

**Corte d'Appello di Milano [Milan Court of Appeal], decision No. 3123/2019, 12 July 2019**

Parties: Claimant: INTERROUTE S.P.A. (Italy)  
Respondent: CLOUDITALIA TELECOMUNICAZIONI S.P.A. (Italy)

Subject matters: law applicable *ratione temporis* to the challenge of the award on ground of error of law

**Headnote**

**The Milan Court of Appeal ruled on the challenge of an ICC award on the ground of error of law stating that it is admissible where so provided by the procedural law in force at the time of the signing of the arbitration agreement.**

**Summary**

**Facts of the case**

In 2000 and 2001, Interoute and Clouditalia entered into multiple contracts granting Clouditalia the indefeasible right to use part of the telecommunication infrastructures of Interoute's property, along with the maintenance services thereof; such a right was balanced by Interoute same one with regard to part of Clouditalia's infrastructures. In 2014 Clouditalia failed to pay the fee under the contract providing the maintenance of Interoute's infrastructures. Therefore, the parties negotiated an installment plan, which Clouditalia complied with only partly. Hence, Interoute filed a request for injunction with the Tribunal of Rome, against which Clouditalia raised an arbitration exception. Consequently, Interoute waived the injunction, while Clouditalia initiated a preventive arbitration seated in Milan under the ICC Rules, in accordance with the arbitration clause included in the contracts, to ascertain Interoute's breach of the maintenance contract and Claimant's consequent right to renegotiate it; Interoute filed a counterclaim seeking for its credits. The Arbitral Tribunal rendered the award assessing *inter alia* (i) Clouditalia's breach of the maintenance services contract; (ii) Interoute's breach of its obligation to renegotiate the said contract and, as a result, (iii) the temporary impossibility for Interoute to request the immediate payment of part the money Clouditalia was condemned to pay as a consequence to point (i). Interoute then filed a recourse with the Milan Court of Appeal seeking the partial annulment of the award.

**Arguments of the Parties**

Interoute claimed that the Tribunal's finding concerning the existence of its obligation to renegotiate the contract, and the consequent breach thereof, implied grounds for setting aside the award under Article 829 of the Italian Court of Civil Procedure (ICCP).

Interoute argued *inter alia* that the decision amounted to an error of law and was to be found inadmissible pursuant to Article 829, Para. 3 ICCP, in its version prior to the Legislative Decree No. 40/2006, which was applicable to the case at hand and allowed the challenge on ground of error of law unless the parties had agreed otherwise. Clouditalia requested the Court to reject all counterparty's recourse.

### **Judgment of the Court**

With regard to the admissibility of the challenge on the ground of error of law, the Court of Appeal preliminary found that the procedural law applicable to the case *ratione temporis* allowed for such a challenge. The Court made reference to the transitional regime set out in Article 27 of the Legislative Decree No. 40/2006, according to which error of law entails a ground for challenge unless the parties had agreed otherwise (opt-out solution). We point out that, on the contrary, the 2006 legislative revision provided that any challenge on error of law is prevented unless the parties have expressly agreed thereto, according to the so called "opt-in solution". Still, in the case at hand the Court considered that the parties referred to the ICC Arbitration Rules, which established a presumption upon the parties of waiver of their right to any form of recourse insofar as such waiver can validly be made (Art. 34.6 of the 2012 edition of the ICC Rules applicable to the case). Having the parties failed to opt out of the above-mentioned provision included in the ICC Rules, the Court found it applicable and concluded that, by reference to the ICC Arbitration Rules, the parties had willfully renounced to their right to challenge the award on ground of *error in iudicando*. Interoute's grounds for recourse were therefore found inadmissible and dismissed.