Kluwer Arbitration Blog

The Strange Case of Italy and its Distrust of International Arbitration

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According to the last "Scoreboard" published by the European Commission in 2015 regarding the civil justice system in each Member State, the average length of first instance proceedings in Italy is 608 days. Only Cyprus and Malta take more time to reach a decision.

As if this was not enough, the number of proceedings which are challenged before the second instance courts increases each year, requiring even more time to have a final determination. These, in turn, can then be appealed to the Court of Cassation. It is not surprising to read on the official website of the Consiglio Nazionale Forense (ie the national public institution representing lawyers in Italy) that the average duration of Italian judicial proceedings, including both first and second instance proceedings, is more than 7 years.

An Italian lawyer abroad will often find it challenging to explain to her foreign colleagues how the civil justice system works in Italy given the somewhat bizarre procedures and the above mentioned inexcusable timeframe. Equally challenging is trying to explain why Italy is not taking proper steps to solve these issues, or why the small steps that are taken are so ineffective. For an outsider looking in, it must appear that Italian citizens and corporations have simply resigned themselves to the fact that they will have such inefficient proceedings, and that wasting time and money has become standard in the daily activity of domestic litigators.

It would be fair to say that the Italian judicial system is sinking, but this is not the proper venue to look at the reasons for this Titanic scenario. Rather, it would be better to consider potential solutions and the benefits which these solutions might bring to Italy.

It is not exactly a novel idea to suggest that one of the potential solutions might be the use of alternative dispute resolution methods. International Arbitration is one of these mechanisms, and its main benefits are well-known to legal practitioners. As set out in greater detail below, International Arbitration is generally quick and flexible, proceedings are private and confidential, and the final award is binding between the parties.

Given that the benefits of Arbitration and the disadvantages of the Italian civil justice are so well-known, it remains a mystery why domestic litigation is still the primary mean to resolve commercial disputes. It is astonishing to observe how the outlined inefficiency of the civil justice system has not affected the common and traditional view in Italy. There is still a general distrust of International Arbitration which has inevitably impacted its development and its spread over the

years.

The data provided by the Chamber of Arbitration of Milan (CAM) – the main institution for Arbitration in Italy, established within the Milan Chamber of Commerce – are self-explanatory. The number of new cases started in 2009, including both domestic and international arbitrations, was 153; 129 in 2010, 130 in 2011, 138 in 2012, 167 in 2013, and 148 in 2014. In addition, during the course of the past few years, the average value in dispute has dropped from 6.7 million Euro in 2009 to approximately 2.3 million Euro in 2014. Being generous, one might suggest that Arbitration has "plateaued" in Italy, but, in reality, the picture suggests that fewer large scale disputes are being arbitrated within Italy itself. Based on the statistics here, there can be little expectation that the picture will change over the next few years, despite the fact that in 2014 the average duration of those arbitrations, most of which were commercial arbitrations, was approximately 14 months from the request of the arbitration to the award, an extraordinary timeframe.

These CAM statistics demonstrate that Italy has a functioning and functional machine, which is well-organized, and operates with efficiency and reactiveness. That machine is Arbitration, not litigation. Unfortunately, what is missing is the "gasoline" to run that machine, ie the disputes which are actually submitted to Arbitration. This is despite the fact that Italy is full of "gasoline": the judicial courts are overloaded with disputes, one of the main contributing factors in their disorganization. But the choice to go to arbitration rather than the court will require a culture shift amongst Italian parties and their legal advisers.

All this does not mean that litigation and arbitration must be considered as two completely separate and antagonistic entities. As reported by Daniel Fisher in a recent article on Forbes (wisely headed "Arbitration vs. Litigation: It's Not An Either-Or Proposition"), Imre Stephen Szalai, a well-known professor at the Loyola University College of Law in New Orleans, was right when he said: *"A robust system of arbitration is healthy for our court system – it serves as a safety valve"*. This is a universal principle, as Arbitration is part of every civil justice system and not an alternative to it.

International Arbitration's advantages are impressive, especially if considered from the Italian perspective.

First, the duration of each arbitration procedure is substantially shorter than any Italian litigation. The parties would agree on a reasonable timetable in advance, and they would be able to have a pragmatic expectation about the date of delivery of the award. This is crucial in the discussion: while you know when you start a civil litigation before the Italian courts, there is no way to predict the duration of that such litigation nowadays. This would also reduce significantly the amount of work of the judicial courts themselves, which in turn would gain efficiency and reliability.

Second, Arbitration is extremely flexible, a characteristic totally absent from the Italian judicial system. Besides the initial agreement on the timetable for the arbitration, the parties are able agree to extensions of time as well as to have certain phases of the proceedings more developed than others, according to their actual needs. Also, the parties will be able to choose one or more arbitrators who are highly specialized in the field underlying the dispute they are dealing with. This would dramatically reduce potential oversights in the final award, and have a positive impact on the enforceability of the award and credibility of the arbitration system.

Third, Arbitration is private and confidential, including the final award. Of course, it is a choice of

the parties involved in the dispute to decide whether to make the procedure and its outcome, public. However, the benefits of having this option are self-evident, especially for commercial parties: in contrast with ordinary courtroom proceedings under the Italian media gaze, confidentiality would allow the parties to pursue their goals and strategies without any external public interference, not to mention the opportunity to avoid any other dispute related to the potential prejudice deriving from publicity.

Fourth, the final award is binding and cannot be challenged, except in very limited circumstances (eg in case of serious irregularity on the part of the tribunal). The parties would have a final and binding decision within a timeframe which is shorter than any average first instance proceedings in Italy and, as a consequence, a significant number of groundless appeals – which represent a nationwide practice in Italy – would be aborted. Once again, all this would be beneficial both to the reputation of the arbitration system and to the trustworthiness of the Italian judicial system.

As noted above, the development of International Arbitration in Italy might have a knock-on effect also on the efficiency of the national courts. As a further consequence, the advantages that the entire Italian economy may gain from it would be substantial. In fact, International Arbitration plays a key role in cross-border transactions due to the neutrality and independence of the arbitration process as well as the opportunity for the disputing parties to find a neutral venue that is not linked to any national system. While Italy is one of the less attractive countries in the world nowadays for doing business (as shown by the Enforcing Contracts indicator of Doing Business 2015, released by the World Bank Group and measuring the time and cost for resolving a commercial dispute through a local first-instance court), it cannot be doubted that an efficient court system would render Italy more attractive for foreign investors. Arbitrating Italian disputes and taking them out of the courts will held increase the courts' efficiency and this would likewise make parties more confident in Italy both as seat for arbitration and place where to enforce the final award. Arbitration will not undermine the Italian judicial system. It has the potential to save it.

This entry was posted on Friday, December 18th, 2015 at 6:34 am and is filed under Arbitration, Domestic Courts, International arbitration, Italy
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