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To: Members of the IBA Recognition and Enforcement of Awards Subcommittee

From: Prof. Massimo Benedettelli; Michele Sabatini

Subject: Public policy and Italian law of international arbitration

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I. Executive Summary

1. This report analyses the notion of public policy applied by Italian courts in the context of both the recognition and enforcement of foreign arbitral awards and the annulment of domestic awards.[1]

2. This report is divided in two sections. The first section provides a theoretical analysis of the different notions of public policy adopted by Italian courts, with a focus on the notion applicable in cases of recognition and enforcement of foreign awards. The second section describes some of the most significant cases where Italian courts have been presented with a public policy exception, whether in the context of the recognition and enforcement of foreign awards, the annulment of domestic awards or the recognition and enforcement of foreign judgments.

3. The findings of this report may be summarized as follows:

    - in the context of the recognition and enforcement of foreign awards, Italian courts have construed the notion of public policy in a considerably narrow fashion by holding that it only encompass those fundamental norms and values of ethical, social, political and economic nature that lie at the heart of the Italian legal order

    - this notion of public policy (usually described as "*ordine pubblico interno internazionale*") remains one of domestic law, notions of "transnational" or

[1] For the purposes of this report, the terms "domestic award" and "foreign awards" refer to awards rendered by arbitral tribunals having their seat in Italy or abroad, respectively.

"truly international" public policy finding no room in the prevailing Italian case-law;

- public policy is applied with a considerable degree of restraint by Italian courts as their review is generally confined to the operative part of the foreign award and does not cover the underlying reasoning;

- the notion of public policy applicable in the context of the annulment of domestic awards is arguably broader, provided that domestic awards having an international element (i.e. awards rendered in proceedings where foreign parties are involved or where foreign law applies) are subject to a public policy scrutiny which basically corresponds to the one applied to foreign awards.

II. Public policy as a ground for denying recognition and enforcement to foreign awards or annulling domestic awards

4. As is the case in many other jurisdictions, public policy may be invoked before Italian courts as an exception to the recognition and enforcement of foreign awards or as a ground for annulling domestic awards.

A. The sources of the public policy exception in Italy

5. In the context of the recognition and enforcement of foreign awards, the main source for the public policy exception is Article V(2)(b) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). Indeed, the New York Convention has been implemented in Italy through the technique of the "*ordine di esecuzione*" and, therefore, its provisions are directly applicable to proceedings before Italian courts for the recognition and enforcement of foreign awards.

6. Pursuant to its Article VII, the New York Convention gives way to provisions of national legislation laying down a more favourable regime for the recognition and enforcement of foreign awards. This may be the case of Articles 839 and 840 of the Italian code of civil procedure (the "**cpc**"), which lay out the procedure for the recognition and enforcement of foreign awards in Italy and restate (almost *verbatim*) the provisions of Article V of the New York Convention, but for the public

policy exception which is drafted in slightly narrower terms.[2]

7. Indeed, under Articles 839 and 840 of the cpc (as interpreted by Italian courts) the judge may uphold or raise *ex officio* public policy exceptions to the recognition and enforcement of foreign awards only if they relate to the operative part of the award (as opposed to the award as a whole or its reasoning). Accordingly, Italian courts may not review (at least in principle) the reasoning on which the foreign award rests to verify whether it is consistent with public policy. They must rather verify whether the enforcement of that award, i.e. its concrete implementation in the Italian legal system, would breach public policy, without delving any further into the way in which the arbitral tribunal has justified its determinations.

8. Since the public policy exception under Art. V(2)(b) of the New York Convention may be construed in more expansive terms, allowing the forum's courts to extend their review beyond the operative part of the relevant arbitral decisions, the provisions of the Italian cpc may fairly be considered more favourable to the recognition of foreign awards and therefore prevail in accordance with Article VII.

9. The European Convention on International Commercial Arbitration of 1961 (the "**Geneva Convention**") may also have a (indirect) bearing on the application of the public policy exception in the context of recognition and enforcement of foreign awards.

10. Article VIII of the Geneva Convention allows arbitrators, in certain circumstances, to dispense with providing reasons to their decisions. Thus, by ratifying the Geneva Convention Italy has accepted that in some cases awards may be rendered without stating the underlying reasons, with the result that Italian courts can no longer hold that public policy mandates that arbitral awards be reasoned.[3]

[2] Article 839 cpc provides that, in the *ex parte* phase, the President of the competent Court of Appeal must declare the foreign award effective in the Italian Republic unless the award contains "*disposizioni*" that are contrary to public policy. By the same token, if an *ex parte* decision under Article 839 cpc is challenged, Article 840 cpc again provides that the Court of Appeal may deny the recognition and enforcement of a foreign award where the award contains "*disposizioni*" that are contrary to public policy. The term "*disposizioni*" in Article 839 and Article 840 cpc is consistently interpreted by Italian courts as referring to the operative part of the award only.

[3] Court of Appeal of Genova, May 2, 1980.

11. Further, according to Art. IX of the Geneva Convention, courts may not deny recognition or enforcement to foreign awards on the ground that they have been annulled for public policy reasons in the State in which, or under the law of which, they have been made.

12. As already mentioned, the public policy exception may also be invoked in a domestic setting to seek the annulment of a domestic arbitral award. Here the relevant source is Article 829(3) of the cpc, which provides that it is always possible for the parties to challenge an award on the grounds that it is contrary to public policy.

B. Notion(s) of public policy

13. The Italian legal system contemplates different notions of public policy, which apply to a number of different legal settings.

14. First, public policy applies as a limit to party autonomy in contractual relationships governed by Italian law.[4] This is a squarely domestic notion of public policy that embraces social, economic and political principles that characterize the Italian legal system at a given point in time.

15. In private international law settings, public policy operates first of all as a bar to the application of foreign law by Italian courts.[5] Moreover, public policy may be invoked as a ground for denying recognition and enforcement to foreign judgments.[6] The case law on this matter may provide guidance as to what constitutes public policy in the context of the recognition and enforcement of foreign awards. Indeed, under Italian law arbitral awards and judgments are considered fundamentally equivalent[7] and there is no compelling reason why the notion of public policy applicable to the review of foreign awards should differ from that applicable to foreign judgments.

16. Public policy may then be invoked as a ground for setting aside domestic awards (Article 829(3) cpc). According to a more rigid view, here public policy would

[4] Cf. Article 1343 of the Italian civil code.
[5] Cf. Article 16 of law 31.5.1995 no. 218 (the Italian private international law act).
[6] Cf. Articles 64(1)(g) and 65 of law 31.5.1995 no. 218 and Article 45(1)(a) of EU Reg. 1215/2012.
[7] Cf. Article 824-bis cpc and Article 4(2) of law 31.5.1995 no. 218.

encompass all provisions of mandatory law out of which the parties may not freely contract in the exercise of party autonomy.[8] Hence, according to some commentators, this public policy exception may be invoked with respect to any misapplication of Italian mandatory laws and policies by arbitral tribunals seated in Italy. A different (and nowadays prevailing) view is that the public policy exception in domestic set aside proceedings only covers fundamental principles underlying the social, economic and political order on which the Italian legal system rests and that not all provisions of mandatory law embody such principles.[9]

17. In the context of the recognition and enforcement of foreign awards (but also in the context of set aside proceedings concerning arbitral awards rendered in domestic proceedings having an international character), the public policy exception, as set forth in the applicable provisions of law and international instruments, has been construed in substantially narrower terms.[10] Italian case law and scholars, also building on the case law regarding foreign judgments, suggest that this notion of public policy only encompasses norms that are so critical to the protection of the main ethical, social, political and economic values on which the Italian legal order rest that they must necessarily apply also in international settings. In other words, this notion of public policy would cover only those fundamental principles that Italian courts must apply in all circumstances, regardless of whether there is a material connection between the Italian legal system and the relevant parties or their legal relationship, because a failure to apply them would clearly be repugnant to the Italian legal order.

18. The notion of public policy applicable to the recognition and enforcement of foreign awards (and to set aside of domestic awards rendered in proceedings having an international element) is therefore considerably more limited than the one applicable in a purely domestic setting.

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[8] S. MENCHINI, *L'impugnazione del lodo "rituale"*, in *Rivista dell'arbitrato*, 2005, 860; see also Italian Supreme Court, May 4, 1994, No. 4330 [*Siciliana Progettazioni v. Municipality of Trabia*].

[9] According to this view, there is no substantial difference between the notion of public policy applicable to the review of domestic awards and that applicable to the review of foreign awards, see L. SALVANESCHI, *Arbitrato*, 2015, Zanichelli Editore Bologna, 1000.

[10] L. SALVANESCHI, *Arbitrato*, 2015, Zanichelli Editore Bologna, 1000; L. RADICATI DI BROZOLO, *Controllo del lodo internazionale e ordine pubblico*, in *Rivista dell'arbitrato*, 2006, 637.

19. The fundamental principles and norms underlying this particularly limited notion of public policy are usually drawn from the Italian Constitution,[11] the provisions of the Italian criminal code,[12] public international law (both customary and conventional) and other sets of provisions laying out the "essential features" of the Italian legal system.

C. Further considerations on public policy as a ground to deny recognition and enforcement of foreign awards

20. As already mentioned, the notion of public policy applied to the recognition and enforcement of foreign awards is substantially narrower than the one applied to cases of challenges to purely domestic awards.[13] Still, this "domestic international public policy" (as opposed to purely domestic public policy)[14] remains a notion of domestic law.[15] In particular, it should not be confused with the notion which has been developed in other legal systems of a "transnational" or "truly international" public policy, i.e. that core of fundamental principles and values which is common to all, or at least the majority of, civilized nations. While Italian courts may occasionally engage in a comparative analysis as to whether the public policy principle or norm that would purportedly be breached is recognized as such also in other advanced legal systems, and may look at international law instruments or international customary law, their analysis will ultimately turn on whether the relevant principle or norm is protected as such within the Italian legal framework.

21. It is worth exploring whether the notion of public policy applied by Italian courts refers to substantive norms and principles alone (i.e. "substantive public policy") or covers also principles and norms of procedural nature (i.e. "procedural public policy"). In fact, there are principles and norms regulating the procedure before a

[11] Italian Supreme Court, December 6, 2002, No. 17349 [*Finleader S.r.l. v. Grant Thornton*]; Italian Supreme Court, December 13, 1999, No. 13928 [*Italstampi S.r.l. v. Pagplastika S.p.A.*]; Italian Supreme Court, February 23, 2006, No. 4040 [*C.S. v. Rai Radiotelevisione Italiana*].

[12] M.V. BENEDETTELLI, C. CONSOLO, L.G. RADICATI DI BROZOLO, *Commentario breve al diritto dell'arbitrato nazionale ed internazionale*, 2010, Cedam Padova, p. 1054.

[13] M. BOVE, *Il riconoscimento del lodo straniero tra Convenzione di New York e codice di procedura civile*, in *Rivista dell'arbitrato*, 2006, p. 30.

[14] Court of Appeal of Venice, January 16, 2013, No. 91 [*Helios Technology S.p.A. v. Jiangxi Ldk Solar Hi-Tech Co. Ltd*].

[15] P. BERNARDINI, *Riconoscimento ed esecuzione dei lodi stranieri in Italia*, in *Rivista dell'arbitrato*, 2010, 438.

judge or arbitrator so critically linked to notions of justice and fair trial that their correct and effective implementation may well implicate issues of public policy.

22. In general, Italian courts are loath to entertain public policy objections resting on procedural violations that under the New York Convention, or other applicable sources, may give rise to alternative grounds for denying recognition and enforcement of an award.[16] This is the case, for instance, of the breach of the parties' right to be heard. Even though this is considered a fundamental procedural right in almost every legal system, Italian courts will likely not consider the violation of such a right a breach of public policy. They will rather conceive it as an autonomous ground to resist recognition and enforcement of a foreign award under Article V(1)(b) of the New York Convention.

23. In the italian courts' view, there may not be overlaps between the grounds for refusing recognition and enforcement under Article V(1) and those under Article V(2), because they are subject to a substantially different regime. Whereas the objections under Article V(2) may be raised ex officio by the forum's judges, the grounds set forth in Article V(1) must necessarily be invoked by the interested party, which therefore may waive them on a voluntary basis or be prevented from invoking them as a matter of estoppel. Thus, if a complaint or violation already falls within any of the grounds laid down by Article V(1), it may not be regarded as also giving rise to a ground for refusing recognition and enforcement under Article V(2) such as a breach of public policy. This is the case of procedural violations that may potentially implicate a breach of procedural public policy. Because they generally come within the scope of Article V(1) (most likely Article V(1)(b) or Article V(1)(d)), they may not, at the same time, give rise to a public policy exception under Article V(2)(b). Otherwise, the differences in the regime applicable to Article V(1) and Article V(2) would be blurred and the prohibition for courts to raise the objections under Article V(1) *ex officio* would eventually become meaningless.

24. This said, there may be cases where the breach of a fundamental norm or principle of procedure may not effectively be invoked through any of the grounds encompassed by Article V(1) of the New York Convention. This is for instance the

[16] See for instance Italian Supreme Court, February 8, 1982, No. 722 [Damiano v. Toepfer].

case of the fundamental principle of *ne bis in idem* according to which, once a final judgment has become *res judicata* in the forum, no judge or arbitrator may enter a decision on the same subject matter.[17] None of the grounds under Article V(1) of the New York Convention would allow a party to resist recognition or enforcement of a foreign award on the basis of *ne bis in idem*. Hence, parties would have no chance but to invoke the public policy exception under Article V(2)(b).[18]

25. The same holds true where the procedural rules applicable to the arbitration proceedings, as set forth in the arbitration agreement (also by reference to the rules of arbitral institutions)[19] or in the relevant provisions of the law of the seat,[20] do not require arbitrators to be impartial and independent. In this case, the grounds for resisting recognition and enforcement of foreign awards under Article V(1) of the New York Convention would be unavailing. In particular, the parties would not be able to invoke the ground of Article V(1)(d), which permits to resist recognition or enforcement where the composition of the arbitral tribunal or the arbitral procedure did not accord with the agreement of the parties or the law of the seat. In these residual instances, and to the extent that a fundamental principle of procedure has been violated such as the impartiality and independence of a judicial decision-maker, the parties would be able to raise a complaint for breach of procedural public policy and invoke Article V(2)(b) of the New York Convention.[21]

26. The better view is therefore that Italian courts will generally interpret the relevant sources (the New York Convention, Articles 839 and 840 cpc) as referring to substantive public policy alone, with procedural public policy coming into play only

[17] E. D'ALESSANDRO, *La nuova disciplina dell'arbitrato* (ed. by S. Menchini), Cedam Padova, 2010, 501; R. MURONI, *Il conflitto pratico tra lodi e la Convenzione di New York*, in *Rivista dell'arbitrato*, 2000, 763.
[18] Italian Supreme Court, January 15, 1992, No. 405 [*Privilegiata Fabbrica di Maraschino Excelsior Girolamo Luxardo S.p.A. v. Agrarcommerz A.G.*].
[19] Court of Appeal of Florence, January 30, 2006, No. 150 [*Tessuti a Pelo F.G. S.p.A. v. Chargeurs Wool Pty Ltd*].
[20] Italian Supreme Court, December 15, 1982, No. 6915 [*Rocco Giuseppe e figli S.n.c. v. Federal Commerce and Navigation Ltd.*]. As for foreign judgments see Italian Supreme Court, March 3, 1999, No. 1769 [*Polielettronica S.p.A. v. Ditta Photo Service July S.A.*].
[21] Italian Supreme Court, January 20, 1995, No. 637 [*Conceria De Maio v. Emag A.G.*]; Court of Appeal of Milan, April 29, 2009 [*C.G. Impianti S.p.A. v. B.M.A.A.B. and Son International Contracting Company W.L.L.*].

where there would be no alternative ground for a party to vindicate its fundamental procedural rights and prerogatives.

27. The notion of public policy adopted by Italian courts also embraces the so called "European public policy", i.e. the set of principles and norms that are part of public policy from the perspective of the law of the European Union ("**EU**"). As set out by the European Court of Justice in *Eco Swiss* (C-126/97) and *Mostaza Claro* (C-168/05), the courts of the Member States must consider the public policy exception under the New York Convention and national legislation as covering also breaches of norms that form part of the European public policy. However, Italian courts have always been loath to engage in a substantial review of the way arbitral tribunals interpret and apply fundamental norms of EU law, such as EU competition norms, and have rather confined themselves to verifying whether the arbitrators duly considered such norms in their decisions, with no review of the awards' underlying reasoning. In general, if the breach of a fundamental public policy norm of EU law falls short of being manifest and glaring, Italian courts will hardly refuse recognition or enforcement of an award on that ground.[22]

28. The above-mentioned judgments of the European Court of Justice pointed out in pellucid fashion that the provisions of Article 101 of the Treaty on the Functioning of the European Union on anticompetitive undertakings and the norms on the protection of consumers are to be considered as public policy provisions. They however did not lay down any general principle or guideline to assist interpreters in discerning which other norms and principles of EU law should be regarded as coming within the notion of European public policy. In particular, it is not clear whether all EU law mandatory norms may *per se* raise to the ranks of public policy or whether only some of them do. The issue of the scope of European public policy has been recently addressed in the opinions filed with the European Court of Justice by two EU Advocate Generals, who seem to have reached slightly different conclusions. In the opinion presented in Gazprom (C-536/13), Advocate General Wathelet appeared to take a fairly restrictive stance on what constitutes European public policy arguing that this notion would only encompass those provisions and

[22] Court of Appeal of Milan, July 15, 2006, No. 1897 [*Terra Armata S.r.l. v. Tensacciai S.p.A.*]; Court of Appeal of Florence, March 21, 2006 [*Nuovo Pignone v. Schlumberger*].

principles of EU law that "form part of the very foundation of the [EU] legal order".[23] On the strength of such a narrow construction of European public policy, he concluded that the provisions of the Brussels I Regulation do not engender European public policy. In the opinion rendered in CDC (C-352/13), Advocate General Jääskinen interpreted the notion of European public policy in apparently broader terms, adumbrating that at least all provisions of EU competition law do amount, as such, to European public policy. Thus, in the near future, the European Court of Justice will have to take issue with the notion of European public policy. One hopes that it will seize this opportunity to provide clear guidance on which EU law norms and principles come within the scope of that notion.

29. In the realm of international sources, it must be noted that Italian courts will construe the relevant notion of public policy as also incorporating the provisions and principles of the European Convention on Human Rights as interpreted and enforced by the European Court of Human Rights.[24] Indeed, while the Italian Constitution already contemplates all the provisions and principles in question, the European Court of Human Rights may apply them more expansively. If this is the case, the Italian courts must make sure they keep up with the way in which such norms are applied at the European level and take a consistent approach when seized of a request for the recognition and enforcement of an award that may arguably clash with such norms.[25]

30. In light of the above, the role played by public policy in the context of the recognition and enforcement of foreign awards may be described as "negative" in nature. Indeed, public policy serves as an escape device for the Italian legal system to deny recognition and enforcement to arbitral awards that do not square with fundamental principles and norms constituting "domestic" international public

[23] Advocate General Wathelet's opinion in *Gazprom* (C-536/13), § 177.

[24] Court of Appeal of Milan, December 4, 1992, No. 2091 [*Allsop Automatic Inc. v. Tecnoski s.n.c.*]. On the possible interaction between the ECHR and international arbitration cf. MV BENEDETTELLI, *Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, forthcoming in *Arbitration International*, 2015.

[25] The importance for courts of EU member States to adopt an approach that is consistent with that of the European Court of Human Rights has been emphasized (albeit in the context of the circulation of foreign judgments rather than awards) also by the European Court of Justice (*Krombach*, C-7/98, [2000] ECR, I-1935).

policy and operates as a barrier preventing such awards from entering the Italian legal space. In Italy the different objective of guaranteeing that provisions enacted for the purpose of safeguarding public interests are "positively" applied is achieved through the different instrument of the "*norme di applicazione necessaria*" or "overriding mandatory provisions", i.e. rules that have to be applied even when Italian law is not the applicable law.[26]

31. The notion of public policy is also "relative" in nature. Italian courts appreciate that it may change over time since certain fundamental values and principles may no longer be such in the future. [27] For this reason, they will not consider the notion of public policy existing at the time the foreign or international award has been rendered, but rather the one existing at the time recognition and enforcement of such award are sought.

32. Finally, when it comes to the way in which the above-mentioned notion of public policy is concretely applied by Italian courts, case law shows that Italian courts usually interpret and apply public policy with a considerable degree of restraint. Commentators observe that, in accordance with the pro-enforcement bias of applicable international instruments such as the New York Convention, Italian courts would uphold a public policy defence only in exceptional circumstances. Indeed, the public policy defence is treated as an exception to the system designed by the relevant national and international sources of wide and unfettered circulation of foreign arbitral awards.

33. In practice, this means that the mere circumstance that the provisions of foreign law applied by the relevant arbitral tribunal regulate a certain issue differently from the way the same would have been regulated were Italian law applicable to the merits will never *per se* implicate a breach of public policy. Similarly, the breach of a provision of Italian mandatory law will never *per se* amount to an issue of public policy preventing recognition or enforcement of a foreign award.[28] A

[26] Article 17of law 31.5.1995 No. 218, article 9 of EC Reg. No. 593/2008.
[27] Italian Supreme Court, February 21, 1997, No. 1601 [*F. Bozzo v. E. Diefenbacher*].
[28] For instance, a domestic award enforcing a contractual right of first refusal was not considered to breach public policy on the ground of its alleged conflict with the fundamental principle of free circulation and trading of shares set out by Italian company law: Court of Appeal of Milan, April 4, 2013, reported in L. SALVANESCHI, *Arbitrato*, 2015, Zanichelli Editore Bologna, 915, n. 133. It is worth noting that

public policy defence will be granted only if there is clear showing that a fundamental principle or norm is breached, which safeguards ethical, political, social or economic values that inform in a critical way the fundamental features of the Italian legal system.[29]

34. Moreover, a public policy breach may only be raised with respect to the operative part of the relevant award. It is only the concrete implementation of the foreign award, on its operative terms, that is subject to review by Italian courts under the umbrella of public policy.[30] By contrast, Italian courts will neither review the reasons provided by the arbitrators to justify their conclusions nor the way in which arbitrators have resolved intermediate issues that lied on the road to the decision of the dispute.[31] As long as the concrete implementation of the award accords with the very limited set of fundamental principles that are considered to be part of the Italian conception of international public policy, Italian courts will dismiss objections based on a purported breach of public policy.[32] This would likely be so even if the interested party were to provide clear showing that the award lacked reasoning or that the arbitrators have made a blatantly wrong application of mandatory norms.[33]

35. This somewhat "minimalist" approach to the review of foreign awards is dictated by Articles 839 and 840 of the cpc, which are interpreted in the sense that the public policy exception to recognition and enforcement of foreign awards may only regard the operative part of the relevant award, as well as by the principle deeply embedded in both Italian law on arbitration and international instruments that courts should refrain from reviewing awards on their merits. The merits of an award of course include the reasons on which it rests. Thus, a court review of such

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in the past foreign judgments have been recognized and enforced despite their conflict with Italian mandatory norms such as Art. 1 of law 16.3.1942 no. 267, which excludes the submission to insolvency of subjects that do not carry out a commercial activity, or Articles 1341 and 1342 of the Italian Civil Code requiring burdensome clauses in contracts with consumers to be expressly approved by the latter in writing.

[29] Italian Supreme Court, November 26, 2004, No. 22332 [*Alitalia S.p.A. v. C. Buonocore*]; Italian Supreme Court, December 28, 2006, No. 27592 [*R.D.V. v. E.M.M.A.*].

[30] Court of Appeal of Milan, December 4, 1992, No. 2091 [*Allsop Automatic Inc. v. Tecnoski s.n.c.*].

[31] Court of Appeal of Milan, May 3, 1977 [*Renault Jacquinet v. Sicea*].

[32] Italian Supreme Court, April 3, 1987, No. 3221 [*Abati Legnami S.p.A. v. Fritz Haupl*].

[33] Court of Appeal of Genua, May 2, 1980 [*Efxinos Shipping v. Rawai Shipping Lines*].

reasons would be seen as an undue encroachment on the arbitral tribunal's exclusive bailiwick: the resolution of the merits of the dispute.[34]

36. It should be noted that the fact that the award does not state the reasons on which it is premised may however give rise to an autonomous defence under Article V(1)(d) of the New York Convention. Indeed, the parties' agreement (as supplemented by relevant arbitration rules or international instruments) or the relevant arbitration law may require that the award be reasoned.[35] In those cases, if the reasons are not stated, either party may well argue that the procedure was not conducted in accordance with their agreement or with the law of the seat, with all the attendant consequence in terms of enforceability of the award.

III. Cases where Italian courts have dealt with the public policy exception

37. This section presents the most relevant cases where the public policy exception has been raised before Italian courts to resist the recognition and enforcement of a foreign award or to request the annulment of a domestic award. This section also addresses some significant cases where Italian courts have dealt with the public policy exception in the context of the enforcement or recognition of foreign judgments. Indeed, the notion of public policy applied by Italian courts in these cases arguably reflects the notion applied in the context of the recognition and enforcement of foreign awards.

D. The public policy exception in the context of enforcement and recognition of foreign awards

38. *Vigel S.p.A. v. China National Machine Tool Corporation*. This case concerns the attempt by Vigel S.p.A. ("**Vigel**") to resist the enforcement of an award rendered in China, under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC). Under the award, China National Machine Tool Corporation ("**China National**") was granted damages in the amount of U.S. $ 400,000 plus costs. China National requested and obtained the *exequatur* of such

[34] Italian Supreme Court, April 8, 2004, No. 6947 [*Vigel S.p.A. v. China National Machine Tool Corporation*]; Italian Supreme Court, March 17, 1982, No. 1727 [*Fratelli Variola S.p.A. v. Kampffmeijer S.à.r.l.*]; Court of Appeal of Venice, May 21, 1976 [*Pando Compania Naviera v. FILMO S.a.s.*].
[35] Italian Supreme Court, February 8, 1982, No. 722 [*Damiano v. Toepfer*].

award before the Court of Appeal of Turin. Vigel then sought to resist the enforcement on different grounds among which was Article V(2)(b) of the New York Convention for breach of the forum's public policy. Vigel alleged that the arbitral tribunal had failed to apply the proper law of the contract, which was supposed to be the United Nations Convention on Contracts for the International Sale of Goods of 1985 (the "**CISG**"), and rather applied general principles of international trade. Vigel argued that, had the arbitral tribunal applied the CISG, China National's claim would have been dismissed as time-barred. It was Vigel's submission that the failure to apply the provisions of that international instrument resulted in a breach of public policy.

39. Vigel's petition was rejected. According to the Court of Appeal of Turin, a public policy exception under the New York Convention must be limited to the operative part of the award and, in particular, to the concrete effects of its enforcement within the Italian legal system. By its petition, instead, Vigel had impliedly challenged the reasons adduced by the arbitral tribunal to apply general principles of international trade instead of the CISG. This was regarded as a challenge to the reasoning of the award, which the Court could not review, not even on grounds of public policy.

40. The Italian Supreme Court later confirmed the decision of the Court of Appeal of Turin. In doing so, it clarified that the weight of case law suggests that, "when it comes to the recognition of a foreign award, the public policy review must be confined to the operative part".[36]

41. *Nuovo Pignone S.p.A. v. Schlumberger Sa*. In this case, Schlumberger S.A. ("**Schlumberger**") sought to enforce an award in Italy against Nuovo Pignone S.p.A. ("**Nuovo Pignone**"). Nuovo Pignone resisted enforcement on the grounds that the arbitral tribunal misapplied EU competition law (in particular Article 101 of the Treaty on the Functioning of the European Union) and that this amounted to a breach of public policy within the scope of Article V(2)(b) of the New York Convention.

[36] Italian Supreme Court, April 8, 2004, No. 6947 [*Vigel S.p.A. v. China National Machine Tool Corporation*].

42. The Court of Appeal of Florence dismissed Nuovo Pignone's petition out of hand. In the Court's view, State judges should always refrain from carrying out a substantive analysis of the arbitrators' decision, even though the relevant decision may involve issues of public policy. This approach would also be consistent with, if not required by, the principle that awards may not be reviewed on their merits. Building on these premises, the Court explained that, when presented with a public policy exception turning on the alleged misapplication of fundamental competition norms, courts should confine themselves to verifying whether the arbitrators have taken cognizance of those norms, giving reasons as to the way in which such norms have been interpreted and applied. The Court found that the arbitral tribunal had done that and dismissed the public policy exception raised by Nuovo Pignone.[37]

43. *Fratelli Damiano s.n.c. v. Ditta Topfer*. In this case, Fratelli Damiano s.n.c. ("**Fratelli Damiano**") sought to resist enforcement of an arbitral award rendered in favour of Ditta Topfer by an arbitral tribunal appointed under the auspices of The Refined Sugar Association, with seat in London.

44. The enforcement of the award was challenged on several grounds. One of them was that, despite having being expressly requested by Fratelli Damiano to render a reasoned award, the arbitrators had failed to state the reasons on which their decision had been predicated. On this basis, Fratelli Damiano advocated that (i) the arbitration procedure had not been conducted in accordance with the parties' agreement (Article V(1)(d) New York Convention) and (ii) the award was contrary to public policy (Article V(2)(b) New York Convention).

45. In the first instance, the Court of Appeal of Messina denied Fratelli's Damiano objections and granted the enforcement of the award. However, the Italian Supreme Court later reversed this decision on the grounds that the arbitration procedure had not been conducted in accordance with the parties' agreement. The Supreme Court noted that the parties' agreement was subject to the Geneva Convention. The Supreme Court thus found that the arbitration agreement impliedly incorporated Article VIII of the Geneva Convention, which mandates that,

[37] Court of Appeal of Florence, March 21, 2006 [*Nuovo Pignone S.p.A. v. Schlumberger Sa*.].

where the parties have so requested during the proceedings, the arbitrators must necessarily state the reasons of their decisions, even if they would not be required to do so under the relevant arbitration rules or arbitration law. The Court found that Fratelli Damiano had expressly requested the arbitrators to render a reasoned award and that, by failing to meet such a request, the arbitrators fell short of conducting the arbitration in accordance with the parties' agreement. Thus, the Court came to the conclusion that enforcement was to be denied on the ground of Article V(1)(d) of the New York Convention. As the award's lack of reasoning engendered an autonomous ground for refusing recognition and enforcement of the award under the New York Convention, the Supreme Court did not consider the public policy exception.[38]

E. The public policy exception in the context of the annulment of domestic awards

46. *Siciliana Progettazioni v. Municipality of Trabia*. In this case, a surveyor, entered into a contract for public works with the Municipality of Trabia. This contract included an arbitration clause providing that the arbitrators had to decide *ex aequo et bono*. On the basis of that clause, the plaintiff started arbitration proceedings to recover fees it was owed under the contract and eventually obtained a favourable award.

47. That award, which was a purely domestic one, was later challenged by the Municipality of Trabia, which eventually managed to have it set aside. The Court of Appeal of Palermo found that the contract concerned the performance of professional activities that, pursuant to the mandatory provision of Article 2231 of the Italian Civil Code, had to be performed by an engineer duly enrolled in the Engineers' Professional Register, rather than a simple surveyor.[39] Accordingly, the Court found that the contract was null and void because contrary to a mandatory provision of Italian law and therefore annulled the award on the grounds of breach of domestic public policy.

[38] Italian Supreme Court, February 8, 1982 No. 722 [*Damiano v. Toepfer*].

[39] Under Italian law, professions such as that of doctors, lawyers and engineers cannot be exercised without prior qualification and registration with the relevant Professional Register. According to Article 2231, unregistered professionals cannot bring claims for fees relevant to the professional activity they may have nonetheless performed.

48. The Supreme Court upheld the Court of Appeal's ruling that Article 2231 is a mandatory norm that forms part of the notion of domestic public policy. The fact that the arbitrators had to decide *ex aequo et bono* was considered no excuse for their failure to properly apply that provision.[40] In the Supreme Court's view, the failure to apply a mandatory provision of Italian law in a purely domestic arbitration called necessarily for the annulment of the arbitral award. This case confirms the view that, with respect to purely domestic awards, Italian courts may be inclined to interpret the public policy exception in broader terms.

F. The public policy exception in the context of enforcement and recognition of foreign judgments

49. *F. Bozzo v. Diefenbacher Erich.* In this case, Mr. Diefenbacher sought to enforce before the Court of Appeal of Milan three Swiss judgments recognizing his right to be paid for the legal assistance rendered to Mr. Bozzo. The latter resisted enforcement on the grounds that (i) the contract was null and void because contrary to currency regulations that prevented payments to non-Italian residents without previous administrative authorization and (ii) the same controversy had already been settled by a judgment of the Court of First Instance of Milan. The Court of Appeal of Milan granted enforcement of the Swiss judgments,[41] but the Supreme Court, relying on Article 27(3) of the Bruxelles Convention of 1968, reversed the lower's court decision and rejected the enforcement of the foreign decisions on the grounds of *res judicata*.

50. This case is relevant from a public policy perspective for the following reasons. First, the Supreme Court stated that the alleged violations of mandatory provisions of domestic public policy must be assessed only with respect to the operative part of the judgment and, therefore, it cannot review the merits of the dispute (*i.e.* the validity of the contract). Second, the Supreme Court gave a clear definition of the notion of public policy applicable to foreign judgments. In the Supreme Court's view, that notion of public policy covers "*the universal principles, grounded on the entire juridical system, which characterize the legal order in a given historical period*". Third, while accepting that currency regulations are to be considered

[40] Italian Supreme Court, May 4, 1994, No. 4330 [*Siciliana Progettazioni v. Municipality of Trabia*].
[41] Court of Appeal of Milan, November 23, 1993 [*F. Bozzo v. E. Diefenbacher*].

mandatory rules, the Supreme Court held that the provisions invoked by the applicant had been repealed and thus were no longer in force. Accordingly, it stated that the notion of public policy is relative in nature and must be analysed at the time recognition and enforcement of the relevant decision is sought.[42] Finally, the Supreme Court recognized that the principle of *res judicata* is part of Italian public policy.

51. *Ruffinatti S.r.l. v. Oyola Rosado*. In this case the plaintiff, Oyola Rosado, sought enforcement of a U.S. decision ordering the defendant to pay damages for $ 8 million as a result of work-related injuries. The Court of Appeal of Turin granted enforcement of the U.S. judgment. The Italian Supreme Court reversed the decision stating that the court of enforcement had to verify whether the amount of damages was such that they could be truly defined as "compensatory" rather than punitive in nature. Relying on a similar precedent,[43] the Supreme Court determined that the amount of damages awarded by the U.S. Court was in fact disproportionate and, therefore, punitive. Thus, it denied the recognition and enforcement of the U.S. judgment.

52. By its decision, the Supreme Court held that punitive damages are contrary to the fundamental principle underlying the Italian legal system that damages for civil liability may only have a compensatory nature. According to the Supreme Court, this principle forms part of the Italian public policy.

53. *Other cases concerning court judgments*: in the past, Italian courts have denied recognition and enforcement of foreign judgments on public policy grounds where: a limitation of liability clause was held valid despite the gross negligence or wilful misconduct of the interested party (this would run counter to Article 1229 of the Italian civil code); the enforcement of the foreign judgment would have amounted to enforcing a State expropriatory measure that had not been accompanied by just compensation (this would run counter to Articles 42 and 43 of the Italian Constitution); a statute of limitation was applied despite its terms were not clearly defined under applicable law.

[42] Italian Supreme Court, February 21, 1997, No. 1601 [*F. Bozzo v. E. Diefenbacher*].
[43] Italian Supreme Court, January 19, 2007, No. 1183 [*P.J. v. Fimez S.p.A.*].

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