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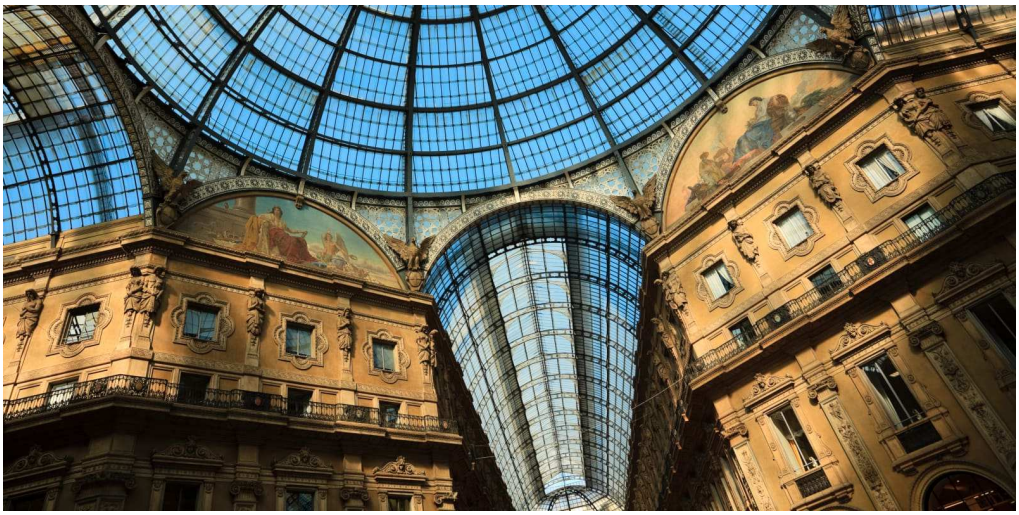
Italian judges tend to uphold awards, research shows

Alison Ross 08 September 2016



Galleria Vittorio Emanuele II

Ten years after a reform of the Italian law doubled the grounds for challenging arbitral awards set out in the UNCITRAL Model Law, a researcher at Bocconi School of Law in Milan has found that Italian judges tend to uphold awards regardless.

In her study, (http://res.cloudinary.com/lbresearch/image/upload/v1473350245/indagine_statistica_sull_impugnazione_del_lodo_arbitrale_nazionale_88116_16 **Laura Barison** looked at over 99 decisions arising from the challenge of arbitral awards issued by the Courts of Appeal of Brescia, Genoa, Turin and Milan – the four courts most involved with arbitration matters – from 1 January 2007 to 30 June 2014.

These decisions represent 27 per cent of the total number of challenge decisions nationally in the same period. They also include 47 by the Court of Appeal of Milan – the court most frequently seized to hear challenges of awards.

They include decisions relating to both domestic and international awards, as Italian law makes no distinction between the two if the place of arbitration is within Italian territory.

Of the 99 decisions scrutinised, only four ordered the set aside of awards. The Court of Appeal of Genoa set aside two awards in 2011 and 2012 – because of the invalid appointment of an arbitrator and the failure to state reasons, respectively.

The Court of Appeal of Turin also set aside two, in 2010 and 2012, because of the invalidity of the arbitration agreement and because the arbitrators exceeded the limits of the agreement.

Of the 99 decisions, 27 concerned appeals from awards arising from institutional arbitration proceedings before the Milan Chamber of Arbitration and other Italian arbitral institutions.

Indeed, Barison found that, despite the number of cases administered by the Milan Chamber steadily increasing between 2008 to 2012, the percentage of its awards that were challenged remained consistently low – only 1.8 per cent.

In 15 of the 99 cases, appellants requested to suspend the enforcement of the arbitral award pending the outcome of the appeal. The relief was granted in four cases only, albeit only one of the appeals ultimately succeeded.

In 2006, Italy introduced reforms to Article 829 of the Italian Code of Civil Procedure, governing international and domestic arbitration, through Decree No. 40/2006. Among other things, this increased the grounds for appealing arbitral awards from nine to 12 – double the grounds set out in the UNCITRAL Model Law.

Admittedly, the departure from the Model Law is not as dramatic as it appears. 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 of the Italian code sets out the two grounds separately.

For many of the grounds to be validly invoked, the Italian code also requires that the ground be promptly raised as an objection and that the objection is not removed during the proceedings. A reform in 2012 also introduced a "filter" to the admissibility of appeals, provided that courts shall declare them inadmissible at the first hearing unless it has a "reasonable probability" of being upheld. In the case of specious challenges, the appellant will be required to pay a fine.

In other respects, the law as amended in 2006 is in line with international standards – for example reducing interference with the merits of awards by prescribing that, unless the parties have expressly otherwise agreed, the infringement of a rule of law is not a valid ground for set aside.

The law states that, after setting aside an award, the competent Court of Appeal must refer the parties back to arbitration unless they have expressly agreed the court shall resolve the matter.

So what is the significance of the latest findings? According to a commentary on the study by the secretary general of the Milan Chamber of Arbitration **Stefano Azzali** and case manager **Beka Tavartkiladze**, the "time is ripe" to assess how judges are applying the law 10 years after the law reforms that were seen as less than "arbitration friendly". The research focused on the four Courts of Appeal that most frequently hear challenges to awards and is a "solid basis" for drawing conclusions.

They say that the data clearly shows that, despite the many grounds for setting aside arbitral awards in Italy, judges adopt a "very deferential approach". The risk of an award being appealed and set aside is low – and even lower if the award arose from an arbitration administered by an institution.

Thus, far from impairing the stability of awards as might have been predicted, they say the 2006 law reform "strengthened the reliability of arbitration as a fast and efficient tool for resolving disputes".

In truth, it is not the number of grounds of challenging arbitral awards that determines whether a legal system is arbitration friendly or not but the attitude of judges towards arbitral awards, they argue. "[E]ven if the Italian Code of Civil Procedure apparently provides twice as many grounds as the UNCITRAL Model Law, arbitral awards rendered in Italy are harder to challenge than those from many other jurisdictions".

They attribute this to "a positive arbitration culture in Italy", partly fostered by the Milan Chamber and supporting law firms which hold regular training, seminars and roundtables. The chamber recently teamed up with ICCA and Italy's "Scuola Superiore della Magistratura" [senior judges' school] to hold a "roadshow" on the workings of the New York Convention, attended by more than 30 senior Italian judges.

Thanks to these kinds of efforts, the Supreme Court regularly affirms that arbitration is fully equivalent to national court jurisdiction, they say.

Speaking to *GAR* today, Azzali said that Italy may not be an arbitration *heaven* but it is not the *hell* it has occasionally been portrayed to be. The market "is really moving on with many signals of positive change," he says – the survey being just one.

Another sign is the increasingly international activity of the Milan Chamber (http://globalarbitrationreview.com/article/1067317/milan-chamber-reveals-tribunal-members). Last year, 23 per cent of the chamber's cases involved a non-Italian party, with parties from the European Union featuring in 9 per cent of cases and parties from outside the EU in 6 per cent.

The improvement of Italian arbitration has been recognised internationally, with the result that the country is to play host to both the Euro-Mediterranean Arbitration Conference held by the OECD and UNCITRAL in January 2017 and the IBA Arbitration Day in March 2017, Azzali adds.

It will also play host to the next GAR Awards, shortly before the IBA Day.

According to Azzali, a further reform of the Italian arbitration law is also imminent. The ministry of justice has already created a commission to handle this, chaired by the former president of the National Bar Association, **Guido Alpa** – and a final draft is expected by the end of October.

Among the reforms the commission is expected to make is to grant arbitrators the power to issue interim measures of protection and introduce an express duty of disclosure for arbitrators. It is also expected to re-examine at the grounds for challenging awards with a view to bringing the Italian law closer to the UNCITRAL Model Law.

All the changes would be welcome, says Azzali. However, he thinks the last change would be “more cosmetic than substantial” as he says the law is already closer to the UNCITRAL Model Law than it may first appear and applied by judges in a similar way.

Quoting words attributed to Julius Caeser as he led his army across the Rubicon into Northern Italy, he says that as far as arbitration-friendliness is concerned, "*alea iacta sunt*" – the die is cast.

The UNCITRAL Model Law and the Italian Civil Code of Procedure compared

Article 34 of the UNCITRAL Model Law

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specifi ed in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not 20 UNCITRAL Model Law on International Commercial Arbitration valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in confl ict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;

or (b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Article 829 of the Italian Code of Civil Procedure

829 (Grounds for nullity) – Notwithstanding any prior waiver, a recourse for nullity may be filed in the following cases:

1) if the arbitration agreement is invalid, without prejudice to the provision of Article 817, paragraph 3 [to be read: paragraph 2];

2) if the arbitrators have not been appointed in the form and manner laid down in Chapters II and VI of this Title, provided that this ground for nullity has been raised in the arbitral proceedings;

3) if the award has been rendered by a person who could not be appointed as arbitrator according to Article 812;

4) if the award exceeds the limits of the arbitration agreement, without prejudice to the provision of Article 817, paragraph 4 [to be read: paragraph 3], or has decided the merits of the dispute in all other cases in which the merits could not be decided;

5) if the award does not comply with the requirements of Article 823, numbers (5), (6) and (7);

6) if the award has been rendered after the expiry of the prescribed time-limit, subject to the provisions of Article 821;

7) if during the proceedings the formalities prescribed by the parties under express sanction of nullity have not been observed and the nullity has not been cured;

8) if the award is contrary to a previous award which is no longer subject to recourse or to a previous judgment having the force of res judicata between the parties, provided such award or such judgment has been submitted in the proceedings;

9) if the principle of contradictory proceedings (principio del contraddittorio) has not been respected in the arbitration proceedings;

10) if the award terminates the proceedings without deciding the merits of the dispute and the merits of the dispute had to be decided by the arbitrators;

11) if the award contains contradictory provisions;

12) if the award has not decided some of the issues and objections raised by the parties in conformity with the arbitration agreement.

The party having caused a ground for nullity or which has waived such a ground or has not objected to the violation of a rule regulating the course of the arbitral proceedings in the first statement or statement in reply subsequent to the violation, cannot challenge the award on this ground.

The recourse for violation of the rules of law relating to the merits of the dispute shall be admitted if so expressly provided by the parties or by the law. The recourse against decisions which are contrary to public policy shall be admitted in any case. The recourse for violation of the rules of law relating to the merits of the dispute shall always be admitted:

1) with regard to the disputes contemplated by Article 409;

2) if the violation of the rules of law concerns the solution of a preliminary issue over a matter which may not be made subject to an arbitration agreement.

As regards the disputes contemplated by Article 409, the award may be subject to recourse also for violation of the collective contracts and agreements.