

## **Supreme Court decision No. 5693, rendered on 20 March 2015**

### **Headnote**

The Supreme Court dismissed a recourse against an arbitral award for alleged lack of decision of the arbitrators.

### **Summary**

#### **Facts of the case**

Claimant, Ros Roca Group SA, a Spanish company, filed a recourse before the Supreme Court (*Corte di Cassazione*) against the decision of the Court of Appeal of Milan (dated 30 November 2012) that dismissed the challenge of an arbitral award rendered between Ros Roca and Unipol Banca S.p.A. – Millet S.p.A. (Italy). Ros Roca grounded its challenge of the award before the Court of Appeal *inter alia* on Art. 829, No. 12 of the Italian Code of Civil Procedure (ICCP), arguing that the award did not decide one of the issue it raised along the arbitral proceedings in conformity with the arbitration agreement. In fact, Ros Roca Group SA – acting as Respondent in arbitration - filed a counterclaim for the Arbitral Tribunal to declare the termination of the contract out of which the dispute arose. The Court of Appeal dismissed the challenge: it found that no lack of any decision occurred in the award, since the Arbitral Tribunal decided on the counterclaim by declaring that it could not proceed as the parties necessary by law (*litisconsorzio necessario*) did not join the proceedings, in accordance with Art. 816-quarter ICCP.

The Court of Appeal observed that the Arbitral Tribunal requested for joinder of all the parties necessary by law, while no additional party actually joined the case: indeed, the Arbitral Tribunal did not actually “ordered” any joinder, while it “invited” the parties to provide the joinder of the parties necessary by law. The Court of Appeal considered such an invitation to be in compliance with the requirement set by Art. 102 ICCP applying to State court proceedings (providing that in case of parties necessary by law, the judge shall order the joinder). Furthermore, the Court considered that the Arbitral Tribunal correctly found that Ros Roca’s counterclaim could be divided from the other claims brought before the arbitrators, and then the lack of the parties necessary by law prevented the case to proceed on the counterclaim only. Therefore, the Court of Appeal found that no lack of any decision could be detected in the award and dismissed the challenge.

#### **Judgment of the Court**

The Supreme Court dismissed Ros Roca’s recourse.

Preliminarily, the Court confirmed that it examined the judgement of the Court of Appeal only, while not the arbitral award itself.

The Supreme Court agreed with the reasoning of the Court of Appeal, that perused the minutes of the arbitral hearing held on 31 July 2008 and found that the Arbitral Tribunal requested the parties if they were willing to explore whether the other additional parties necessary by law (Hempel and Haris S.A.) would agree on joining the arbitration before that very same arbitral panel of arbitrators. Such a request from the arbitrators aimed to apply the due process principle and make Ros Roca’s counterclaim proceed. On the other hand, Ros Roca informed the Tribunal that “for the time being, it did not consider it to be appropriate”: Ros Roca itself had not been available to extend the due process to any additional party, hence the Arbitral Tribunal’s decision not to proceed with its counterclaim was correct. Art. 816-quarter ICCP sets that, where multiple parties are bound by the same arbitration agreement, each party may request for all or some of them be summoned in the same arbitral proceedings, provided that (i) the arbitration agreement defers to a third party for the appointment of the

arbitrators, or that (ii) the arbitrators are appointed by agreement of all parties, or that (iii) the other parties, following the appointment by 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. The same provision then rules that where none of the above alternatives occur, then the proceedings shall be divided into as many different proceedings as there are the additional parties, unless the latter are necessary by law, while in this case the arbitration cannot proceed. Regardless of the fact that Ros Roca was faced with an invitation - rather than an order - of the Arbitral Tribunal, it expressly denied to move towards the additional parties necessary by law to provoke them into joining the arbitration, therefore the arbitrators correctly declared that its counterclaim could not proceed. The Supreme Court considered that Art. 816-quarter ICCP was duly applied and agreed on the Court of Appeal reasoning, where no basis for challenge of the award was found to be grounded.