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The Aftermath in Italy of the Ruling of the European Court of Human Rights in BEG

BY THE EDITORS OF THE EAPIL BLOG
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The author of this post is Michele Grassi, who is a post-doc at the University of Milan.

In 2010, Bechetti Energy Group ('BEG') commenced proceedings against Italy before the European Court of Human Rights (ECtHR). The applicant complained that Italy had breached its obligations under Article 6(1) of the European Convention on Human Rights (ECHR) by failing to set aside an arbitral award rendered in a dispute between BEG and Enelpower, despite the apparent lack of impartiality of the arbitrator appointed by the opposing party. In particular, the concerned arbitrator had served as Vice-Chairman and member of the Board of Directors of Enel, Enelpower mother company, and had several professional links with the latter.

In May 2021, the ECtHR rendered its ruling and found that Italy had in fact violated Article 6(1) ECHR. Nonetheless, the Strasbourg Court dismissed the applicant's request to order the reopening of the domestic proceedings in which Italian courts rejected the appeal for nullity of the arbitral award. They did so on the assumption that

> *it is in principle for the Contracting States to decide how best to implement the Court's judgments without unduly upsetting the principles of res judicata or legal certainty in civil litigation.*

However, the Court stressed the

> *importance, for the effectiveness of the Convention system, of ensuring that domestic procedures are in place to allow a case to be revisited in the light of a finding that the safeguards of a fair hearing afforded by Article 6 have been violated.*

The Revocation of Final Civil Judgments under Italian Law

Under Italian procedural law, revocation of final civil judgments (and the reopening of the respective proceedings) is only available in a limited number of cases, listed at Article 395 of the Italian code of civil procedure (CPC). This same provision also applies (in part) to arbitral awards pursuant to Article 831 CPC.

Before 2022, revocation was not available in case of breach of the ECHR rights (see the judgments of the Italian Constitutional Court of 26 May 2017 no. 123, and of 27 April 2018 no. 93). The situation has now changed, following a recent reform of the Italian code of civil procedure that introduced, among other things, a new reason for revocation of civil judgments that have been found in breach of the Convention by the ECtHR (Article 391-*quater* CPC).

Still, the new provision requires that three cumulative – and quite restrictive – conditions be met: (1) The violation must concern a right of *status* of a natural person; (2) The just satisfaction awarded by the Court pursuant to Article 41 ECHR must not be sufficient to remedy the consequences of the violation; (3) The revocation of the judgment must not affect the rights of third parties (i.e. parties that did not participate in the proceedings before the ECtHR).

Those conditions resemble the requirements for the reopening of domestic proceedings provided by the laws of other States parties to the ECHR (e.g., Article L 452-1 of the French *code de l'organisation judiciaire* or Article 510 of the Spanish code of civil procedure. See also the recommendation issued by the Committee of Ministers to member States, R(2000)2 of 19 January 2000). Still, the combined application of the above conditions significantly narrows the scope and effectiveness of the Italian remedy. In particular, it is apparent that Article 391-*quater* CPC cannot be applied in the BEG case, since the violation of the ECHR addressed in the case does not concern a right of *status* of a natural person.

The Position of the Italian Government

In light of the above, on 3 August 2022, the Italian government submitted an Action Report to the Secretariat of the Committee of Ministers. According to the Report: the Italian State had promptly paid to BEG the "just satisfaction" awarded by the ECtHR judgment (€ 51,400); the domestic civil proceedings that led to the violation of the ECHR had not been reopened, in compliance with the decision of the Court that dismissed the applicant's request to that end; the Italian State considered to have fully discharged its obligations under Article 46 ECHR; BEG had commenced proceedings in Italy against the Italian government, the opposing party in the arbitral proceedings and the arbitrator concerned, seeking compensation of further damages.

The Position of the Applicant

On 27 January 2023, BEG submitted a Communication pursuant to Rule 9(1) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, whereby it: confirmed that it had commenced proceedings against, inter alia, the concerned arbitrator for compensation of the relevant damages; contested the Italian government's contention that the judgment only entailed the payment of the amount of just satisfaction awarded by the Court pursuant to Article 41 ECHR; contested the Italian government's argument that it had no obligation to ensure the reopening of the domestic proceedings, because the Court had dismissed the applicant's request to that effect; contended that, from a theoretical standpoint, the re-examination or reopening of the domestic proceedings would constitute an appropriate measure of *restitutio in integrum* to re-establish the situation which would have existed if the violation had not been committed. At the same time, it acknowledged that, under Italian procedural law, it was not possible to reopen the domestic proceedings; requested, as a result, full financial compensation of the damages suffered.

The Effects of the BEG judgment in Italy

The Committee of Ministers of the Council of Europe has not yet issued a final resolution and the supervision process is still pending. Accordingly, for the time being, the decision of Italian courts on the validity of the contested arbitral award still stands as *res judicata*. The applicant has not sought a revocation of the domestic judgment, as this remedy is not available under Italian procedural law, but it has rather commenced new proceedings, claiming full compensation of the relevant damages. Conversely, the Italian government contends to have fully discharged its international obligation to abide by the final judgment of the ECtHR by paying the just satisfaction awarded by the ECtHR.

One might then question the effectiveness of the ECtHR decision in this case. Following several years of litigation, the applicant is still bound by a decision that has been found in violation of its Convention rights. This is not the place to elaborate on the possible existence of an international obligation of the Italian State to ensure that the domestic proceedings are reopened, despite the ECtHR's dismissal of the applicant's claim to that end. I personally think that this is the case, based on the State's customary law obligation to ensure the cessation of international wrongful acts and to make full reparation for the injury caused. Moreover, in a recent decision against Greece, the same Strasbourg Court held that "the taking of measures by the respondent State to ensure that the proceedings before the Court of Cassation are reopened, if requested, would constitute appropriate redress for the violation of the applicant's rights" (see *Georgiou v Greece*, 14 March 2023, app. no. 57378/18).

What is worth mentioning – especially in light of the recent decision of the French *Cour de Cassation*, reported in the post by Gilles Cuniberti on this blog – are the possible side effects of the BEG judgment, concerning the recognizability of the arbitral award at stake outside Italy. Indeed, according to well established case-law of the ECtHR, requested States shall refuse the recognition and enforcement of foreign judgments if the parties' procedural rights were infringed in the State of origin (see *Pellegrini* v. *Italy*, 20 June 2000, app. no. 30882/96; *Avotiņš v Latvia*, 23 May 2016, app. no. 17502/07; *Dolenc v Slovenia*, 20 October 2022, app. no. 20256/20). This might explain why the *Cour de Cassation* did not focus on the possible irreconcilability between the Albanian judgment, whose recognition was sought in France, and the arbitral award between BEG and Enelpower. Nonetheless, it might still be quite contradictory to hold that a foreign decision cannot be enforced due to the party's attempt to "evade" an award that has been found in violation of the Convention right to fair proceedings.

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CONTACT US

Association Européenne de droit international privé /
European Association of Private International Law

4 Rue Alphonse Weicker
L-2721 Luxembourg

THE SECRETARY GENERAL

secretary.general@eapil.org

THE EDITORS OF THE BLOG

blog@eapil.org