

Arbitration - Italy

Enforcement of Foreign Award Issued by Tribunal of Two Arbitrators

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In a recent judgment the Supreme Court held that the Code of Civil Procedure requirement that the number of arbitrators be uneven does not apply to foreign arbitrations.⁽¹⁾ Therefore, the disputed award could not be set aside on these grounds.

Facts

German company Inter Eltra Kommerz und Produktion GmbH and Italian Company Nigi Agricoltura srl entered into a sale agreement. The contract contained a reference to the Federation of Oils, Seeds and Fats Associations (FOSFA) standard contract.

Section 30 of the FOSFA standard contract provides that:

"Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations Limited in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant."

A dispute arose between the parties with regard to the contract. Eltra appointed an arbitrator. However, Nigi failed to appoint an arbitrator within the period stipulated by the FOSFA rules. Therefore, FOSFA appointed the second arbitrator according to the rules. Thus, the tribunal consisted of two arbitrators.

On October 6 2000 the arbitral tribunal issued its award. Eltra applied to the Florence Court of Appeal, which issued a decree declaring the award to be enforceable in Italy.

Nigi challenged the decree before the same court. It submitted that the award should be set aside on the grounds that:

- the arbitration agreement was void, since the contract between the parties did not include the arbitration clause;
- the parties had not agreed to the arbitration clause, which had been imposed by Eltra; and
- the tribunal could not be impartial, since it was composed of an equal number of arbitrators, not an uneven number as required by the Code of Civil Procedure.

The court rejected the appeal. It held that the contract made express reference - albeit only by incorporation - to established arbitration rules (ie, those contained in the FOSFA standard contract). In passing, the court stated that the Code of Civil Procedure provides that an arbitration clause contained in general conditions of trade is valid and binding when the parties to a contract make reference to such general conditions, even without express reference to the arbitration clause, provided that the parties knew of the clause or should have known of it through the use of ordinary diligence. The court referred to previous Supreme Court judgments in finding that this provision is aimed at mitigating formalistic requirements, particularly in reference to international trade, and is consistent with Section 2(2) of the New York Convention, which contains a wide definition of the term 'written agreement'.⁽²⁾ The existence of such reference empowered the relevant institution (ie, FOSFA) to appoint an arbitrator if one of the parties failed to do so. The court rejected as groundless the argument that the parties had not agreed to the arbitration clause or the composition of the tribunal.

The court also held that the provision of the Code of Civil Procedure which stipulates that a tribunal must be composed of an uneven number of arbitrators applies only to arbitrations regulated by Italian procedural law. Nigi's submission that the composition

Authors

[Giovanni De Berti](#)



[Nadia Milone](#)



of the tribunal called into question its impartiality was found to be groundless, as such grounds for opposition to the recognition and execution of a foreign award are not found in the New York Convention or in the Code of Civil Procedure.

Nigi appealed to the Supreme Court.

Supreme Court Decision

The Supreme Court upheld the appeal court's decision. It rejected Nigi's argument that the tribunal was not impartial because it was composed of an even number of arbitrators, which was contrary to Italian procedural rules. Nigi contended that according to Section 3 of the New York Convention, a foreign award must be recognized and enforced in accordance with the procedural rules of the jurisdiction in which the relevant application is filed. The court held that this provision relates to the procedures for recognition and enforcement, not to the validity of an award and the conditions for setting it aside, which are governed by Section 5 of the New York Convention.

Comment

The judgment appears to be a correct application of Section 5(d) of the New York Convention, whereby enforcement may be refused if the opposing party demonstrates that the composition of the arbitral tribunal or the arbitral procedure was inconsistent with the agreement of the parties or the law of the jurisdiction in which the arbitration took place. This provision is incorporated into the Code of Civil Procedure.

The judgment also confirms that a reference in a contract to standard rules containing an arbitration clause is deemed to incorporate the clause, even if no specific mention is made thereof, in consideration of the needs of international trade.

By implication, the court has also indicated that the provision of the Code of Civil Procedure which requires that the tribunal be composed of an uneven number of arbitrators cannot be considered a rule of public policy; rather, it is binding only on arbitration proceedings conducted in Italy.

For further information on this topic please contact [Giovanni De Berti](#) or [Nadia Milone](#) at *De Berti Jacchia Franchini Forlani* by telephone (+39 02 72 55 41), fax (+39 02 72 55 47 00) or email (g.deberti@dejalex.com or n.milone@dejalex.com).

Endnotes

(1) *Inter Eltra Kommerz und Produktion GmbH v Nigi Agricoltura srl*, First Division, July 23 2009, Decision 17312.

(2) First Division, November 16 2000, Decision 1486.

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