

appropriate for the proceedings to continue as if it were an action, particularly where the dispute is one of some complexity. However, in this relatively straightforward case, and ‘Consistent with the Overriding Objective, the priority must be to progress matters sensibly and cost effectively rather than to waste time and costs for formalistic reasons’.

The overriding objective also made an appearance in *Terna Bahrain Holding Co v Marzook* (unrep, QBD, 20/09/12), in which the court recognised the importance of the policy that enforcement of arbitration awards should not be delayed unnecessarily. This did not, however, enable the court to deal with issues that had been raised in a manner that would contravene the overriding objective, and could not be used to displace the usual procedures in place for summary dismissal applications, which had been devised to allow the courts to determine matters in an efficient and orderly way.

Conclusion

The courts recognise the important role they have to play in giving effect to any award made by an arbitral body. *West Tankers* is a clear indication of the courts’ pro-arbitration stance. However, there is also evidence that the courts will use section 66 flexibly where justice so requires, and seek to balance the need to follow due procedure and the need to enforce awards promptly with the need to ensure the parties each get a fair hearing.

Notes

- 1 *Arbitration News*, Vol 17 No 2 September 2012.
- 2 The Act also applies to Wales and Northern Ireland. However, this article focuses on recent case law in the English courts.
- 3 See, *ASM Shipping Ltd of India v TTMI Ltd of England* [2007] EWHC 927 (Comm).
- 4 See, *Middlemiss & Gould v Hartlepool Corp* [1972] 1 WLR 1643.
- 5 See, *West Tankers Inc v Allianz Spa* [2012] EWCA Civ 27.

Ferdinando Emanuele

Cleary Gottlieb Steen & Hamilton, Rome
femanuele@cgsh.com

Milo Molfa

Cleary Gottlieb Steen & Hamilton LLP, London
mmolfa@cgsh.com

Recent developments in the challenge of arbitral awards under Italian law

Introduction

The expression ‘challenge of an arbitral award’ covers any form of judicial recourse for the setting aside or annulment, in whole or in part, of an arbitral award.

The body of rules applicable to the challenge of an award rendered in international arbitration proceedings is the by-product of the interplay between:

- the *lex arbitri*, that is, the law of the seat of the arbitral proceedings, which sets forth the procedural framework pursuant to which arbitral awards may be challenged;
- the arbitration agreement, including any institutional rules incorporated by reference therein; and
- international treaties, such as the 1958 Convention on the Recognition and

Enforcement of Foreign Arbitral Awards and the 1961 European Convention on International Arbitration.

Challenges of awards in arbitral proceedings with an Italian seat

Articles 827–831 of the Italian Code of Civil Procedure (the ‘CCP’) govern the challenges of awards rendered in arbitral proceedings with an Italian seat. These provisions contemplate three forms of judicial recourse against arbitral awards:

- a challenge for the annulment of an award, which is the ordinary form of recourse that is available to the parties for the setting aside of an award (Articles 828–830 CCP);
- a challenge for the revocation of an award, which is a particular recourse available

to parties for setting aside an award which suffers from limited, yet serious irregularities (Articles 831, first and second paragraphs, and 395, Nos 1–3 and 6, CCP); and

- a third-party challenge of an award, which is a form of recourse that is available to third parties for the setting aside of an award that adversely affects their rights (Articles 831, third paragraph, and 404 CCP).

All recourses against awards rendered in Italy must be brought before the appellate court of the district at the seat of the arbitration (Articles 828, first paragraph, and 831, third paragraph, CCP).

Only final awards resolving – in whole or in part – the subject matter of a dispute are subject to challenge (Article 827, second paragraph, CCP). Conversely, interim awards deciding one or more issues that have arisen in the arbitral proceedings, but which do not definitively adjudicate the dispute, may only be challenged jointly with the award that finally adjudicates the dispute.

Annulment

TIME LIMITS

Pursuant to Article 828 CCP, a challenge for the annulment of an award must be brought:

- within 90 days from the date on which the party bringing the challenge was notified of the award in accordance with the rules for service of claims in judicial proceedings. The notification of an award made by the arbitral tribunal or by the institution administering the proceedings under its own arbitration rules does not trigger the running of this 90-day time limit;¹ or
- if the award has not been notified in accordance with the rules for service of claims in judicial proceedings, within one year from the date the award was rendered.

GROUNDS

A challenge for the annulment of an award may be brought only on the following grounds: (i) procedural violation; (ii) error of law (in very limited circumstances); or (iii) breach of public policy.

Procedural violation

Pursuant to Article 829, second paragraph, CCP, an award may be challenged for procedural violations only if the party

bringing the challenge has not caused the ground invoked for challenging the award. Moreover, if the party has failed to raise the alleged procedural violation before the arbitral tribunal, then the party is prevented from relying upon this alleged violation as a ground for annulment.

Article 829, first paragraph, CCP, lists the procedural violations which may give rise to a challenge as follows:

- invalidity of the agreement to arbitrate;
- appointment of the arbitrators in breach of Italian law, provided that the party challenging the award had raised the relevant objection before the arbitral tribunal;²
- rendering of the award by a person who did not satisfy the prerequisites to be appointed as an arbitrator;
- the award deals with matters which are not arbitrable or which are not contemplated by, or do not fall within the scope of, the agreement to arbitrate;³
- the award omits the reasons on which it is based, the determination of the relief which it purports to grant, or the arbitrators' signatures;⁴
- rendering of an award after the expiration of the relevant time limits, for example, pursuant to Article 820 CCP (ie, 240 days from the constitution of the arbitral tribunal) or other applicable rules, provided that before the award is rendered, the party bringing the challenge notifies the other party and the arbitrators of its intention to challenge the award on this ground;⁵
- non-compliance with the procedural requirements for the conduct of the arbitral proceedings as agreed by the parties, provided that these requirements were set forth under express sanction of annulment, and were not otherwise waived by the parties in the proceedings;
- the award conflicts with a previous award or judgment which is binding on the same parties, provided that such award or judgment was submitted in the arbitral proceedings;
- a due process violation (for example, the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or of the commencement of the proceedings);⁶
- the award does not decide the issues in dispute;
- the award contains contradictory findings; or

- the award does not address the parties' claims which are within the scope of the agreement to arbitrate.

Pursuant to Article 829, first paragraph, CCP, parties cannot agree to waive any of the foregoing grounds to challenge an award in their arbitration agreement.

Error of law

Pursuant to Article 829, third paragraph, CCP, an award cannot be challenged based on an error of law, unless:

- The parties have agreed otherwise. Unlike in other jurisdictions, in Italy, the rules concerning the exercise of rights within a certain time period are rules of substantive law. Accordingly, alleged violations of these rules may give rise to a challenge of the award only if the parties have previously agreed that the award may be challenged on errors of law.⁷
- The error of law relates to a mandatory provision of Italian law (ie, statutory provisions from which the parties may not depart) or results in a breach of public policy (discussed below).
- The arbitral proceedings relate to a labour law dispute.
- 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).

Even in the very limited instances in which a challenge for error of law is allowed, Italian courts will not revisit the findings of fact made by the arbitral tribunal.⁸

Breach of public policy

An award may be challenged based on a breach of public policy (Article 829, third paragraph, CCP). Although Italian law provides no guidance on this subject in the context of challenging arbitral awards, there seems to be consensus among Italian scholars on the following key points:

- Italian courts are allowed to determine *ex officio* whether or not an arbitral award has been rendered in breach of public policy;
- a breach of public policy refers to a breach of a legal principle of the jurisdiction whose substantive law governs the dispute;
- if the applicable substantive law is not Italian law, then the notion of public policy must be construed narrowly, that is, by reference to international public policy, which comprises the fundamental notions

of morality and justice of the community of nations; and

- if the applicable substantive law is Italian law, then public policy must be construed more broadly, that is, by reference to national public policy, the boundaries of which should be determined by reference to the fundamental principles of Italian law enshrined in the Italian Constitution and the European Convention on Human Rights.

The consequences of a successful challenge for the annulment of the award

Pursuant to Article 830, first paragraph, CCP, if the state court upholds a challenge for the annulment of an award, it sets aside the whole award, unless it finds that there is no agreement to arbitrate, that is, the parties have not agreed to arbitration or the subject matter of the agreement to arbitrate relates to disputes that are not even theoretically capable of being referred to arbitration.⁹

If the challenge is only partly upheld or relates to only a portion of the award, the state court may set aside only that portion of the award that is affected by the challenge, leaving intact the balance of the award.

If the award is set aside, the court must decide the merits of the dispute, provided that:

- the award has been set aside on one of the grounds set forth in Article 829, second paragraph, Nos 5–9 and 11–12, or third through fifth paragraphs, CCP (discussed above); and
- the parties have not agreed otherwise in the agreement to arbitrate.

If, however, at the time of execution of the agreement to arbitrate one of the parties was domiciled in a country other than Italy, the court will decide the merits of the dispute only if the parties have so agreed. In any event, the parties may not raise new claims in the state-court proceedings deciding the merits of the dispute upon the annulment of an award.¹⁰

Challenge for the revocation of the award

This is a remedy that can be sought only when the award is rendered:

- In proceedings where there has been fraud, collusion or corruption by one or more members of the arbitral tribunal or one of the parties, provided that such conduct (i) has already been ascertained in a judgment that has become *res iudicata*,¹¹ and (ii) was a decisive element in the reasoning of the arbitral tribunal;¹²



- on the basis of forged evidence; or
- where a party has been unable to proffer decisive evidence in the arbitral proceedings, either because the other party has concealed it or because the evidence was not available due to force majeure (Articles 831, first and second paragraphs, and 395, Nos 1–3 and 6, CCP).

Traditionally, Italian courts have construed these grounds narrowly in order to avoid parties relying on them spuriously to invalidate awards.

The 30-day time limit applicable to a challenge for the revocation of an award starts running from when the facts which would justify the challenge become known to the party intending to bring it (Articles 325 and 326, first paragraph, CCP).

Third-party challenge

This is the only form of recourse that is available to third parties against arbitral awards (Articles 831, third paragraph, and 404 CCP). A third party is a party which has not participated in the arbitral proceedings, irrespective of whether it was a party to the agreement to arbitrate.

A third party can challenge an arbitral award if the award undermines its own rights. This is typically the case where two parties have fraudulently colluded to obtain an award which prejudices the rights of a third party (for example, where the third party is a creditor or an assignee of one of the parties).

In the event a third party is prejudiced by the fraudulent collusion of the arbitrating

parties, the third-party challenge must be brought within 30 days from the date on which the third party discovers the collusion. In all other cases of third-party challenge, there are no time limits.

If the appellate court upholds the third-party challenge, modification of the award will be made by (i) the appellate court (if the third party is not a party to the agreement to arbitrate) or (ii) the arbitral tribunal (if the third party is a party to the agreement to arbitrate).

Notes

- 1 Italian Supreme Court, Judgment No 17420 of 30 August 2004.
- 2 Italian Supreme Court, Judgments No 23056 of 15 November 2010, and No 13246 of 16 June 2011.
- 3 Italian Supreme Court, Judgment No 13968 of 24 June 2011.
- 4 Italian Supreme Court, Judgments No 8049 of 8 April 2011, and No 14574 of 16 June 2010.
- 5 Italian Supreme Court, Judgment No 889 of 23 January 2012.
- 6 Italian Supreme Court, Judgment No 3917 of 17 February 2011.
- 7 Italian Supreme Court, Judgment No 2400 of 20 February 2012.
- 8 Italian Supreme Court, Judgments No 15085 of 10 September 2012, and No 13968 of 24 June 2011.
- 9 Italian Supreme Court, Judgment No 22083 of 16 October 2009.
- 10 Italian Supreme Court, Judgment No 20880 of 8 October 2010.
- 11 Italian Supreme Court, Judgment No 1409 of 27 January 2004.
- 12 Rome Court of Appeals, Judgment of 11 February 1980.

Choosing the right route to enforcement of awards in the Netherlands

According to Article VII of the New York Convention, a party is allowed to base its request for enforcement of a foreign arbitral award on the conditions set out in the domestic laws of the country in which enforcement is sought (the forum

country). Accordingly, under Dutch law, a party seeking enforcement can choose between the domestic conditions set out in Article 1076 of the Dutch Civil Code for Procedures ('DCCP') and the conditions set out in the New York Convention (Article 1075 DCCP).¹

Saloua Hoeve-Ouchan

VoskampLawyers,
Singapore
Saloua.hoeve-ouchan@voskamplawyers.com