured in the sector<sup>55</sup> becomes even more evident in matters subject to a high level of regulatory obsolescence (consider, for example, payment services, where jurisprudential creationism emerges particularly clearly) because the delay of legal formant (which is physiological) can only make up for the jurisprudential formant, thereby meaning that decisions precede legislation.

To allow for private disputes to fully achieve their end of being instrumental to public regulation, it may be useful – according to the recalled cultural preclusions – to have a legislative inclusion of the regulatory functions.

We can therefore wonder if the route by which to guarantee a greater stability of decisions could be the provision of a rule of principle and a programmatic approach that assigns legislative relevance to the connection between public and private protection, accompanying the solution of disputes with the general industry objectives and, specifically, those of regulation (more generally, we should consider the express legislative prohibition of gold-plating), on the model of the provisions of Articles 13 and 23 of the Commercial Code<sup>56</sup> and, therefore, envisage that in leanella nella dispute resolution, the ABF decides in regard to market stability and integrity.

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<sup>55</sup> COSTANTINO, *Appunti sulla nomofilachia e sulle nomofilachie di settore*», in *Riv. dir. proc.*, 2018, pp. 1443 at 1454.

<sup>56</sup> PRETO, *Il lungo cammino della riforma*, in *Tra regolazione e giurisdizione*, cit., pp. 13 at 15.