

SETTING ASIDE AN ARBITRAL AWARD

WITH A REFERENCE TO RECENT JUDGMENTS OF THE ITALIAN COURT OF CASSATION

Revision on the merits of an award is not allowed in Italy. The request for setting aside (nullity) an award shall be proposed before the Court of Appeal at the seat of the arbitration, only on the grounds set forth by article 829 of the Italian Code of civil procedure.

After the 2006 Reform, the grounds for setting aside the award are:

1. if there is an invalid arbitration agreement, provided that said objection has been raised in the first submission after the arbitrators' acceptance of the appointment;
2. if the arbitrators have not been appointed according to the provisions of the Code of Civil Procedure, provided that said objection has been raised during the arbitral proceedings;
3. if the award has been rendered by a person who could not be appointed as an arbitrator, as provided for by article 812 of the Code of civil procedure;
4. if the award exceeds the scope of the arbitration agreement, provided that said objection has been raised during the arbitral proceedings; or if the award decides the merits of the dispute when the merits could not be decided;
5. if the award does not include the reasons on which the award is based, the arbitrators' decision (relief) and the arbitrators' signature;
6. if the award has been rendered after the expiration of the time-limit, provided that the party's intention to set aside the award on this ground has been notified to the others parties and to the arbitrators before the issuing of the award;
7. if the formalities required by the parties - under express sanction of nullity - have not been complied with, and the nullity has not been cured;
8. if the award is contrary to a previous award or judgment having the force of *res judicata* between the same parties, provided that said award or Court decision has been brought to the attention of the arbitrators during the proceedings;

9. if the principle of due process has not been observed during the arbitration proceedings;
10. if the award concludes the arbitral proceedings without deciding the merits of the dispute and the merits had to be decided;
11. if the award contains contradictory provisions;
12. if the award has not pronounced on some of the claims and counterclaims falling under the scope of the arbitration agreement.

Italian Court of Cassation, section I, 08-06-2007, n. 13511

If there is a request for setting aside an award (nullity), the Court of Appeal shall limit itself to the grounds of art. 829 Code of Civil Procedure and shall not re-examine other circumstances already considered by the arbitral tribunal, therefore, the interpretation of a contract made by the arbitral tribunal based on certain circumstances of fact cannot be challenged in the judgment for setting aside the award, unless the award contains insufficient (or no) indication of the grounds upon which a certain decision is based.

Italian Court of Cassation, section I, 16-05-2007, n. 11315

The award can be challenged under art. 829 of the Code of Civil Procedure for insufficient statement of the reasons upon which the award is based only if the award does not give the reasons at all or if the reasons given do not allow to understand the reasoning of the arbitrators to reach a certain decision (*ratio decidendi*).

When the decision of the Court of Appeal setting aside an award is challenged, the Court of Cassation shall not directly evaluate arbitrator's decision but only the Court of Appeal's judgment. Therefore, subject matter of the Court of Cassation judgment shall be limited to the validity of the reasons given by the Court of Appeal's decision to set aside the award (on the same principle see also **Italian Court of Cassation, section I, 09-01-2008, n. 178, Italian Court of Cassation, section I, 15-03-2007, n. 6028**).

Italian Court of Cassation, section I, 20-01-2006, n. 1183

The Court of Appeal can set aside an award on the ground of "contradictory provisions" (art 829 n. 4 of the Code of Civil Procedure) only if it is impossible to conciliate the various provisions of the award and it is impossible to find the "*ratio decidendi*" of the Tribunal (ultimately, this ground corresponds with another ground i.e. the "lack of statement of the reasons upon which the award is based", art. 829 n. 5 Code of Civil Procedure).

Italian Court of Cassation, section II, 12-04-2007, n. 8798

The Court of Appeal shall not exercise any control on the adequacy of the reasons upon which the award is based: the award's nullity shall be decided only if there is a contradiction between various grounds upon which the award is based or between the grounds upon which a certain relief is given (or rejected) and the relief itself so that it is impossible to understand the *ratio decidendi* or the said *ratio decidendi* is completely inconsistent.

Italian Court of Cassation, section I, 07-02-2007, n. 2717

The reasons given by the arbitral tribunal to interpret a contract in a certain way may be challenged only if such interpretation is reached through a mistake of law¹. Therefore, the Court of Appeal cannot take into consideration the reconstruction of the facts made by the Arbitral Tribunal based on the evidence taken during the proceedings if such a reconstruction follows a logic stated in the award (even if the Court of Appeal does not agree with that reconstruction) unless the conclusion reached by the arbitral Tribunal is completely illogic and inconsistent.

Italian Court of Cassation, section I, 28-05-2003, n. 8545

The setting aside of the award can be requested only by the parties to the arbitration. A third party that has not participated in the arbitral proceedings cannot address to this remedy and may complain against the award only through the opposition to the award judgment under art 831, section 3.

¹ The reform of the Code of civil procedure provides that parties may challenge an award based on the mistakes of law by the Tribunal related to the merits of the dispute only if the arbitral agreement allows it, or if there are legislative provisions that allow it.