International Law Office

Specialised commercial courts with jurisdiction over claims against foreign defendants: the Italian approach

ARB LIT RADICATI DI BROZOLO SABATINI BENEDETTELLI TORSELLO

01 September 2020 | Contributed by ARBLIT Radicati di Brozolo Sabatini Benedettelli Torsello

Litigation, Italy

Introduction

In recent years, an intense debate has taken place in many jurisdictions regarding the appropriateness and benefits of establishing specialised international commercial courts – that is, national judicial bodies set up to suit the specific demands and needs of international commercial litigation. In Europe, the debate has intensified after Brexit, as several EU member states are now competing through the establishment of specialised commercial courts operating in English to attract part of the transnational dispute resolution business that has previously taken place primarily in London. The underlying assumption is that British judgments' loss of the benefit of automatic recognition and enforcement under the EU regime based on the EU Recast Brussels Regulation (1215/2012) will induce several EU-based businesses to opt for a different forum in their choice-of-court agreements.

Against this backdrop, this article presents the strange case of the Italian (pre-Brexit) reform, which established specialised commercial courts with jurisdiction over cases brought against foreign defendants (foreign-defendant cases) with a view to attracting foreign investments and businesses by assigning the adjudication of disputes in which they are involved to a limited number of highly specialised courts, located in major cities which are easily accessible from abroad. However, the fact that the Italian courts, unlike most other international commercial courts, do not operate in English makes the Italian solution less appealing than others. Moreover, additional confusion for foreign operators stems from the complexity of the mechanism of identification of the competent specialised court. According to the original text of the reform, all civil disputes involving a foreign company which has no permanent establishment in Italy would have been assigned to the jurisdiction of only three specialised courts, located in Milan (with territorial jurisdiction over northern Italy), Rome (with jurisdiction over central Italy) and Naples (with jurisdiction over southern Italy). However, the solution which was implemented jilted this approach. On the one hand, it limited the subject-matter jurisdiction of the specialised courts with jurisdiction over foreign-defendant cases to claims dealing only with IP rights, antitrust litigation, corporate-related matters and actions for collective redress. On the other hand, it extended the number of territorial courts with jurisdiction over foreign-defendant cases to most (but not all) specialised commercial courts with jurisdiction over domestic commercial disputes. However, a revival of the original project, limiting the number of specialised courts to three, has been implemented with regard only to antitrust disputes.

The result of this confusing overlap of legislative interventions is a questionable patchwork of legal provisions, often difficult to coordinate and interpret, particularly for foreign investors. To some extent, this may be attributed to the fact that the reform was introduced prior to the UK vote on Brexit, meaning that the policy choices were made without consideration of the possibility of competing in attracting post-Brexit transnational commercial litigation. Whatever the reason, what is currently in force is a complex system of jurisdictional rules, with respect to which guidance is needed for foreign businesses operating, or otherwise involved in litigation, in Italy.

Establishment of specialised commercial courts

Under the current Italian regime of jurisdiction, disputes relating to IP rights, corporate-related matters and actions for collective redress are assigned to the jurisdiction of 23 specialised courts (more precisely, chambers of the ordinary courts) located throughout the country. The current situation is the result of the stratification of multiple legislative interventions meant to implement a system of highly qualified and specialised commercial chambers of the Italian courts.

The decision to create specialised chambers with jurisdiction over IP-related disputes dates back to Legislative Decree 168/2003 of 27 June 2003, which aimed to ensure that these highly technical commercial disputes were adjudicated by specialised judges. The decree provided that specialised chambers would be established within the first-instance and appeals courts located in 12 major cities (ie, Bari, Bologna, Catania, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice), which would have jurisdiction over disputes concerning IP-related disputes – namely:

- national and international trademarks;
- patents for inventions and for new plants varieties;
- utility models;
- designs and models;
- copyrights; and
- unfair competition interfering with IP rights.

The judicial system so created in 2003 was modified in 2012 by Law Decree 1 of 24 January 2012, finalised by Law 24 of 24 March 2012. This new piece of legislation introduced two major innovations to Legislative Decree 168/2003. On the one hand, it broadened the scope of the subject matter jurisdiction of the specialised commercial chambers to include all corporate-related disputes, as well as antitrust litigation. On the other hand, it increased the number of specialised commercial chambers to 21 (by adding specialised chambers in L'Aquila, Ancona, Brescia, Catanzaro, Campobasso, Cagliari, Perugia, Potenza and Trento). This was further increased to 22 as a result of the establishment of a specialised commercial chamber in Bolzano, and the territorial jurisdiction over the Valle d'Aosta region was assigned to the specialised commercial chamber in Turin.

More recently, the scope of the subject-matter jurisdiction of specialised commercial chambers was further extended by Law 31 of 12 April 2019, which added to the list actions for collective redress under the new law on class actions, which will enter into force on 19 November 2020.

Jurisdiction over claims against foreign defendants

The system set out in Legislative Decree 168/2003 underwent another substantial change in 2013, when the legislature's focus shifted from domestic to transnational litigation. Law Decree 145 of 23 December 2013, finalised by Law 9 of 21 February 2014, selected 11 of the 23 existing specialised commercial chambers (those based in Bari, Cagliari, Catania, Genoa, Milan, Naples, Rome, Turin, Venice, Trento and Bolzano) and conferred them mandatory jurisdiction over foreign-defendant cases (including foreign companies with a secondary office or a permanent establishment in Italy) in the areas of IP law, antitrust and corporate-related matters.

As an additional layer of complexity, on the occasion of the implementation in Italy of the EU Private Enforcement of Competition Law Directive (2014/104/EU of 26 November 2014), by virtue of Legislative Decree 3 of 19 January 2017, the legislature further amended Legislative Decree 168/2003 by providing that the exclusive jurisdiction for all kinds of antitrust dispute (whether involving validity issues, provisional measures or claims for damages, and whether resulting from the violation of domestic or EU competition law) would lie with the sole specialised commercial

chambers of the courts of Milan, Rome and Naples. Moreover, the said provision applies irrespective of the parties' nationality, seat or domicile and therefore also (but not only) in cases where foreign companies are party to the dispute.

As already mentioned, the original proposal to concentrate disputes in all foreign-defendant cases in only three courts was fiercely opposed by many, including the Italian Bar Council and it was ultimately abandoned, with the sole exception of antitrust disputes, in favour of the establishment of a larger number of specialised courts. As a result, the identification of the court with jurisdiction over foreign-defendant cases now requires a complicated three-step analysis, with a possible fourth variation. First, the general jurisdictional rule must be identified, which localises the territorially competent ordinary court. Second, the corresponding specialised commercial chamber must be identified, with jurisdiction over (domestic) commercial disputes (ie, intellectual property, antitrust, corporate or collective redress). Finally, the claimant must check whether the specialised commercial chamber so identified is also competent with regard to foreign-defendant cases; if not, the claimant must identify the competent chamber for disputes against foreign defendants.

For example, in the hypothetical instance of a claim with respect to which the ordinary criteria would lead to the jurisdiction of the court of Modena, if the case fell within the scope of application of domestic commercial (ie, intellectual property, corporate or collective redress) disputes, the specialised commercial chamber of the Bologna court would have jurisdiction. However, in the event of a foreign defendant, the Bologna court (which is not among the 11 courts with jurisdiction in cases brought against foreign defendants) would not have jurisdiction as exclusive jurisdiction over foreign-defendant cases is conferred to the specialised commercial chamber of the Genoa court. Further, if the dispute related to competition law, the special rule on antitrust litigation would apply, which would bestow jurisdiction on the Milan court.

Open issues regarding jurisdiction over claims against foreign defendants

The difficulty in identifying the territorial commercial chamber to which jurisdiction is conferred in cases against foreign defendants does not exhaust the complexities and uncertainties produced by the new legislation. In particular, the fact that Legislative Decree 168/2003 (as amended) refers only to foreign defendants has raised the question of whether the application of the rule at hand may also be invoked in the event of foreign claimants. A literal interpretation of the rule would seem to lead to a negative answer. However, in the absence of relevant case law, several commentators have argued in favour of the opposite solution on the grounds that the rationale of the rule is that disputes with foreign parties be concentrated in a limited number of specialised commercial courts. A similar issue arises as regards the conferral of jurisdiction in multi-party proceedings involving both Italian and foreign defendants or Italian and foreign claimants. Legislative Decree 168/2003 expressly refers to Article 33 of the Code of Civil Procedure (on joinder of multiple co-defendants), to the effect that it is undisputed that in the event of multiple defendants, the claim can be instituted before the specialised chamber of the court having jurisdiction over the foreign defendant, also with regard to the Italian co-defendants. On the other hand, the decree does not expressly address instances in which a foreign company is acting as co-claimant along with an Italian claimant. Again, the answer hinges on whether a literal or a purposive interpretation of the law should be adopted, which is still an open question.

Another relevant issue relates to claims put forward against a foreign company in an action on a warranty or guarantee or other third-party proceedings. This situation is not expressly addressed by the decree, which refers only to Article 33 of the Code of Civil Procedure (on joinder of multiple co-defendants) and not Article 32 on actions on a warranty or guarantee. In the face of a sharp division of scholars on this matter, a recent decision by the Bologna court (Judgment 859 of 16 March 2018) adopted a literal interpretation, thus allowing the court to retain jurisdiction over the action on warranty against a foreign company (although Bologna is not among the 11 courts on which jurisdiction is conferred for such cases) on the grounds that the opposite solution (ie, allowing for the attraction of the main claim before the specialised chamber of the commercial court with jurisdiction over foreign-defendant cases) would favour dilatory tactics and 'torpedo' strategies. The policy considerations emphasised by the Bologna court should lead to the application of the same rule on *perpetuatio iurisdictionis* in other similar situations, such as the joinder by the defendant of a foreign company in the proceedings or the voluntary intervention of a foreign company in domestic commercial proceedings.

Mandatory nature of jurisdiction and its (in)compatibility with EU Recast Brussels Regulation

A puzzling issue regarding the Italian rules on jurisdiction under consideration relates to the fact that Legislative Decree 168/2003 expressly qualifies the territorial jurisdiction of the specialised commercial courts with jurisdiction over foreign-defendant cases as mandatory, and thus not subject to derogation. In applying the general principles on mandatory territorial jurisdiction, the lack of jurisdiction in foreign-defendant cases of a court other than one of the 11 specialised commercial courts identified above must be either objected by the defendant in its first brief of defence, under penalty of forfeiture, or raised *ex officio* by the judge no later than the first pre-trial hearing under Article 183 of the Code of Civil Procedure.

However, the situation is more complicated in the event of a choice-of-court agreement derogating to the jurisdiction of the otherwise competent specialised court. From a purely domestic perspective, the rule introduced by Legislative Decree 168/2003 seems to lead to the conclusion that such derogating agreement is ineffective in light of the mandatory character of the jurisdictional rule introduced by the decree. However, this conclusion must be reconciled with the EU Recast Brussels Regulation (and the 2007 Lugano Convention), keeping in mind the primacy of EU law. Accordingly, the decree cannot prevent an Italian court, other than one of the 11 specialised courts identified above, from entertaining a claim where that court is specifically designated by a valid choice-of-court agreement governed by the EU regulation. Moreover, the decree cannot prevent the court of another EU member state designated by a valid choice-of-court agreement from entertaining a claim in spite of the mandatory jurisdiction of the Italian specialised court, and the latter cannot invoke the mandatory character of the jurisdiction conferred on it by the domestic provision to entertain a claim in disregard of the choice-of-court agreement derogating to its jurisdiction. In other words, notwithstanding the mandatory nature of the rule of jurisdiction set out in Legislative Decree 168/2003, parties to a choice-of-court agreement subject to the EU Recast Brussels Regulation may validly stipulate that their disputes (although possibly involving a foreign defendant) may be adjudicated by an Italian court other than one of the 11 specialised ones with jurisdiction over foreign-defendant cases or by the court of another EU member state.

Moreover, issues of compatibility between Italian and EU law on jurisdiction, to be addressed on the basis of the principle of primacy of EU law, may also arise in the absence of a choice-of-court agreement when the EU Recast Brussels Regulation does not merely designate the member state whose courts have international jurisdiction, but also designates which court, within such member state, is entitled to hear the case. This is the case, for instance, in matters relating to contracts (with respect to which jurisdiction lies with the court of the place of performance) or matters relating to torts (with respect to which jurisdiction lies with the court of the place where the harmful event occurred or may occur). Should the EU rules, based on a localising factor, result in the conferral of jurisdiction on the Italian courts other than the specialised ones, a conflict may arise between the EU regime and the Italian rules on specialised commercial courts. Although it could be legitimately argued that the scope of the jurisdiction of each of the domestic courts should be a matter to be decided by the national legislature, it seems more convincing to argue otherwise and conclude that, in light of the EU regulation's goal to unify the rules of conflict of jurisdiction in civil and commercial matters by way of rules which are highly predictable, when the EU rules have double relevance and also designate the domestic court competent to hear the case, that uniform rule must prevail over divergent domestic rules, irrespective of their affirmed mandatory nature.

For further information on this topic please contact Marco Torsello or Caterina Coroneo at ARBLIT Radicati di Brozolo Sabatini Benedettelli Torsello by telephone (+39 02 8425 4810) or email (marco.torsello@arblit.com or caterina.coroneo@arblit.com). The ARBLIT Radicati di Brozolo Sabatini Benedettelli Torsello website can be accessed at www.arblit.com.

Marco Torsello

Caterina Coroneo