The European Arbitration Review

2019

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

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Summary

INTRODUCTION

Recourse to arbitration for the resolution of domestic and international disputes in Italy is on the rise. Arbitration in Italy is seen as a valid alternative to state court proceedings, often perceived as excessively lengthy and cumbersome. Indeed, although litigation before national courts remains the most-used means of dispute settlement, there has been a significant growth of arbitration, both ad hoc and institutional.

It is not possible to collect reliable figures on the overall use of arbitration in Italy: the only available data are those pertaining to arbitrations administered by institutions, whereas the number of ad hoc arbitrations remains unknown. The statistics published by the Institute for the Study and Diffusion of Arbitration and International Commercial Law show a 40 per cent increase between 2006 and 2016 in arbitral proceedings administered by arbitral institutions (708 proceedings in 2016 versus 505 in 2006).[1] The same trend is evidenced by the data published by the Chamber of Arbitration of Milan (CAM) on cases registered over the last decade (131 in 2017 versus 99 in 2007).

The growing success among users has been encouraged and fostered by several legislative reforms adopted over the past 15 years aimed at updating the relevant legal framework, mainly contained in articles 806–840 of the Italian Code of Civil Procedure (ICCP).

In 2003, Legislative Decree No. 5/2003 introduced special provisions governing arbitration in corporate matters, applicable to arbitration proceedings commenced pursuant to arbitration clauses inserted in the articles of associations of unlisted companies.

In 2006, by Legislative Decree No. 40/2006, the Italian legislator enacted a comprehensive reform of arbitration law, revising the general regime of articles 806–840 ICCP. The law, currently in force, is not based on the UNCITRAL Model Law, but recognises and implements most of its inspiring principles and rules. By departing from the previous dualistic approach, the reform adopted a unitary system that, but for one exception, does not distinguish between domestic and international arbitration. As further detailed below, the only residual difference between the two systems regards the powers entrusted with the domestic courts following the annulment of an award. Pursuant to article 830, paragraph 2, if, upon entering into the arbitration agreement, one of the parties had its residence outside Italy, the Court of Appeal is empowered to decide the merits of the dispute following the annulment of the award only if the arbitration agreement so provides or if the parties have so agreed at a later time.

In 2014, in an attempt to deflate the number of state court proceedings, Law No. 162/2014 introduced the possibility – upon the parties' joint request – to transfer the proceedings pending before the court to an arbitral tribunal, leaving the substantive and legal effects of the original legal action unaffected.

Finally, in 2017 a proposal for a new reform was submitted to the Ministry of Justice by a commission of leading professionals and academics, created a year earlier to evaluate possible amendments to the existing legal framework of alternative dispute resolution in Italy. Among all the proposed innovations, two are the most relevant. First, the proposal addressed the question of interim measures, finally empowering arbitrators to grant such orders (a power that arbitrators currently lack in Italy). Second, it attempted to speed up the process for challenging awards, by introducing the possibility of a direct challenge before the Supreme Court, without prior recourse to the Court of Appeal. However, such proposal

has not yet been submitted to Parliament, and it is currently uncertain whether and when it will be enacted.

The following brief legislative overview shows that Italian arbitration law can certainly be improved (as the most recent unaccomplished initiatives described above confirm), but also that users can count on a generally reliable and friendly legal framework.

MULTIPARTY PROCEEDINGS

Addressing the implications of complex multiparty contractual relations in arbitration proceedings, the 2006 reform has included two provisions, articles 816-quater and 816-quinquies ICCP, governing multiparty arbitration. These provisions are to be welcomed as they allow for disputes between multiple parties to be conducted in a single proceeding, thus limiting the costs and time of separate proceedings and avoiding the risk of conflicting awards.

More specifically, article 816-quater ICCP establishes the conditions upon which multiple parties can commence multiparty arbitration and regulates the appointment of the arbitral tribunal. Article 816-quinquies ICCP governs the joinder and intervention of third parties in already pending proceedings.

Under article 816-quater ICCP, if two or more parties are bound by the same arbitration agreement, each party may summon all or some of the other parties in the same proceedings provided that, alternatively:

- the arbitration agreement defers to a third party the appointment of arbitrators;
- the arbitrators are appointed with the consent of all parties; or
- if one party has already appointed its arbitrators, the remaining parties jointly appoint an equal number of arbitrators or defer such appointment to a third party.

If the parties are not able to agree on a joint appointment, and the arbitration agreement does not confer the power of appointment to a third party, two scenarios are possible. If the parties are not all necessary parties to the dispute, the arbitration is separated into as many proceedings as the number of respondents. However, when the participation of all parties is required, article 816-quater, paragraph 3, provides that the arbitration shall not proceed.

Article 816-quater ICCP only regulates multiparty arbitration arising out of the same arbitration agreement. It does not contemplate the possibility of multiparty proceedings deriving from multiple contracts. Such possibility has been, however, recognised by the Supreme Court to the extent that the various arbitration clauses are contained in related contracts.[2]

Special provisions are established under article 34 of Legislative Decree No. 5/2003 to regulate multiparty arbitration arising out of an arbitration agreement contained in the articles of associations of unlisted companies. Under this provision, arbitrators are to be appointed by a third party unrelated to the company, on which the arbitration agreement confers such power. This rule thus mirrors one of the possible means for the appointment of arbitrators under article 816-quater ICCP. However, unlike article 816-quater ICCP, article 34 provides that unless the third party's power to nominate the arbitrators is provided for in the arbitration agreement, the latter is null and void. Moreover, unlike in the ordinary regime of article 816-quater, if the third party fails to make the appointment, the parties may seek the

assistance of the president of the court at the place where the company has its headquarters, who may proceed to the appointment.

Article 816-quinquies ICCP governs the intervention and joinder of a third party not bound by the arbitration agreement, subjecting the participation of such party in the arbitration proceedings to the consent of the original parties, the arbitrators and the third party itself. More specifically, under article 816-quinquies, paragraph 1, ICCP, such consent is required only when the third party intervenes to raise claims against one or all of the original parties.

Conversely, article 816-quinquies, paragraph 2, provides that the party's intervention is always allowed when such party:

- acts as a side intervenor (ie, in support of one of the original parties); or
- is a necessary party for the adjudication of the dispute.

The rationale of this provision is self-evident. The side intervenor is, in fact, a party that could be adversely affected by the arbitration award and which, therefore, is entitled to challenge the arbitral decision under article 404 ICCP (third-party opposition). By allowing its intervention and defence during the proceedings, article 816-quinquies, paragraph 2, ICCP enhances the stability of the arbitral award by reducing the risk of a subsequent challenge.

INTERIM MEASURES

One of the best-known, and infamous, features of Italian arbitration law is the arbitrators' lack of power to grant interim measures. Pursuant to article 818 ICCP, '[a]rbitrators may not grant attachments or other interim measures, unless the law provides otherwise'.

The vast majority of jurisdictions,[3] including those that follow the approach of the UNCITRAL Model Law,[4] provide that arbitrators may issue interim measures. The Italian legislator has thus opted for a minority position among Westerner jurisdictions. Article 818 ICCP is considered a mandatory rule, applicable when the place of arbitration is in Italy despite any contrary agreement of the parties.[5] Therefore, an arbitration agreement purporting to empower an arbitral tribunal seated in Italy to grant interim relief, even by reference to arbitration rules that recognise the arbitrators' powers, would be considered ineffective.[6] Having regard to this limitation, article 22(2) of the CAM Rules provides that '[t]he arbitral tribunal may issue all urgent and provisional measures of protection, also of an anticipatory nature, that are not barred by mandatory provisions applicable to the proceedings'.

The rationale of the prohibition for arbitrators to issue interim relief is generally identified in the following considerations:

- Arbitrators lack the coercive powers required to grant interim relief, which is reserved to state courts. Arbitrators should therefore not be empowered for issue decisions, as is the case of some interim measures, which may be directly enforced by organs of the state. This argument can easily be rebutted by noting that arbitrators are empowered to render awards on the merits, which potentially affect the parties' positions in a more serious and permanent manner. This concern may easily be addressed by providing for appropriate mechanisms for the recognition of arbitral decisions on interim measures, such as those existing in most modern arbitration statutes.
- Given the summary nature of interim measures proceedings, the national judicial system is deemed to offer more guarantees than arbitration. In this respect, the

> prohibition reflects a persistent attitude of mistrust towards arbitrators, which is obsolete and isolated in the international context. The availability of appropriate enforcement mechanisms may guarantee state control before the measures become enforceable.

Because of the prohibition, parties to arbitration proceedings seated in Italy may only seek interim relief from state courts on the basis of the provisions governing the granting of interim measures in ordinary judicial proceedings. The competent judge is the one which, absent the arbitration agreement, would be competent to hear the merits of the case or the judge of the place where the measure is to be enforced.

Although the most recent reforms have confirmed the prohibition, there is limited scope for arbitrators sitting in Italy to issue provisional and conservatory measures. The current version of article 818 ICCP, resulting from the 2006 reform, is less strict than the pre-2006 text, insofar as it introduced a narrow exception to the prohibition, by empowering arbitrators to order interim measures in specific cases identified by the law ('unless the law provides otherwise'). The only exception that can be currently identified is provided by the Legislative Decree No. 5 of 2003, which regulates arbitration in corporate matters. Pursuant to article 35 of the decree, the arbitrators are empowered to suspend the effectiveness of a shareholders' resolution pending final adjudication of the dispute relating to that resolution's validity.-[7] Obviously, since an arbitral tribunal can only issue an interim order after it has been constituted, the courts' power to order a stay of the shareholders' resolution would still be exclusive before the constitution of the arbitral tribunal.

Despite the prohibition of article 818 ICCP, limited effects can be attached to interim measures issued in Italian-seated arbitrations. First, if the arbitration agreement or the arbitration rules referred to therein provide for the arbitrators' power to grant interim relief, any measure rendered, though not enforceable, would be binding on the parties on the basis of their agreement. Second, arbitrators are not prevented from rendering 'self-executing' measures – ie, measures which do not require enforcement since they can be implemented without need for cooperation by state organs or the other party (eg, declaratory measures).

If the place of arbitration is outside Italy, the parties may still seek interim relief from Italian courts in support of the foreign-seated proceedings.

CHALLENGE TO AWARDS

Under article 827 ICCP, three remedies are available against an arbitral award: application for setting aside, revocation and third-party opposition.

Only awards that decide, in whole or in part, the merits of the disputes may be subject to these remedies. Therefore, interim awards that decide on issues arisen during the course of the arbitration, but do not dispose of the merits of the dispute, may only be challenged together with the final award.

The ordinary and most common form of recourse available to obtain the setting aside of an award is the request for annulment provided under articles 828–830 ICCP.

Article 829 ICCP lists the grounds on which the annulment of an award can be obtained. As part of the 2006 reform, the number of grounds has raised from nine to 12, which corresponds to the double the grounds set out in the UNCITRAL Model Law. However, the departure from the Model Law is not as great as it might seem: for example, while article 34

of the UNCITRAL Model Law states that awards may be set aside 'if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties', article 829 ICCP provides for two separate grounds for setting aside relating to the irregular composition of the arbitral tribunal.

The 12 grounds listed in article 829, paragraph 1, relate to procedural issues and apply notwithstanding any waviers of the parties. An award may be challenged for procedural violations only if the party challenging the award has not itself caused the violation. For most of the grounds to be validly invoked, it is also required that the ground be promptly raised as an objection, and that the right to invoke the objection is not waived, during the arbitration.

In addition to the 12 grounds listed in article 829, paragraph 1, ICCP, an award may be challenged based on the violation of the substantive law governing the merits of the dispute if:

- the parties expressly so agreed, or the law so provides;
- the violation of the law resulted in a breach of public policy;
- the arbitration relates to labour law disputes; or
- the violation concerns the determination of a preliminary issue in a matter that cannot be subject to arbitration.

The current regime of annulment for violation of the law was introduced in 2006. Before the 2006 reform, article 829 ICCP provided that awards could always be set aside for violation of the law, unless the parties had authorised the arbitrators to decide ex aequo et bono or had agreed that the award could not be challenged on this ground. The current regime has thus reversed the previous rule, making the right to seek the annulment of the award, and not its exclusion), subject to the parties' agreement.

The 2006 reform set out a transitional regime providing that the new rules on the annulment for violation of the law would apply to all cases in which an arbitration agreement was entered into before the entry into force of the 2006 reform, but the arbitration was commenced after that date.[8]

The Italian Supreme Court, however, held that even if the arbitration agreement was entered into before the 2006 reform and the arbitration proceedings were commenced after the entry into force of the new law, the award could nonetheless be challenged on this basis even in the absence of an express agreement of the parties.[9] The Supreme Court held that, since the new article 829 ICCP provides that the award cannot be challenged for violation of the law 'unless the parties expressly so agreed or Italian law so provides', the previous regime shall nonetheless apply to those cases, because the law applicable ratione temporis to the arbitration agreement is the law in force at the time when it was concluded.

The Milan Court of Appeal referred the matter to the Constitutional Court for a preliminary ruling on whether the transitional regime and the new article 829 ICCP, as interpreted by the Italian Supreme Court, complies with Italian constitutional principles. In early 2018, the Italian Constitutional Court dismissed the application and confirmed that the interpretation of the Italian Supreme Court is respectful of the Italian Constitution.[10]

As mentioned, article 829, paragraph 2, ICCP provides that the setting aside of an award can always be obtained if the violation of the law amounts to a breach of public policy, without specifying what notion of public policy is relevant in this context. There is consensus among

scholars that the relevant notion differs depending on the applicable substantive law. If Italian law is not applicable to the substance of the dispute, the relevant notion is international public policy, which comprises a limited number of fundamental principles of the Italian legal system that must in any case be respected for the award to have effects in Italy. If, on the other hand, Italian substantive law applies, the relevant notion of public policy is that of Italian domestic public policy, which is also determined based on the fundamental principles of Italian law, but comprises a broader spectrum of principles.[11] In both cases, Italian courts may determine ex officio whether an arbitral award is in breach of public policy.

In any event, arbitral awards cannot be challenged for the allegedly erroneous appreciation of the facts by the arbitral tribunal, as fact-finding can never be reviewed by Italian courts in setting aside proceedings.

In all cases, the time limit for the filing of an application for annulment is 90 days from its notification to the parties, or, in the absence thereof, one year from its signature.

Pursuant to article 831 ICCP, awards can also be challenged through two extraordinary recourses: revocation and third-party opposition.

- Revocation is an extraordinary means available to obtain the setting aside of an award affected by serious irregularities (as set out in article 395 ICCP), such as fraud committed by a party or an arbitrator, forgery or discovery of unknown documents.
- Third-party opposition constitutes a significant departure from international practice. This remedy can be used in those exceptional cases in which a third party establishes that the award affects its rights, as may be the case of creditors of one of the parties when the award is the result of fraud carried out to their detriment (articles 831 and 404 ICCP).

Given the peculiar nature of these remedies, the time limit to file applications for revocation and third-party opposition is 30 days from the day the challenging party was informed of the circumstances on which it relies.

RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS

An award is considered 'foreign' if the place of arbitration is outside Italy. Under article 839 ICCP, a party seeking the recognition of an award in Italy shall file an application before the competent Court of Appeal, to be determined based on the place of residence of the other party.

With the application for recognition, the applying party shall deposit the original or a certified copy of both the award and the arbitration agreement on which it is based, accompanied by a translation if the original language is not in Italian. The exequatur can be obtained ex parte, by means of a decree, on the mere basis of the documents filed by the applicant. The court shall declare the recognition of the award unless such:

- does not comply with fundamental formal requirements set out in article 825 ICCP;
- concerns a dispute that may not be submitted to arbitration under Italian law; or
- the award contains provisions that are contrary to public policy.

The first two points above correspond to the grounds for refusing recognition under article V(2) of the New York Convention.

The party resisting the exequatur, or the applicant in case of rejection, may file an opposition within 30 days from notification of the decree in case of the recognition or from communication of the decree in case of rejection.

The grounds for opposition set out in article 840 ICCP mirror the seven grounds set out in article V of the New York Convention.

PARALLEL PROCEEDINGS PENDING BEFORE ITALIAN COURTS

Pursuant to articles 39 and 40 ICCP, in ordinary court proceedings, when the same action is brought before different courts, the court seized second dismisses the case based on lis pendens.[12] In deciding whether to dismiss the second case, courts will apply the 'triple identity test', ie, the two cases must involve the same parties, the same cause of action and the same relief sought.[13]

Article 39 and 40 ICCP and the above-mentioned principles are not directly applicable to parallel proceedings before state courts and arbitral tribunals. In this case, if the same action is brought both before state courts and an arbitral tribunal, the second action will not be dismissed.

If, despite the applicability of an arbitration agreement, a party commences proceedings before state courts, the other party may raise a jurisdictional objection, which is subject to specific time limits.[14] In particular, the objection to the jurisdiction of a court based on the existence of an arbitration agreement must be raised in the first brief filed in the court case. Likewise, under article 817, paragraph 2, ICCP, the objection to the jurisdiction of the arbitral tribunal has to be raised in the first brief filed after the appointment of the arbitrators.

If no objection is raised within the deadline set under article 819-ter ICCP, the right to have the dispute resolved in arbitration may be considered waived. The waiver, however, applies only to that particular dispute, and not to the arbitration agreement. Therefore, it does not prevent the parties from to filing other disputes before an arbitral tribunal constituted on the basis of the same arbitration agreement.

Thus, although the law does not provide for the dismissal of parallel proceedings on the basis of lis pendens, it provides the parties with an opportunity to raise jurisdictional objections before either the state court or the arbitral tribunals. If the objection to the state court's jurisdiction is successful, the arbitration can continue. If, however, no objection is raised in a timely fashion, and both proceedings continue in parallel, the risk of conflicting decisions cannot be excluded. In this case, if the arbitral award is rendered after the court ruling, it may be set aside for contrariness to a previous final judgment between the same parties.[15] Conversely, if the award is rendered before the court decision, the latter may be annulled as being contrary to a previous decision having res judicata effect between the parties.[16]

Notes

[1] ISDACI, 10th Report on the Diffusion of Alternative Justice in Italy (Decimo rapporto sulla diffusione della giustizia alternativa in Italia), (2018).

[2] Italian Supreme Court (Civil Division No. I), Decision No. 12321 dated 25 May 2007.

[3] Article 183(1) of the Swiss Federal Act on Private International Law (PIL) states: 'Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, grant interim relief and conservatory measures'. See also section 593 of the Austrian Arbitration Law: '(1) Unless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party and after hearing the other party, order against the other party such interim or protective measures it deems necessary in respect of the subject-matter in dispute if the enforcement of the claim were otherwise frustrated or significantly impeded, or there were a risk of irreparable harm. . .'.

[4] See article 17 UNCITRAL Model Law. In particular, article 17(1) provides 'Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures'.

[5] Italian Supreme Court, Judgment No. 9909 dated 27 April 2009.

[6] The choice of the Italian legislator not to grant the arbitrators the power to issue interim measures has been subject to criticism by the scholars. See for example, A Briguglio and L Salvaneschi, 'Regolamento di arbitrato della Camera di Commercio Internazionale', *Giuffrè Editore* (2005) p 413.

[7] Article 35, paragraph 2, of Legislative Decree No. 5 of 2003.

[8] Article 27, paragraph 4 of Legislative Decree No. 40/2006.

[9] Italian Supreme Court sitting en banc, Decisions No. 9341, 9285 and 9284 of 9 May 2016.

[10] Italian Constitutional Court, Decision No. 13 of 30 January 2018.

[11] F Emanuele and M Molfa, 'Selected Issues in International Arbitration: the Italian Perspective', p 198, (2014) *Thomson Reuters*.

[12] Article 39 ICCP.

[13] Moreover, lis pendens requires that the two (or more) proceedings are brought before the same judicial authority (civil versus criminal courts) of equal level of review (first instance or appeal).

[14] Article 819-ter ICCP.

[15] Article 829, para. 1, No. 8 ICCP.

[16] Article 395, No. 5 ICCP.

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