

## **Court of Appeal of Milan, rendered on 12 November 2012**

### **MW Corp Private Ltd v. I.P.E.F. III Holdings n. 18 SA et al.**

#### **Headnote**

Territorial competence of enforcement court, consolidation of enforcement proceedings, requirements for enforcement (in general), enforcement proceeding is opposition proceeding.

#### **Summary**

*An ICC award was granted recognition and enforcement only with respect to the respondent having its seat in the court's district. The territorial consolidation mechanism provided for in Italian law for actions based on the same claim – which applies in respect of ordinary proceedings on the merits – does not apply in proceedings for the recognition and enforcement of foreign awards, which are not proceedings on the merits. Within the limitations of these latter proceedings, which only aim at ascertaining the existence of certain given formal requirements, the court found that claimant supplied certified copies of the award and arbitration agreement together with certified translations, the dispute was arbitrable under Italian law and the award was not at odds with public policy.*

*Accession: 31 January 1969*

*No Reservations*

(1)

BS Private Equity SpA (BS Private), I.P.E.F. III Holdings n. 18 SA, MPS Venture SGR SpA (MPS Venture) and AGEM Holdings Inc. (collectively, the claimants in the arbitration) filed a request for ICC arbitration against MW Corp Private Ltd (MW Corp) and MW Unitex SA (MW Unitex), a Luxembourg company, alleging breach of contract and seeking payment for the sale of certain shares. The request for arbitration was based on the arbitration clause in an Agreement among the parties, dated 7 February 2008.

By an award of 20 August 2012, an ICC arbitral tribunal granted the claims in respect of MW Unitex; however, the arbitrators rejected the claims brought against MW Corp and directed the claimants in the arbitration, jointly and severally, to refund the legal expenses borne by MW Corp in the arbitration, in the amount of € 210,000.

MW Corp sought recognition and enforcement of the ICC award in the Milan Court of Appeal against all the claimants in the arbitration (collectively, Defendants).

The President of the Milan Court of Appeal noted at the outset that MW Corp duly supplied a certified copy of the arbitral award and the arbitration agreement, together with certified translations into Italian.

The Court then found that it had territorial competence in respect of BS Private only, as only BS Private had its seat in the court's district (the other Italian company, MPS Venture SGR SpA, had its seat in Florence). MW Corp argued that proceedings against all Defendants should be consolidated in Milan because all Defendants were jointly party to the relationship decided on in the award and the Italian Code of Civil Procedure provides for a consolidation mechanism allowing for actions that should be filed in different districts to be consolidated in one court when these actions have the same subject matter or concern the same claim. The court disagreed, holding that the territorial consolidation principle could not be applied here. Such principle applies in cases where the ensuing consolidated proceeding is a proceeding on the merits; the

opposition proceeding for the recognition and enforcement of a foreign award, on the contrary, only aims at ascertaining whether the President's ex parte decision granting or denying recognition and enforcement complies with certain listed formal requirements.

In the present case, as the dispute was arbitrable under Italian law and the determinations in the award did not violate public policy, the award was formally valid and could be recognized and enforced.

### ***Excerpt***

[1] “The President has examined the request by which [MW Corp], pursuant to Arts. 33 and 839 CCP,<sup>(2)</sup> seeks the recognition of the [ICC] award rendered on 20 August 2012 between MW Corp and [MW Unitex], Claimants, on the one hand, and [Defendants] on the other hand.

[2] “[The President] has examined the award, which rejected all claims of breach of contract and related claims for damages brought against MW Corp (‘Rejects all claims as directed against MW Corp’), and directed [Defendants] jointly to pay € 210,000 to MW Corp for reasonable legal fees (‘Orders the Claimants [in the arbitration], jointly and severally, to pay € 210,000 to MW Corp on account of its reasonable defence and representation costs’). [The President] has also examined the relevant arbitration clause contained in Art. 17.2 of an ‘Agreement’ of 7 February 2008, which referred any dispute to arbitration ‘under the ... “ICC”’; a certified copy of this latter document, as well as of the award, was supplied together with a certified translation.

[3] “[The President] makes the prejudicial remark that only BS Private has its seat in the district of this court of appeal, Milan. Hence, the pre-condition for dealing with the request for recognition of the foreign award in respect of the other parties mentioned above – which (previously) elected to claim jointly in the arbitration [*litisconsorzio facoltativo attivo*] – on the ground that they should be treated as one because they were jointly party to the relationship decided on in the award (a hypothesis that does need to be examined), is not met.

[4] “Decisively, the consolidation of parties [mechanism] under Art. 33 CCP relied on [by MW Corp] does not apply here, because the ensuing proceeding [envisaged in that Article] – following consolidation of [territorial] competence, as also sought here – is a typical ordinary proceeding on the merits [*procedimento ordinario di cognizione*], in which actions against various parties, if connected by subject matter or claim, may be decided ... in one sole proceeding.

[5] “[Art. 33 CCP] cannot be available and applied in respect of the declaration of efficacy – by decree pursuant to Art. 839 CCP – of a foreign award concerning several parties. Such decree does not in itself contain a decision, that is, in no manner does it decide on the substantive relationship decided on in arbitration; nor does it issue from an adjudication proceeding further to the adjudication proceeding that was finally concluded before the foreign arbitrators. Hence, the application by analogy of the consolidation principle is excluded.

(...)

[6] “[We note] in support of this conclusion that Art. 840 CCP<sup>(3)</sup> is significantly titled “Opposition”; hence, it does not provide for a proper impugnation phase on the merits, but rather for a mere action to ascertain [the existence of] certain determined formal elements in the decision granting or denying recognition of the award, and the conditions therefor.

[7] “[The President] finds, within the above-mentioned limits of the request at issue, that the dispute was arbitrable under Italian law and that the award does not contain provisions that are contrary to public policy and is thus formally valid, as required by the law for its efficacy.”

(...)

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<sup>1</sup> The General Editor wishes to thank Valentina Faienza, trainee lawyer at Studio Legale Rubini, Milan, for her invaluable assistance in translating this decision from the Italian original.

<sup>2</sup> Art. 33 of the Italian Code of Civil Procedure (CCP) reads:

*“Consolidation of parties [Cumulo soggettivo]*

Actions against more than one person that pursuant to Arts. 18 and 19 should be filed before different courts may be filed before the court of the domicile or residence of one of them, and be decided in the same proceeding, if connected by subject matter or claim [*titolo*].”

Art. 839 Italian CCP reads:

*“Recognition and enforcement of foreign arbitral awards*

The party wishing to enforce a foreign award in the Republic shall file a petition with the president of the court of appeal of the district in which the other party has its domicile; if that party has no domicile in Italy, the court of appeal of Rome shall have jurisdiction.

The petitioner shall supply the original award or a certified copy thereof, together with the original arbitration agreement or an equivalent document, or a certified copy thereof.

If the documents specified in the second paragraph are not written in Italian, the petitioner shall in addition produce a certified translation thereof.

The president of the court of appeal, after having ascertained the formal regularity of the award, shall declare by decree the efficacy of the foreign award in the Republic unless:

- (1) the subject matter is not capable of settlement by arbitration under Italian law;
- (2) the award contains provisions contrary to public policy.”

<sup>3</sup> Art. 840 Italian CCP reads:

*“Opposition*

An opposition may be filed against the decree granting or denying enforcement of the foreign award by filing a writ of summons with the court of appeal within thirty days of communication of the decree denying enforcement or notification of the decree granting enforcement.

After the filing of the opposition, the proceedings shall be held in accordance with Article 645 and following in so far as they are applicable. The court of appeal decides with a judgment subject to recourse before the supreme court.

The court of appeal shall refuse the recognition or the enforcement of the foreign award if in the opposition proceedings the party against which the award is invoked proves the existence of one of the following circumstances:

- (1) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State where the award was made;
- (2) the party against which the award is invoked was not informed of the appointment of the arbitrator or of

the arbitration proceedings or was otherwise unable to present its case in the proceedings;

- (3) the award decided upon a dispute not contemplated in the submission to arbitration or in the arbitration clause, or exceeded the limits of the submission to arbitration or of the arbitration clause; nevertheless, if the decisions in the award which concern questions submitted to arbitration can be separated from those concerning questions not so submitted, the former can be recognized and enforced;
- (4) the composition of the arbitration tribunal or the arbitration proceedings was not in accordance with the agreement of the parties or, failing such an agreement, with the law of the place where the arbitration took place;
- (5) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the State in which, or under the law of which, it was made.

If an application for the setting aside or suspension of the effects of the award has been made to the competent authority indicated at number 5) of the third paragraph, the court of appeal may adjourn the decision on the recognition or enforcement of the award; on the request of the party seeking enforcement it may, in the case of suspension, order the other party to give suitable security.

Recognition or enforcement of a foreign award shall be refused also where the court of appeal shall ascertain that:

- (1) the subject matter is not capable of settlement by arbitration under Italian law;
- (2) the award contains provisions contrary to public policy.

In all cases, the provisions of international treaties shall be applicable.”