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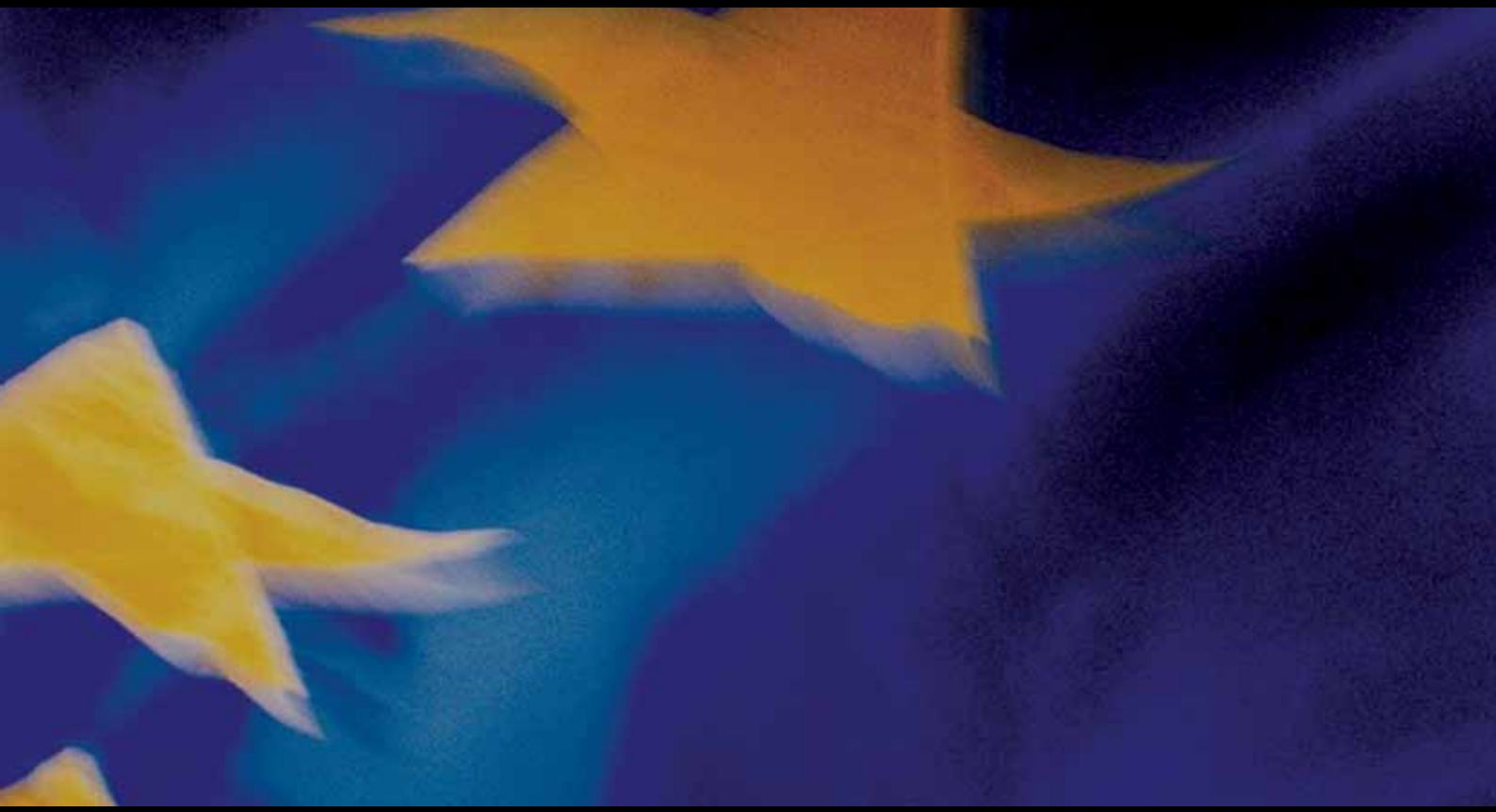

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Evidence in International Arbitration: The Italian Perspective

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The procedural framework governing the gathering and evaluation of evidence in international arbitration depends upon a complex interaction of different legal sources, including:

- the parties' agreement to arbitrate, which, either directly or by reference to a predetermined body of rules, may govern several aspects of the evidentiary phase, including the type of evidence that is available to the parties for use in the proceedings (eg, oral and documentary evidence), the procedure through which such evidence may be gathered (eg, in-person examination of witnesses and document production), and the legal standard applicable to the admissibility, relevance and materiality of such evidence;
- the procedural orders of the arbitral tribunal, which, in default of the parties' agreement, will set out the applicable evidentiary rules;
- the law of the seat of the arbitration (lex arbitri), which, in addition to contemplating the various forms of state court assistance in the gathering of evidence (eg, in respect of a recalcitrant witness), may also impose limitations on the ability of the parties and the arbitral tribunal to determine on their own the applicable evidentiary rules (eg, in respect of the parties' ability to obtain or rely upon certain evidence and the tribunal's power to evaluate it freely);
- the law of the state where the evidence is located, which may contemplate various forms of judicial assistance in the gathering of evidence in support of an arbitration seated overseas (eg, witness depositions in the United States pursuant to part 28, section 1782, of the US Federal Rules of Civil Procedure for use in foreign arbitration proceedings); and
- the law of the place where recognition and enforcement of the award is sought (lex loci executionis), which may restrict a party's ability to obtain such recognition and enforcement if the evidentiary rules that were applied in the arbitration proceedings did not accord with public policy or with the mandatory rules of that country.

This paper addresses the interaction of these sources in international arbitration proceedings whose seat is in Italy.

Parties' autonomy in the determination of applicable evidentiary rules

Procedural flexibility is one of the key features of international arbitration and indeed one of the reasons why parties to international business transactions tend to favour arbitration over litigation. The autonomy of the parties in determining the procedural rules applicable to international arbitration, including evidentiary rules, is of 'special importance' because it allows them to 'select or tailor' those rules in accordance with their own 'specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts', thus obviating the 'risk of frustration or surprise' that may ensue from 'unexpected and undesired restrictions found in national laws.'[1] This principle is codified in article 19.1 of the UNCITRAL Model Law, which provides that 'the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings'. It is also found in many arbitration statutes;[2] Italian arbitration law is no exception.

Pursuant to article 816-bis, first paragraph, of the Italian Code of Civil Procedure (CPC), 'the parties may establish, in the arbitration agreement or in a separate written document preceding the commencement of the arbitration, the rules that the arbitral tribunal shall apply to the proceedings'. Accordingly, in arbitration proceedings where the seat is in Italy, parties have three avenues for agreeing upon the applicable evidentiary rules.

First, the parties may lay down those rules in the arbitration clause, which reflects the parties' agreement to submit to arbitration future disputes that may arise out of the contract that contemplates it.[3] In practice, however, this is uncommon. At the time of entering into the contract, the parties would not know whether a dispute would arise, what the relevant issue would be, who would have the burden of proof and which type of evidence the parties would seek to rely upon. Thus, usually the arbitration clause would merely incorporate the arbitral rules of a leading institution[4] or other set of predefined ad hoc rules,[5] which would outline the procedural framework applicable to the arbitration, including rules relating to evidence. Institutional and ad hoc arbitration rules follow a minimalistic approach with regard to evidence, as they are intended to preserve the flexibility inherent in international arbitration.[6]

Second, the parties may set forth the applicable evidentiary rules in the submission agreement, which is a purpose-drafted agreement whereby parties agree to submit to arbitration a dispute that has already arisen between them, but which is not covered by an earlier arbitration clause.[7] Here, the parties are better positioned to assess the type of evidentiary rules that may best suit their case because, unlike the arbitration clause scenario, a dispute has already arisen. In practice, however, submission agreements are rare, and even assuming parties are able to agree to arbitration once a dispute has arisen, it is unclear whether at that point they would also be willing to agree upon the evidentiary rules applicable to the arbitration.

Third, the parties may agree upon the evidentiary rules applicable to the arbitration in a 'separate written document [...] preceding the commencement of the arbitration.' The Italian Supreme Court has held that, for purposes of article 816-bis, first paragraph, CPC, the expression 'preceding the commencement of the arbitration' must be interpreted as a reference to the period preceding the constitution of the arbitral tribunal,[8] as opposed to the period preceding the institution of the proceedings (which is normally determined by reference to the service of the request for arbitration upon the respondent or the filing of such request with the institution administering the proceedings).[9] A similar rule is reflected in the Rules of Arbitration of the Milan Chamber of Arbitration (CAM), the leading Italian arbitral institution. Pursuant to Article 2 of the CAM Rules, 'arbitral proceedings shall be governed [...] by the rules agreed upon by the parties, up to the constitution of the Arbitral Tribunal.' In Italy, it is customary for an arbitral tribunal to declare itself formally constituted at the first procedural hearing, which is also the hearing at which the tribunal will normally seek

the parties' consent for the adoption of the procedural rules applicable to the arbitration, including the rules applicable to evidence. The minutes of this hearing and the procedural rules contemplated therein constitute a 'separate written document' for purposes of article 816-bis, first paragraph, CPC.

Depending on the features of the arbitration, the parties may wish to set out provisions governing certain specific aspects of the evidentiary phase, including the following.

Whether any, and if so, which, documents or classes of documents should be disclosed and produced by the parties and at what stage

The parties may agree that each of them is entitled to seek the production of documents that are in the possession of the other. Parties may have different expectations on the extent of their entitlement to obtain documents that are favourable to their case from their opponents, especially if they come from different legal traditions. It is thus critical to lay down, at the outset of the arbitration, the rules applicable to document production. In that regard, it has become common practice in international arbitration to include in the arbitration agreement or in the separate written document a reference to the IBA Rules on the Taking of Evidence (the IBA Rules of Evidence). Article 3 of the IBA Rules of Evidence – which international arbitration scholars regard as the universally recognised international standard for an effective, pragmatic and relatively economical document production regime – sets forth the rules applicable to document production in international arbitration, which may be summarised as follows:

- each party may submit to the arbitral tribunal and to the other parties a document production request containing:
  - a description of the documents or the category of documents requested;
  - a statement explaining how the requested documents are relevant to the case and material to its outcome; and
  - a statement that the requested documents are in the possession, custody or control of the party to whom the request for document production is addressed;
- the party to whom the request for document production is addressed may object to the request based on one of the grounds set forth in article 9.2 of the IBA Rules of Evidence, namely, that it would be unreasonably burdensome or disproportionate or unfair for it to produce the documents, or the requested documents:
  - are irrelevant to the case or immaterial to its outcome;
  - are legally privileged or commercially or politically sensitive; or
  - have been destroyed or cannot be located; and
- the tribunal orders the production of documents for which no objection has been raised and decides upon the objections raised.

Pursuant to article 9.5 of the IBA Rules of Evidence, if a party fails 'without satisfactory explanation' to comply with a document production order or to produce a document against whose production it had raised no objection, the arbitral tribunal 'may infer that such document would be adverse to the interest of that party' or, subject to the provisions of the lex arbitri, may take steps to compel its production.

Whether the parties should be allowed to rely upon witness evidence and, if so, whether there should be any limitations on the parties' ability to do so.

Article 4 of the IBA Rules of Evidence sets out the rules applicable to witnesses. This article codifies the procedures that have been developed over the years by international arbitral tribunals and arbitral institutions. As a result, some of these rules may conflict with the procedural rules applicable to domestic state court proceedings. Thus, pursuant to article 4.2 of the IBA Rules of Evidence, 'Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.' In contrast, the Italian rules of civil procedure forbid parties' representatives and other individuals having an interest in the outcome of the case from tendering evidence as witnesses (article 246 CPC). Furthermore, pursuant to Articles 2721 and 2722 of the Italian Civil Code (CC), testimony of a witness is not admissible in state court proceedings when it is tendered to prove the content of a contract, or additions or amendments to it: another limitation that is not found in the IBA Rules of Evidence. The common view among Italian arbitration practitioners is that these domestic limitations do not apply to international arbitration proceedings whose seat is in Italy, unless the parties explicitly agree to incorporate them.

Under the IBA Rules of Evidence, the testimony of factual witnesses is tendered in writing (through what is known as a witness statement) ahead of the evidentiary hearing, in accordance with the requirements set forth in article 4.5 of the IBA Rules of Evidence. If one party presents a witness, the other party is entitled to request his appearance at the evidentiary hearing (article 8.1 of the IBA Rules of Evidence) and to cross-examine him. There are at least three objectives a cross-examiner would seek to achieve in examining a witness:

- to discredit the witness in the eyes of the tribunal (eg, by exposing inconsistencies or inaccuracies in the witness statement);
- to disprove the case put forward by the party tendering the witness (by exposing inconsistencies between the statement filed by the witness and the submission and documents filed by the party presenting that witness); and
- to support the case being made by the party represented by the cross-examiner (by eliciting facts, through questioning of the witness, that are favourable to that party).

Article 4.7 of the IBA Rules of Evidence provides that, if a witness whose appearance has been requested pursuant to article 8.1 thereof fails, without a valid reason, to appear to provide testimony at an evidentiary hearing, then the arbitral tribunal must disregard that witness' statement.

The language in which documents should be produced and evidence tendered.

Documents and evidence are usually submitted in their original language with a translation into the language chosen for the arbitration. The parties may agree that documents and submissions can be exchanged in a language other than the language of the arbitration. This may appear to be a relatively minor point, but insofar as time and costs are concerned it is not. If the parties can anticipate that a large quantity of documents will be submitted in a language other than the language of the arbitration, it can save considerable time and costs to agree that those documents need not be translated.

The role of the arbitral tribunal

Pursuant to article 816-bis, first paragraph, CPC, 'Failing the parties' agreement, the arbitral tribunal may conduct the proceedings in such manner as it considers appropriate.'[10] Likewise, article 2 of the CAM Rules provides that 'The arbitral proceedings shall be governed by the [CAM] Rules, by the rules agreed upon by the parties, [...] or in default, by the rules set forth by the Arbitral Tribunal.'[11]

Due to the impact that the conduct of the evidentiary phase might have on the overall time and costs of the arbitration, prior

to determining the rules applicable to the arbitration, the arbitral tribunal will consult with the parties. This principle is stated in the IBA Rules of Evidence. Pursuant to article 2 thereof, 'The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.' This consultation would typically address the scope, timing and manner of the taking of evidence, including the requirements, procedure and format applicable to document production, the preparation and submission of witness statements and expert reports, the taking of oral testimony at the evidentiary hearing, and the rules pursuant to which such hearing will be conducted.

Likewise, pursuant to article 24 of the ICC Rules, as soon as it has drawn up the terms of reference, the arbitral tribunal 'shall convene' a case management hearing 'to consult the parties on procedural measures,' including on evidentiary matters. Specifically, appendix IV to the ICC Rules lists 'examples of case management techniques that can be used by the arbitral tribunal' to 'control time and cost' in order to ensure that these 'are proportionate to what is at stake in the dispute.' Among these techniques are the early determination of the procedure applicable to document production and the setting of limitations on the length and scope of written submissions and written and oral evidence (both fact witnesses and experts) 'so as to avoid repetition and maintain a focus on key issues.'

The lex arbitri

Public policy and mandatory rules of the lex arbitri

The parties can tailor the evidentiary phase in the arbitration to meet their wishes and expectations in order to secure a fair and effective resolution of the dispute, but international arbitration does not take place in a legal vacuum, and the parties' ability to design their own procedure is limited by public policy and the mandatory rules of the lex arbitri. A breach of these rules may result in a defect of the ensuing award, exposing it to a challenge under the rules of the lex arbitri and, in certain circumstances, to a potential refusal of recognition and enforcement pursuant to article V.1(b) and article V.1(d) of the New York Convention.[12]

In Italy, a breach of public policy and Italian mandatory rules relating to evidence could potentially give rise to a challenge of an award based on a due process violation pursuant to article 829, first paragraph, No. 9, CPC, and an error of law resulting in a breach of public policy pursuant to article 829, third paragraph, CPC, which does not amount to a due process violation.[13]

Due process

International arbitration proceedings must be conducted fairly and properly to ensure that each party is treated with equality and is given a fair hearing, with a full and proper opportunity to present its case. This fundamental principle is embodied in article 18 of the UNCITRAL Model Law ('The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case') and in many arbitration statutes. Specifically, pursuant to article 816-bis, first paragraph, CPC, the arbitral tribunal 'shall, in any event, give effect to the principle of due process, granting the parties reasonable and equal opportunity to present their cases.' A breach of due process in respect of evidence may occur if a party is denied the opportunity to present its witnesses or to attend a hearing or to cross-examine the other party's witnesses or experts. While these are clear instances of conduct resulting in a breach of due process, in practice, it is not easy to determine whether such a breach has occurred.

Mandatory rules

Italian law contemplates a number of mandatory rules relating to the evaluation of evidence, the breach of which could potentially expose the award to a challenge. Among these rules are those imposing a specific evidentiary weight attributable to certain types of evidence. These rules conflict with one of the fundamental principles in international arbitration, codified in article 9.1 of the IBA Rules of Evidence, that the arbitral tribunal must determine for itself the weight to be given to the evidence presented before it. Parties and international arbitrators in proceedings whose seat is in Italy should therefore be aware of the existence of these rules. Hereunder, it is worth mentioning those relating to:

- judicial confession. Pursuant to article 2730 CC, this is a 'statement of the truth of a party that is unfavourable to that party and favourable to the other.' Article 2733, second paragraph, CC provides that a judicial confession constitutes 'full proof' of its subject matter, against the party who gave it; and
- public or notarised documents. These are documents that have been drawn up in accordance with certain formalities. Pursuant to article 2700 CC, public or notarised documents constitute 'full proof' of the facts that are recorded in them. The party intending to challenge the evidentiary weight of public or notarised documents must institute an ad hoc criminal proceeding.

The role of these and similar rules and their mandatory nature is expressly recognised in the CAM Rules. Pursuant to article 25(2) thereof, 'the arbitral tribunal shall freely evaluate all evidence, with the exception of that which constitutes legal proof under mandatory provisions applicable to the proceedings or to the merits of the dispute'.

However, it is unclear whether a breach of these rules by the arbitral tribunal could give rise to a challenge of the award. There is no case law on point, but any such challenge is unlikely to be successful as it would require the challenging party to show that a breach of these rule amounts to a violation of public policy pursuant to article 829, third paragraph, CPC, which would, in turn, require that party to show that the notion of public policy under that provision is a notion of domestic as opposed to international public policy, and applies also to procedural rules.

Judicial assistance

In addition to imposing limitations in respect of the parties' and the arbitral tribunal's ability to tailor the rules concerning evidence, the lex arbitri contemplates the various forms of judicial assistance for the gathering of evidence for use in arbitration proceedings.[14]

This is important because one of the most significant shortcomings of arbitration is the arbitral tribunal's lack of coercive power with respect to the taking of evidence. Accordingly, parties to an arbitration would normally have to resort to the assistance of state courts to compel the appearance of witnesses, secure the preservation of evidence, and order the production of documents. The scope of state court assistance in evidentiary matters is laid down in the lex arbitri. The rules described below apply to arbitral proceedings with an Italian seat.

Appearance of witnesses

Pursuant to article 816-ter, second and third paragraphs, CPC, 'The arbitral tribunal may hear witnesses.' But if a witness refuses to appear, the arbitral tribunal may 'request the president of the court where the seat of the arbitration is located to order the appearance of the witness'.

In Italy, unlike the practice in other countries and the UNCITRAL Model Law, only arbitral tribunals (and not the

parties) are vested with the power to seek assistance from state courts to compel the appearance of witnesses.

Arbitral tribunals enjoy a certain degree of discretion in deciding whether to resort to the state court for assistance. The factors that they would normally consider include:

- the reasons given by the witness for his or her refusal to appear before the arbitral tribunal;
- whether a party has filed a petition with the arbitral tribunal seeking state court assistance; and
- the probative value of the witness testimony for the outcome of the case.

Pursuant to article 816-ter, fourth paragraph, CPC, if the arbitral tribunal seeks state court assistance, the time limit for the rendition of the award is stayed and only resumes upon the hearing date for the appearance of that witness before the arbitral tribunal. If a witness refuses to appear, even after a state court has issued an order, the arbitral tribunal may ask the state court to compel his appearance with the assistance of law enforcement pursuant to article 255 CPC.

Preservation of evidence

Prior to the 2006 reform, Italian arbitration law did not contemplate any form of state court assistance in evidentiary matters. To fill this vacuum, a number of scholars had suggested relying upon the rules of the CPC governing the preservation of evidence in anticipation of litigation proceedings. Specifically, a party may seek urgent measures from the court aimed at: securing pretrial witness depositions if there are 'strong reasons to believe that one or more witnesses may not be available during the proceedings', for example, due to health reasons (article 692 CPC); and ordering pretrial inspections of objects or premises if there is 'urgency to ascertain their status or condition' (article 696 CPC).

Until recently, the Italian Supreme Court repeatedly dismissed attempts to seek court-ordered urgency measures in aid of arbitral proceedings on the grounds that the parties' agreement to arbitrate precluded reliance on provisions intended to apply to court proceedings. In a 2010 ruling, however, the Italian Constitutional Court took a different position, holding that parties to arbitration may apply to a state court in order to obtain urgent measures relating to evidence in aid of arbitration.[15] According to the Constitutional Court, any contrary interpretation would violate the fundamental principles of equality (article 3 of the Italian Constitution) and access to justice (article 24 of the Italian Constitution) because it would result in an unreasonable discrimination between arbitrating and non-arbitrating parties with respect to evidentiary matters. Thus, parties to an arbitration proceeding may now resort to state courts to obtain urgent measures for the preservation of evidence to be used in arbitration proceedings in the same way they can be used in national court proceedings.

Document production

Article 670, No. 2, CPC grants state courts the power to order the 'seizure: [...] of books, records, documents, templates, samples and any other thing that is needed for the taking of evidence', when there is a need to secure documents and it is appropriate to detain them temporarily.

Despite this seemingly broad language, the court-ordered seizure under article 670, No. 2, CPC has a much more limited scope. In fact, it only allows for the securing of specific documents.

Recourse to article 670, No. 2, CPC is now also allowed in connection with arbitration proceedings. After the decision of the Italian Constitutional Court mentioned above, 'even during arbitration proceedings, it is allowed, inter alia, to request the seizure of books, records, documents, templates, samples and any other thing that is needed to gather evidence' pursuant to article 670, No. 2, CPC.

The law of the place where the evidence should be gathered

Parties may seek the assistance of a foreign court to obtain evidence for use in arbitration proceedings taking place in Italy.

For instance, part 28, section 1782, of the US Federal Rules of Civil Procedure (Section 1782) allows parties to proceedings pending before a 'foreign' or 'international tribunal' to request assistance from the US federal courts in ordering the production of documents and deposition of witnesses. US courts may exercise the powers contemplated in Section 1782 provided that the evidence to be gathered is in the possession of a third party who is not a party to the 'foreign' or 'international proceedings', and who is subject to the jurisdiction of US courts (eg, because it has assets in the US).[16] Production orders and orders for deposition of witnesses are typically accompanied by subpoenas.

Recently, the notions of 'foreign' and 'international tribunal' have been interpreted broadly to extend the scope of application of Section 1782 to international arbitration proceedings taking place outside the US.[17]

The law of the place where recognition and enforcement is sought

The arbitral tribunal must conduct the arbitration in accordance with the procedure agreed to by the parties and the arbitral tribunal, and the mandatory rules of the lex arbitri. If it fails to do so, the award may be refused recognition and enforcement, including pursuant to article V.1(b) and (d) of the New York Convention. Moreover, pursuant to article V.2(b) of the New York Convention,

> *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> [...]
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country.*

Accordingly, the arbitral tribunal should administer the evidentiary phase in the arbitration bearing in mind that the ensuing award may be scrutinised by a third country at the stage of recognition and enforcement and that the public policy principles relating to evidence that exist in that country might potentially affect a party's ability to rely upon the New York Convention for that purpose.

The importance that the award be recognisable and fully enforceable is of primary concern in an arbitration proceeding, and is explicitly recognised in several arbitration rules, which provide that 'the Arbitral Tribunal [...] shall make every effort to make sure that the Award is enforceable at law' (article 41 of the ICC Rules).

Notes

1 UNCITRAL Model Law, Explanatory Notes, paragraphs 7 and 35.

2 See, eg, section 34(1) of the Arbitration Act 1996 ('it shall be for the tribunal to decide all procedural matters, subject to the right of the parties to agree on any matter'); article 1509 of the French Code of Civil Procedure ('an arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules'); and Article 182(1) of the Swiss Private International Law Act ('the parties may, directly or by reference to the rules of arbitration, determine the arbitral procedure').

3 The Italian requirements applicable to arbitration clauses are set forth in article 808 CPC.

4 Pursuant to article 832, first paragraph, CPC, 'The agreement to arbitrate may refer to a set of pre-existing arbitration rules.' Among the best known commercial arbitration institutions are the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the Milan Chamber of Arbitration (CAM).

5 Among these it is worth mentioning the 2010 UNCITRAL Arbitration Rules and the 2007 CPR Rules for Non-Administered Arbitration.

6 For instance, pursuant to article 19 of the ICC Rules, 'The proceedings before the arbitral tribunal shall be governed by these Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.'

7 The Italian law requirements applicable to submission agreements are set forth in article 807 CPC

8 Italian Supreme Court, Judgment No. 8532 dated 28 May 2003.

9 See, eg, article 3 of the UNCITRAL Rules ('The party or parties initiating recourse to arbitration [...] shall communicate to the other party or parties (hereinafter called the 'respondent') a notice of arbitration. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent'); and article 4 of the ICC Rules ('A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the 'Request') to the Secretariat [...]. The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration').

10 See also, eg, article 19.2 of the UNCITRAL Model Law ('Failing [the parties'] agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence'); section 34(1) of the English Arbitration Act ('it shall be for the tribunal to decide all procedural matters, subject to the right of the parties to agree on any matters'); article 1509, second paragraph, of the French Code of Civil Procedure ('unless the arbitration agreement provides otherwise, the arbitral tribunal shall define the procedure as required, either directly or by reference to arbitration rules or to procedural rules'); and article 182(2) of the PILA (if the parties have not determined the procedure, the Arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to the rules of arbitration').

11 See also, for example, article 14(1) of the LCIA Rules ('the Arbitral Tribunal's general duties at all times: [...] (ii) to adopt procedures suitable to the circumstances of the arbitration'); and article 19 of the ICC Rules ('the proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration').

12 Pursuant to article V.1(b) and (d), 'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...] (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or [...] (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'

13 Pursuant to article 829, third paragraph, CPC, an award may not be challenged based on an error of law, unless:
- the parties have agreed otherwise;
- the error of law relates to a breach of public policy;
- the arbitral proceedings relate to a labour law dispute; or
- the error of law relates to the determination of a preliminary issue in a matter which is not arbitrable (eg, a matter concerning the status of individuals).

14 Pursuant to article 27 of the UNCITRAL Model Law, 'The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.' See also article 184 of the Swiss Federal Law (if 'for the taking of evidence the assistance of state courts is required, the arbitral tribunal or a party, upon the arbitral tribunal's approval, may request such assistance to the court where the seat of the arbitration is established. The court shall apply its own law'); and section 44 of the English Arbitration Act 1996, which provides that 'the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. Those matters are (a) the taking of the evidence of witnesses; (b) the preservation of evidence; (c) making orders [...] for the inspection, photographing, preservation, custody or detention of the property, or [...] ordering that samples be taken from, or any observation be made of, or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration').

15 Constitutional Court, Judgment No. 26 dated 28 January 2010.

16 *Intel Corporation v Advance Micro Device, Inc*, 124 S Ct 2466, 159 L Ed 2d 355.

17 *In re Roz Trading Limited*, 469 F Supp 2d 1221 (ND Ga, 2006).

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