Challenge of Arbitral Awards: The Italian Perspective

Ferdinando Emanuele and Milo Molfa
Cleary Gottlieb Steen & Hamilton LLP

Introduction

The expression 'challenge of an arbitral award' (*impugnazione del lodo*) covers any form of judicial recourse for the setting aside (ie, the annulment), in whole or in part, of an arbitral award.

The body of rules applicable to a challenge of an award rendered in international arbitration proceedings, including the grounds on which a challenge may be brought and the legal consequences arising out of a successful challenge, is the by-product of the interplay between:

- the lex arbitri, ie, the law of the seat of the arbitral proceedings;
- the agreement to arbitrate, 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 (New York Convention) and the 1961 European Convention on International Arbitration (Geneva Convention), to which the country at the seat of the arbitration is a contracting party.

In the first part of this paper, we address the role played by each of the lex arbitri, the agreement to arbitrate and any institutional rules incorporated therein, as well as international treaties in the context of a challenge of an award rendered in international arbitration proceedings. We then turn to the provisions found in articles 827-831 of the Italian Code of Civil Procedure (CPC), which govern challenges of awards rendered in arbitral proceedings with an Italian seat.

Lex arbitri

The lex arbitri sets forth the procedural framework within which to challenge arbitral awards, including by establishing rules on:

- the types of recourse available against arbitral awards;
- the parties' standing to challenge the award and third-party rights in connection therewith;
- the time limits within which to challenge the award;
- the determination of the court with jurisdictional competence to adjudicate the merits of a challenge;
- the grounds on which the award may be set aside and the extent to which parties may waive any of those grounds; and
- the scope of the judicial review of the award and, in particular, the court's ability to review and overturn findings of fact made by the arbitral tribunal.

Unlike the unifying trend in recognition and enforcement of foreign awards to which the New York Convention aspires, there is no international treaty governing challenges of arbitral awards. Thus, states have deemed themselves free to determine for themselves the rules applicable to challenges of awards rendered within their territories. As a result, judicial review is 'heteroclite' and a 'field of frequently unpredictable results'.[1] In particular, as pointed out by the UNCITRAL Secretariat in the Explanatory Note on the UNCITRAL Model Law (Model Law) on International Commercial Arbitration:

> *The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.*[2]

An attempt to standardise the national rules of procedure applicable to the judicial review of awards is found in article 34 of the Model Law. This provision, which lists the grounds on which an award may be set aside, mirrors article V of the New York Convention, which in turn lists the grounds on which an award may be refused recognition and enforcement.[3] So far, the Model Law has not achieved the harmonisation purpose that its drafters had intended, as only a handful of countries have adopted it.[4]

Arbitration rules

The arbitration rules laid down in the agreement to arbitrate may contemplate waivers to the parties' right of recourse against the award or provide their own internal appeal or review process, which adds to the remedies already available under the law of the seat. The application of these and similar rules is subject to, and must be coordinated with, the statutory provisions of the lex arbitri.

For instance, pursuant to article 34(6) of the 2012 Arbitration and ADR Rules of the International Court of Arbitration of the International Chamber of Comments (ICC Rules):

> *Every award shall be binding on the parties. By submitting the dispute to arbitration under the [ICC] Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.*

Italian and English arbitration laws would permit a waiver to the parties' right to challenge the award on a point of law, but would not allow a waiver in respect of serious procedural irregularities or the lack of jurisdiction of the arbitral tribunal (article 829, first and third paragraphs, CPC; sections 67-69 and schedule 1 of the 1996 English Arbitration Act). In contrast, under French law, the parties may waive their right to any form of recourse against the award, consistent with article 34(6) of the ICC Rules (article 1522 of the Code de procédure civile). At the other end of the spectrum are countries such as Austria, which reject in full the idea of allowing any departure from the statutory regime of the lex arbitri with respect to challenges of arbitral awards (section 611(2) of the Zivilprozessordnung).

The existence of internal appeals or review processes of awards

contemplated by the arbitration rules of certain arbitral institutions constitutes another important illustration of the role played by arbitration rules with respect to challenges of arbitral awards.

Thus, for instance, the arbitration rules of trade associations like the Grain and Feed Trade Association (GAFTA) contemplate an internal review process of the first tier award by a board of appeal, whose decision replaces that of the arbitral tribunal (article 12.6 of the 2012 GAFTA Arbitration Rules). In this and similar cases, the lex arbitri would typically provide that no judicial recourse against the first tier award be allowed until exhaustion of the internal appeal or review process.

A rather peculiar system of internal appeals, which does not contemplate any form of state intervention and is thus completely independent of the lex arbitri, is established by the 2006 Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes (ICSID Rules) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Specifically, pursuant to article 50(1) of the ICSID Rules, an application for the annulment of an ICSID award based on one of the grounds listed in article 52(1) of the ICSID Convention must be addressed to the ICSID secretary general. On receipt of the application, the chairman of the ICSID Administrative Council 'shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons' to act as an appellate body (article 52(3) of the ICSID Convention). If the award is annulled, at the request of either party, the dispute is submitted to a new ICSID arbitral (article 52(6) of the ICSID Convention).

International treaties

One of the reasons that international arbitration has become the ordinary means for resolving international commercial disputes is the relative ease with which arbitral awards rendered in one foreign country can be recognised and enforced in another country under the umbrella of the New York Convention.[5]

However, the New York Convention allows contracting states to refuse recognition and enforcement of an arbitral award that has been set aside by a court at the seat of the arbitration or under whose law the award was made. Specifically, pursuant to article V(1)(e) of the New York Convention:

> *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: […] (e) The award […] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

This provision has been criticised by a number of leading international arbitration scholars, as it does not restrict the grounds on which an award may be set aside, and could thus be invoked to prevent – in any contracting state – the recognition and enforcement of an award rendered in violation of any local requirement set forth in the lex arbitri, which undermines the free circulation of foreign awards. As a former secretary general of the ICC put it, article V(1)(e) constitutes a:

> *rock-solid rampart against the true internationalisation of arbitration, because in the award's country of origin all means of recourse and all grounds of nullity applicable to purely domestic awards may be used to oppose recognition abroad.*[6]

The Geneva Convention – which has been adopted by 31 countries, including Italy, a number of member states of the European Union, the Russian Federation and several Eastern European countries – addresses, at least in part, this issue.

Article IX(1) of the Geneva Convention lists the grounds on which it is possible to set aside an award, which would also justify a contracting state's refusal to recognise and enforce it, as follows:

- invalidity of the agreement to arbitrate;
- a due process violation;
- exercise of authority by the arbitral tribunal in excess of its jurisdiction; or
- an irregularity in the composition of the arbitral tribunal or in the conduct of the proceedings.

Critically, article IX(2) of the Geneva Convention provides that:

> *In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.*[7]

Challenges of awards in arbitral proceedings with an Italian seat

Italian law contemplates three forms of recourse against arbitral awards (article 827, first paragraph, CPC):

- a challenge for the annulment of the award (*impugnazione del lodo per nullità*), which is the ordinary form of recourse available to the parties for the setting aside of an award (articles 828-830 CPC);
- a challenge for the revocation of the award (*impugnazione del lodo per revocazione*), which is a form of recourse that is available to the parties for the setting aside of an award rendered:
  - in proceedings where there has been fraud, collusion or corruption by one member of the arbitral tribunal or one of the parties;
  - 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 majeur (articles 831, first and second paragraphs, and 395, Nos. 1-3 and 6, CPC); and
- a third-party challenge of the award (*impugnazione del lodo per opposizione di terzo*), which is a form of recourse that is available to third parties for the setting aside of an award that jeopardises their rights (articles 831, paragraph 3, and 404 CPC).

Recourse against awards rendered in Italy must be brought before the appellate court of the district at the seat of the arbitration agreed upon by the parties (articles 828, first paragraph, and 831, third paragraph, CPC), including by reference to any institutional arbitration rules. If the parties have agreed that the seat of the arbitration is Italy, but have failed to identify the specific location of the seat (eg, Rome or Milan), the default rule in the CPC is that it should be for the arbitral tribunal to specify this location, failing which the seat would be at the place of execution of the agreement to arbitrate. If this place is outside Italy, the seat will be Rome (article 816 CPC).

The awards that are subject to challenge are only those that finally dispose of – in whole or in part – the subject matter of the dispute (article 827, second paragraph, CPC). For instance,

an award holding a respondent liable in contract finally disposes of the liability issue in the proceedings and is thus subject to immediate challenge, even if the tribunal has not yet made a determination on the quantum debeatur.[8] Conversely, interim awards deciding one or more issues that have arisen in the arbitral proceedings, but which do not adjudicate the dispute, may only be challenged jointly with the award that finally adjudicates the dispute. An example would be awards deciding applicable law issues or ordering conservatory or other interim measures. Other instances include jurisdictional and statute of limitations issues, which do not finally dispose of the proceedings (ie, because the tribunal has affirmed its jurisdictional competence or has dismissed the statute of limitations objection raised by the respondent).

Before judicially challenging an arbitral award, the parties must exhaust all other available recourses, including:

- for the correction of the award, which is a remedy that allows the arbitral tribunal to correct clerical or computational errors or omissions in the award (articles 826 and 828, third paragraph, CPC); and
- any available process of appeal or review possibly set forth in the applicable arbitration rules (as discussed above).

Annulment

Time limits

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

- within 90 days from the date on which notification of the award was made to the party bringing the challenge, which has to comply with the rules for service of claims in judicial proceedings. The notification of the award made by the arbitral tribunal or by the institution administering the proceedings would not trigger the running of this 90-day time limit;[9] or
- within one year from the date of rendition of the award by the arbitral tribunal.

Grounds

A challenge for the annulment of the award may be brought on the following grounds:

- procedural violation;
- error of law; or
- breach of public policy.

Procedural violation

Pursuant to article 829, second paragraph, CPC, an award may be challenged for procedural violations only insofar as the party bringing the challenge has not itself caused the ground for challenge to arise. Accordingly, where a party has failed to raise the complained-of procedural violation in the arbitral proceedings, the alleged violation may not subsequently be used as a ground for annulment.

Article 829, first paragraph, CPC 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;
- rendition of the award by a person who could not have been appointed as an arbitrator (eg, a minor);
- the award deals with matters that are not arbitrable or that are not contemplated by, or do not fall within the scope of, the agreement to arbitrate;
- the award omits the reasons on which it is based, the determination of the relief which it purports to grant, or the arbitrators' signatures;
- rendition of an award after the expiration of the time limits within which it should have been rendered, for example, pursuant to article 820 CPC (ie, 240 days from constitution of the arbitral tribunal) or other applicable rules, provided that, before the rendition of the award, the party bringing the challenge notifies the other party and the arbitrators of its intention to challenge the award on this specific ground;
- non-compliance with the requirements for the conduct of the arbitration agreed by the parties, provided that these requirements have been set forth under express sanction of annulment and have not been otherwise waived 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 has been exhibited in the arbitral proceedings;
- a violation of due process (eg, the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or of the commencement of the proceedings, or was not otherwise afforded the opportunity to present its case);
- the award does not decide the merits of the 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.

None of the foregoing grounds for challenge may be preventively waived by the parties (article 829, first paragraph, CPC).

Error of law

Pursuant to article 829, third paragraph, CPC, it is not possible to challenge an arbitral award based on an error of law, unless:

- the parties have agreed otherwise;
- the error of law relates to a mandatory provision of Italian law (ie, a statutory provisions from which the parties may not depart; *norma imperativa*) or results in a breach of public policy (discussed below);
- 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).

Even in the few 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.[10]

Breach of public policy

An award may be challenged based on a breach of public policy (article 829, third paragraph, CPC). Although Italian law provides no guidance on this subject in the context of a challenge to an arbitral award, there seems to be consensus among Italian scholars that:

- 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. By contrast, a breach of the procedural rules governing the arbitration might give rise to a challenge based on a due process violation pursuant to article 829, second paragraph, No.

9, CPC (discussed above);
- if the applicable substantive law is not Italian law, then the notion of public policy must be construed narrowly, ie, 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, ie, 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, CPC, if the appellate court upholds a challenge for the annulment of the award, it sets aside the whole award. However, if the challenge is only partly upheld or relates to only a portion of the award, the court may set aside only the portion of the award that is affected by the challenge, leaving intact the remainder (*nullità parziale*).

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, CPC (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.

As noted, an award that is set aside in Italy may be refused enforcement elsewhere pursuant to article V(1)(e) of the New York Convention. However, vis-à-vis countries that are parties to the Geneva Convention (to which Italy is also a party) this rule applies only insofar as the award has been set aside based on one of the grounds set forth in article IX(1) of the Geneva Convention. In practice, this means that 'Italian' awards that have been set aside by an Italian court based on one of the grounds listed in article 829, second paragraph, Nos. 5, 8, 10-12, CPC, will arguably be enforceable in a country which is a contracting state of the Geneva Convention, despite article V(1)(e) of the New York Convention.

Challenge for the revocation of the award

This is a remedy that can be sought when the award suffers from serious irregularities (eg, it is the result of fraud, corruption or collusion of one of the parties or the arbitral tribunal or has been rendered on the basis of forged evidence) (articles 831, first and second paragraphs, and 395, Nos. 1-3 and 6, CPC). Traditionally, Italian courts have construed the grounds for the revocation of the award narrowly, to avoid parties relying on them spuriously to invalidate awards.[11]

The time limits applicable to a challenge for the revocation of the award start running when the facts which would justify such a challenge become known to the party which intends to bring it, and amount to 30 days (articles 325 and 326, first paragraph, CPC).

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 CPC).[12] A third party is one which has not participated in the arbitral proceedings, irrespective of whether it was a party to the agreement to arbitrate.

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

In the event that the prejudice of the third party is the result of 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 and the award need to be modified accordingly, the modification will be made by:
- the appellate court, if the third party is not a party to the agreement to arbitrate; or
- the arbitral tribunal, if the third party is a party to the agreement to arbitrate.

Conclusion

Italian law essentially follows international standards for challenging arbitral awards. The most significant departure in the CPC from international practice contemplates third-party challenges to an arbitral award. However, as with all challenges to arbitral awards, the grounds for third-party challenges are likely to be interpreted restrictively, and thus would only have a limited impact on international arbitration.

Notes

1 W L CRAIG, *Uses and Abuses of Appeals from Awards, Arbitration International*, 1988, pp174-227, at 175. For instance, it is reported that in certain countries the failure to initial each page of the award constitutes a ground for challenge. A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration*, 2004, 10-46.

2 UNCITRAL Secretariat, *Explanatory Note on the 1985 Model Law on International Commercial Arbitration (as amended in 2006)*, p34 (available at www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

3 These include:
- the invalidity of the agreement to arbitrate (article V(1)(a));
- due process violations (article V(1)(b));
- award dealing with disputes not contemplated by or not falling within the scope of the agreement to arbitrate (article V(1)(c));
- irregularity in the composition of the arbitral tribunal or in the conduct of the proceedings (article V(1)(d));
- the setting aside of the award at the seat of the arbitration (article V(1)(e));
- award dealing with matters which are not arbitrable under applicable laws (article V(2)(a)); or
- breach of public policy (article V(2)(b)).

4 These include Australia, Hong Kong and Singapore. The UNCITRAL Model Law on International Commercial Arbitration, with amendments, as adopted in 2006, Status (available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

5 As of 1 September 2012, the New York Convention has been

adopted by 147 countries, including the member states of the European Union, the United States, Australia, Brazil, China, India and Japan. Treaties governing the reciprocal enforcement of judgments in civil and commercial matters have not received similar international acceptance. The major multilateral treaty for the recognition and enforcement of judgments is contained in Council Regulation (EC) 44/2001 of 22 December 2000, which applies to disputes pending before the courts of a member state of the European Union. The 2005 Hague Convention on Choice of Court Agreements, the aim of which is to create a worldwide basis for upholding exclusive choice of court agreements and enforcing judgments resulting from them, has not yet entered into force, as only one country (Mexico) has ratified it.

6 Y Derains, *Foreword in Hommage à Frédéric Eisemann*, 5, 13 (1978) (translated by J Paulssonin (1996) 7 Am Rev Intl Arb 99), cited in A Refern and M Hunter, *Law and Practice of International Commercial Arbitration*, 2004, 10-46. It has not been frequent, but there have been cases in which arbitral awards that had been set aside at the seat of the arbitration have been recognized and enforced in other countries, chiefly on the grounds that: article V of the New York Convention is permissive, not mandatory (ie, recognition and enforcement 'may be refused'); and article VII(1) of the New York Convention recognises that there may be provisions more favourable than those in the New York Convention, under which an award may be recognised and enforced. However, the ability to enforce awards that have been set aside at the seat of the arbitration remains a highly controversial issue in international arbitration. See, eg, A J van den Berg, *Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Dutch Supreme Court of 25 June 2010*, in Journal of International Arbitration, 2011, Vol 28:6, pp617-641.

7 Emphasis added. See D T Haschier, *European Convention on International Commercial Arbitration (European Convention, 1961) – Commentary*, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 1995 – Volume XX, pp1006-1038.

8 Italian Supreme Court, Judgment No. 2715 of 7 February 2007.

9 Italian Supreme Court, Judgment No. 17420 of 30 August 2004.

10 See, eg, Italian Supreme Court, Judgments No. 13968 of 24 June 2011, and No. 2717 of 7 February 2007.

11 Thus, a party's fraudulent behavior is relevant only to the extent that it seriously undermines the other party's defense rights, thereby affecting the tribunal's findings of facts (Rome Appellate Court, Judgment of 11 June 1990).

12 Italian Supreme Court, Judgment No. 8545 of 28 May 2003.

Cleary Gottlieb Steen & Hamilton LLP

Piazza di Spagna, 15
00187 Rome
Italy
Tel: +39 06 6952 21
Fax: +39 06 6920 0665

City Place House
55 Basinghall Street
London EC2V 5EH
United Kingdom
Tel: +44 20 7614 2200
Fax: +44 20 7600 1698

Ferdinando Emanuele
femanuele@cgsh.com

Milo Molfa
mmolfa@cgsh.com

www.cgsh.com

Cleary Gottlieb Steen & Hamilton LLP is a leading law firm with approximately 1,200 lawyers and 15 offices located in major financial centers around the world. The firm is recognised as among the top litigation and arbitration groups in the world, both domestically and internationally. Cleary Gottlieb's Italian litigation and arbitration lawyers represent Italian and international clients, including sovereign states, in high-profile cases. They handle a broad range of contractual, financial, corporate governance and regulatory disputes (including antitrust, energy and transportation), before civil and administrative courts, as well as arbitral tribunals. Cleary Gottlieb's dispute resolution practice and lawyers are ranked among the best in Italy by leading legal publications.

Ferdinando Emanuele
Cleary Gottlieb Steen & Hamilton LLP

Ferdinando Emanuele is a partner of Cleary Gottlieb Steen & Hamilton LLP resident in the firm's Rome office. His practice focuses on national and international litigation and arbitration, specifically with regard to commercial, financial and antitrust matters. He has acted as counsel in numerous domestic and international arbitrations, both ad hoc and institutional, including proceedings under the Rules of the ICC, UNCITRAL and ICSID. He has also acted as presiding arbitrator, party-appointed arbitrator and sole arbitrator in ad hoc and ICC proceedings. He is recognised as one of the leading lawyers in dispute resolution in Italy by *Chambers and Partners*. In 2009, *TopLegal* named him the 'Best Italian Litigation Lawyer of the Year.' He obtained an LLM from the University of Michigan Law School in 2002. He served as one of the 15 members of the Rome Bar Council from 2004 to 2006, and has been a member of several committees of the National Bar Association. He is a founder of ArbIt, the Italian Forum for International Arbitration and ADR, and a member of the board of the Italian Arbitration Association. He is also a member of the ICC YAF and the LCIA. He has authored a number of law review articles on private international law and on corporate proceedings, and has lectured at numerous conferences and taught courses on international litigation and arbitration. He is fluent in English and proficient in Spanish.

Milo Molfa
Cleary Gottlieb Steen & Hamilton LLP

Milo Molfa is an associate of Cleary Gottlieb Steen & Hamilton LLP resident in the firm's London office. His practice focuses on international arbitration. He regularly advises and represents companies in a broad range of industries on commercial and corporate disputes as well as sovereign states in investment treaty arbitrations before ad hoc and institutional arbitral tribunals. In 2005, he obtained an LLM from the London School of Economics and Political Science. He is the author of several publications in the area of international arbitration. He is qualified as an avvocato in Italy and as a solicitor in England and Wales. He is fluent in English.