GETTING THE DEAL THROUGH

Arbitration

in 47 jurisdictions worldwide

Contributing editors: Gerhard Wegen and Stephan Wilske

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Italy

Angelo Anglani
Ughi e Nunziante

Laws and Institutions

1 International multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to arbitration is your country a party to?

Italy is a contracting state to the New York Convention, in force since 1 May 1969 (as per Law No. 62/1968), ratified without any declarations or reservations. Furthermore, it is worth noting that before becoming party to the New York Convention, Italy was already party to the Geneva Convention of 1927 on the Enforcement of Foreign Arbitral Awards (in force since 12 February 1931 as per Law No. 1244/1930), as preceded by the Geneva Protocol of 24 September 1923 (in force since 28 August 1924 as per Law No. 783/1927). The New York Convention replaces the Geneva Protocol of 1923 and the Geneva Convention of 1927 among states that are bound by the first Convention and any such other international treaty.

Italy is also party to the Geneva Convention of 1961 (European Convention) on International Commercial Arbitration, in force since 3 August 1970 (as per Law No. 418/1970), to the Agreement relating to Application of the European Convention on International Commercial Arbitration of 17 December 1962, in force since 9 June 1976 (as per Law No. 851/1975), and to the Washington Convention of 1965 on Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention), in force since 28 April 1971 (as per Law No. 1093/1970).

2 International bilateral agreements

Do bilateral agreements relating to arbitration exist with other countries?

Italy is party to various bilateral agreements that relate to arbitration or imply reciprocal recognition and enforcement of arbitral awards, including:

- Italy–USA Convention of 16 September 1951, supplementing the Treaty of Friendship, Commerce and Navigation of 2 February 1948;
- Italy–Switzerland Convention of 15 November 1967, on the execution of judgments in civil, commercial and criminal matters, recognition and enforcement of judgments and arbitral awards and on extradition;
- Italy–(former)USSR Convention of 11 December 1945, on commercial matters and navigation (now applicable in relation to the Russian Federation and most of the former states of the Soviet Union);
- Italy–Egypt Convention of 3 September 1977, on the recognition and enforcement of judgments in civil and commercial matters and on personal status.

Furthermore, Italy is party to several bilateral investment treaties (BITs). Most of the bilateral treaties dealing with the protection of investments contain provisions concerning arbitration, in that they grant to the private investor, who is a party to an investment dispute with the host state, the choice between recourse to the courts of the latter state or, alternatively, to arbitration.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The main domestic source of law relating to arbitration in Italy is the book IV, title VIII, articles 806ff of the Code of Civil Procedure (CCP), enacted by Royal Decree No. 1443/1940 and subsequent amendments.

Two further arbitration laws were recently enacted, concerning corporate and general arbitration proceedings:

- Legislative Decree No. 5 of 17 January 2003 (the New Corporate Procedural Law), which took effect on 1 January 2004, containing special provisions designed for arbitration in corporate matters, as well as rules concerning mediation in corporate matters; and
- Legislative Decree No. 40 of 2 February 2006 (the 2006 Arbitration Reform), which took effect on 2 March 2006, amending and restating the provisions on arbitration in general that are contained in the CCP.

The new laws left unaltered the provisions governing the recognition and enforcement of foreign awards in Italy (ie, awards that conclude arbitration proceedings whose seat is not in Italy), which are based on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Following a trend in other countries, Italy adopted a unitary system, in that it no longer makes a distinction (as the previous arbitration law of 1994 did) between purely domestic and international arbitrations, even though certain differences still exist when at least one of the parties resides or has its head office abroad.

According to Italian law, the parties have a choice of formal arbitration, most commonly used in practice and leading to a traditional award having the effectiveness of a judgment, or informal arbitration, referred to by the 2006 Arbitration Reform as a means of 'contractual determination' and leading to a 'contractual award'. The contractual award should not be confused with the consent award contemplated by certain arbitration rules (eg, article 26 of the ICC Rules). Under the new article 808ter of the CCP, the parties' willingness to have an

informal arbitration must be express and in writing, failing which the arbitration is formal.

Pursuant to new article 808bis of CCP, the parties may enter into an arbitration agreement also for the settlement of disputes arising in respect of specific non-contractual relationships.

The New Corporate Procedural Law, as far as arbitration rules are concerned, does not apply to listed companies or to companies whose capital is distributed among the public to a relevant extent. As for unlisted companies, the prevailing view is that this new law applies only when both the company's registered office and the place of arbitration are located in Italy.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Italy adopted an independent drafting approach. The 2006 Arbitration Reform (amending articles 806ff of the CCP) is not based on the UNCITRAL Model Law, although the Italian regulation follows to some extent the same pattern.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties have the power to select the rules of procedure to be applied to the arbitral proceedings, provided that the same are in compliance with the public policy of the place of arbitration and with the rules of due process (equal treatment of the parties and full opportunity to present the respective case). If the parties do not select any rules before the beginning of the proceedings, the arbitrators are entitled to choose whichever set of rules they deem opportune.

The New Corporate Procedural Law governs arbitration clauses inserted in the by-laws of unlisted companies and partnerships and lays down (article 35) certain mandatory provisions applicable to corporate arbitration proceedings commenced pursuant to said clauses, and to the awards rendered in relation thereto. In particular, the award can only be rendered in compliance with the applicable law – and not on an equitable basis (even if the parties so requested) – if the arbitrators have heard issues that would not be arbitrable in order to reach a decision on the disputed matter, and if the disputed matter regards the validity of shareholders' resolutions. Furthermore, awards rendered on the basis of the arbitration clauses inserted in the by-laws are binding on the company, or partnership, and for all its shareholders or partners.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

As far as applicable law is concerned, the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the appropriate law, namely Italian law in the case of domestic arbitration of the law applicable under the Rome Convention of 1980 if a foreign party is a party to the proceedings.

7 Arbitral institutions

What are the most prominent arbitral institutions in your country?

The most prominent Italian arbitration institutions include:

- the Italian Arbitration Association (Associazione Italiana per l'Arbitrato, AIA), founded in 1958 and located in Rome, which administers arbitrations under its own rules and under the UNCITRAL Rules. The AIA has recently launched its new rules, which apply to both international and domestic arbitrations, effective as from 1 January 2008 (the AIA Rules). The previous set of rules, separate for international and domestic arbitrations were in force since 1994 and apply to arbitration proceedings already pending before 1 January 2008. The AIA works in cooperation with ICC Italy (www.cciitalia.org); and
- the Chamber of National and International Arbitration of Milan (CNIAM; www.camera-arbitrale.com), created by the Chamber of Commerce of Milan, whose Arbitration Rules (the CNIAM Rules) are in force since 2004 and are designed for both domestic and international arbitrations.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The general principle is that disputes concerning rights not disposable by the parties cannot be referred to arbitration (CCP, article 806(1), as amended).

Therefore, disputes concerning matters of public interest, such as civil status and capacity of individuals, judicial separation of spouses, all disputes concerning inalienable rights, as well as disputes devolved to the exclusive competence of administrative courts – and not regarding individual rights in relation to the public administration – are not 'arbitrable'.

As to disputes regarding employment relationships, the same can be referred to arbitration only if arbitration rules are inserted in the relevant collective bargaining agreements and pursuant to such rules (CCP, article 806(2)).

It is interesting to note that the arbitrators can hear non-arbitrable matters if the same are not the subject of the award and are considered just to reach a decision over the subject arbitrable matter.

The New Corporate Procedural Law enlarged the area of arbitrable corporate disputes, establishing the principle that only (corporate) matters where the intervention of the public prosecutor is compulsory (therefore, where a public interest exists) cannot be referred to arbitration. That is to say, in principle, and with some minor exceptions, intra-companies disputes may be referred to arbitration, pursuant to the relevant arbitration clauses inserted in the relevant by-laws.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The arbitration agreement, whether in the form of an arbitration clause or a submission to arbitration, is null and void if it is not in writing and clearly determines the disputes to be referred to arbitration. The 'in writing' requirement is satisfied even when the arbitration agreement is expressed by exchange of telegraph, teletype or facsimile exchange and even by electronic means, provided that the latter occur in compliance with the legislation on the transmission and receipt of digital documents.

Arbitration agreements can be contained in general terms and conditions; however, in such cases the arbitration clause must be specifically referred to in the contract which refers to such terms and conditions.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Apart from the termination of the arbitration agreement by consent of the parties, the Italian jurisprudence considers as an implied waiver of the arbitration agreement, with regard to the specific matters under dispute, the fact that both parties file claims with the ordinary judges, or the defendant does not object in due time the lack of competence of the ordinary judge when claims are filed before the latter.

In line with several other jurisdictions, also according to Italian law the arbitration clause is severable and autonomous from the underlying contract. Therefore, any event affecting the enforceability or validity of the underlying contract does not necessarily affect enforceability or validity of the arbitration clause. Corporate insolvency, death and supervened legal incapacity are not circumstances that per se affect the enforceability of the arbitration agreement.

11 Third parties

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Generally, an arbitration agreement only binds the signatories thereof. However, there are some circumstances in which third parties can be bound by an arbitration agreement, such as:

- voluntary assignment of the underlying contract, provided that – according to the more restrictive interpretation of Italian law – the arbitration clause is expressly mentioned in such assignment;
- statutory assignment of the underlying contract (ie, subrogation and succession);
- acceptance of the arbitration agreement by an agent (in the name of the principal), duly empowered to bind the principal;
- insolvency: the arbitration agreement is binding upon the receiver of the bankruptcy proceeding; and
- pursuant to the New Corporate Procedural Law (article 34) the arbitration agreements inserted in companies' or partnerships' by-laws are binding on the company or partnership and on all its shareholders or partners, including those whose quality of shareholders or partners is subject to dispute.

12 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Under Italian law, courts and arbitral tribunals may not, as a rule, extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company.

13 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

According to the 2006 Arbitration Reform, when a sole arbitration agreement binds more than two parties, one of such parties can refer to arbitration the controversy arising thereunder if:

- the arbitrators are appointed by a third party (eg, by a court of arbitration of a chosen institution whose rules the parties have referred to);
- the arbitrators are appointed by general consent of all parties in dispute; or
- once the plaintiff has appointed one or more arbitrators, the other parties agree on the appointment of the other arbitrator or arbitrators, or agree to allow a third party to make the appointment.

If all the arbitrators cannot be appointed in one of the aforementioned ways, then the arbitration commenced against multiple respondents is split into separate proceedings, one for each respondent, which can hardly be considered a satisfactory solution. However, when certain parties must necessarily be joined in the same proceeding, the arbitration cannot proceed and the state courts gain jurisdiction.

Constitution of arbitral tribunal

14 Appointment of arbitrators

Are there any restrictions as to who may act as an arbitrator?

Any individual who has legal capacity can act as an arbitrator. Judges may act as arbitrators if so authorised by the Higher Judiciary Council and provided they act as chairmen or sole arbitrators.

15 Appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The arbitral tribunal may be composed of one or more arbitrators, but under Italian law it is compulsory for their number to be uneven.

If the parties fail to set out the number of arbitrators, the panel will automatically be composed of three arbitrators. If all arbitrators are not appointed by the parties (or by the third party provided for by the arbitration agreement), the same will be appointed by the president of the tribunal in the place of arbitration; if the parties did not determine such place, the competent tribunal will be that of the place where the arbitration agreement was entered into; if such place is abroad, the president of the Tribunal of Rome will be competent.

Default mechanisms for the appointment of arbitrators are also provided by article 12 of the AIA Rules, and articles 14 and 15 of the CNIAM Rules.

16 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced?

As for the grounds of challenge, the 2006 Arbitration Reform introduced a list of specific grounds for challenging arbitrators, namely when:

- the arbitrator does not possess the agreed qualifications;
- the arbitrator, or a company, association or entity of which the arbitrator is a director, has an interest in the dispute;
- the arbitrator or his or her spouse is a relative to the fourth degree or is a cohabitant or 'table companion' of any of the parties, their legal representatives or defence lawyers;
- the arbitrator or his or her spouse has a pending suit or serious enmity with any of the parties, their legal representatives or defence lawyers;
- the arbitrator is an employee or a regularly paid consultant or adviser of any of the parties;
- the arbitrator has given advice or provided assistance or legal services to one of the parties in a preceding stage of the dispute or has testified in relation thereto.

These grounds may be supplemented by the rules of arbitration referred to by the parties.

As far as the replacement of arbitrators is concerned, where, for whatever reason, all or some arbitrators appointed are unable to

act, they shall be replaced in accordance with the procedures established for their appointment in the arbitration agreement. Failing any rules by the parties, the above-mentioned default mechanism would apply.

17 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators?

The relationship between the parties and the arbitrators is a multi-party contractual relationship of a special kind, whose reciprocal rights and obligations are found in the law (CCP, articles 813ff, as amended). All the arbitrators must be neutral – including the party-appointed arbitrators – and perform their duties applying the required average level of diligence; they must take decisions with due care and act in good faith; they must render the award in compliance with all formal requirements provided for by the law, within the time limit assigned by the parties or by the law, and cannot resign without a justified reason.

According to Italian law, the arbitrators shall be liable for damages caused to the parties only if they acted with wilful misconduct or gross negligence, and:

- omitted or delayed acts that they were bound to carry out and for this reason were removed from their assignment, or resigned without a justified reason; or
- omitted to render the award, or prevented the same to be rendered, within the provided time limit.

If the award is rendered, claims for damages against the arbitrator can be filed only if the award is annulled and on the basis of the reasons for such annulment. Where an annulment does not depend on wilful misconduct, there is a cap for arbitrators' liability, equal to three times their remuneration according to the applicable tariffs.

As to the remuneration of arbitrators, they have the right to be compensated for the services rendered and the relevant expenses, and all the parties are jointly responsible for the relevant payments. Unless prevented by specific rules (for instance if rules of arbitral institutions apply), the arbitrators can liquidate their own fees and expenses, but the parties are not bound to accept such liquidation. In such case, the liquidation by the president of the competent tribunal can be requested by the arbitrators; the relevant order of liquidation is subject to recourse to the Court of Appeal within 30 days.

Jurisdiction

18 Court proceedings despite arbitration agreement

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If court proceedings are initiated despite an existing arbitration agreement, the defendant must raise the relevant objection of lack of competence in its first defence. In the absence of a timely objection, according to the new law, the defendant waives the right to submit the specific matter under dispute to arbitration. Moreover, the objection cannot be noted ex officio. The judgment rendered by an ordinary court, stating its own competence notwithstanding an arbitration agreement, can be appealed by ad hoc proceedings before the Supreme Court.

19 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal can rule over its own competence and on the existence, validity, content and scope of the arbitration agreement. Therefore, if the same dispute is brought before the ordinary judge, the latter must reject the action as inadmissible.

The party is precluded from challenging the award objecting lack of competence of the arbitral tribunal for non-existence, invalidity or inefficacy of the arbitration agreement, if it does not raise such objection in its first defence in the arbitration proceedings, immediately after the arbitrators' acceptance of their appointment (except when the lack of competence derives from the non-arbitrability of the dispute).

Furthermore, the party is precluded from challenging the award objecting that the counterparty's went beyond the scope arbitration agreement if it did not make the same objection during the arbitration proceedings.

Finally, while arbitration proceedings are pending no actions regarding alleged invalidity or inefficacy of the arbitration agreement are admissible.

Arbitral proceedings

20 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing prior agreement of the parties, the place of arbitration is determined by the arbitrators. Failing this, the place is where the arbitration agreement was entered into or, if such place is abroad, the place of arbitration is Rome.

As to the language of the arbitral proceedings, failing prior agreement of the parties the same shall be determined by the arbitral tribunal.

21 Commencement of arbitration

How are arbitral proceedings initiated?

Arbitral proceedings start with a notice of arbitration that does not need any particular formal requirements and must at least contain the declaration of the intention to initiate an arbitration, the general description of the dispute submitted to arbitration, and the appointment of the arbitrator (unless the same is already contained in the arbitration agreement) or any relevant request to any third parties to proceed to the appointment of the arbitral tribunal. The notice of arbitration, duly signed by the party or a representative of same duly empowered, must be served upon the counterparty.

Since the limitation period is suspended from the date of service of the notice of arbitration upon the counterparty up to the final award (or up to the final judgment over the challenge of the award), the notice of arbitration should contain sufficient indications as to the identity of the parties, the subject of the dispute, the statement of claims and the relevant legal grounds. However, the arbitral proceedings will be considered as initiated only as from the written acceptance of appointment by all arbitrators.

The request for arbitration, pursuant to both the AIA Rules and the CNIAM Rules, has to be more detailed and is sent to the secretariat of the above-mentioned institutions. In particular, while according to AIA Rules the request for arbitration is sent both to the secretariat and to the counterparty, according to CNIAM Rules the request for arbitration can be just sent to the secretariat, which shall

then forward it to defendant within five working days of the filing. For further details, see article 6 of the AIA Rules and article 10 of the CNIAM Rules.

22 Hearing

Is a hearing required and what rules apply?

As stated above, the parties are free to select the rules of procedure to be applied to the arbitral proceedings and, in lack of choice by the parties, the same can be determined by the arbitral tribunal. The only mandatory rule governing any hearings and the whole arbitration proceedings is the respect of due process, whereby the parties must be granted reasonable and equal opportunity to present their respective cases. A hearing must be held if a party so requests.

Both the AIA Rules and the CNIAM Rules provide guidelines as to the scheduling and the conduct of the hearings (see article 27 of both Rules).

23 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

According to the 2006 Arbitration Reform, the arbitrators may hear witnesses also at their domicile or office, if so agreed by the witness, and can resolve to receive written depositions within an assigned deadline.

Although the burden of proof is on the parties, the arbitral tribunals have some powers of inquiry, among which are:

- site access and inspections;
- request for information in writing to any public administrations in relation to their acts and documents, which need to be considered in the arbitral proceedings;
- order to one party, usually upon request of the other, to exhibit documents whose existence and relevance is clear; and
- appointment of one or more technical experts, either individuals or entities, to be assisted on technical matters (the parties may then appoint their experts to participate to any activity of the tribunal-appointed experts and comment on their conclusions).

In this respect, the Rules of the above-mentioned arbitral institutions are even more in favour of a certain power of initiative by the arbitral tribunal; in particular, the AIA Rules (article 26) provide for the power and duty of arbitral tribunals to proceed within as short time as possible to establish the facts of the case by all appropriate means.

The limit to the active role of the arbitral tribunal is that the same cannot overcome the lack of evidence from one of the parties through its activity, so that its impartiality may be deemed as affected.

24 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The supportive role by the ordinary courts is provided for, apart from the beginning of the proceedings (when the president of the competent tribunal may be requested to appoint one or more arbitrators), also during the same. Examples of such assistance are the intervention for removing arbitrators who omit or delay any actions relevant to their office, and the one for allowing the witness evidence. In this respect, if the witness does not appear before the arbitrators, the latter, considering the relevant circumstances and if deeming it opportune, may request the president of tribunal of the place of arbitration to order his or her appearance before them. In such case, the time limit to render the award is suspended until the hearing scheduled for witness examination.

25 Confidentiality

Is confidentiality ensured?

Despite the absence of specific provisions and jurisprudence, it is generally held that confidentiality is a typical feature of arbitral proceedings, being the same 'private' proceedings. Confidentiality is an obligation for arbitrators, covering the proceedings and the award under the Rules of the above-mentioned arbitral institutions (see: article 37 of the AIA Rules and article 8 of the CNIAM Rules).

Interim measures

26 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The competence of ordinary courts for interim measures is still almost exclusive.

Interim measures can be granted by the competent ordinary courts, as a matter of urgency, before the commencement of, or during, arbitral proceedings, in favour of a party claming that an imminent and unjust prejudice and irreparable damages are threatened against the same (periculum in mora). In addition, the requesting party must show that its right is prima facie evident (fumus boni juris).

Several kinds of relief can be granted:

- *sequestro giudiziario*, namely:
  - seizure of chattels or assets whose title (ownership or right to possession) is at issue, when their temporary seizure and management appears to be opportune; and
  - seizure of documents or anything else that may serve as a source of evidence, when their temporary seizure and management appears to be opportune;
- *sequestro conservativo*, namely, a provisional attachment on chattels or assets, granted where the moving party seeks a monetary award against the defendant and shows that there is the danger that such chattels or assets, which in fact represent the guarantee for the satisfaction of his credit, may be lost;
- *denuncia di opera nuova e danno temuto*, namely, a complaint of new works and feared damages, designed to safeguard property from physical damages caused by work in progress on, or by the physical condition of, adjoining property. Relief can take several forms, inter alia, the form of a restraining order or a mandatory injunction;
- preservation of evidence, namely, a relief that can lead, if it is shown that there is the danger of losing the possibility to offer the relevant evidence during the arbitral proceedings, to examination of witnesses before a judge; or to the filing of an expert report or an inspection on the conditions of a place or of a chattel. Evidence so preserved is nevertheless subject to the evaluation by the arbitrators for their admission and relevance in the arbitral proceedings; and
- urgent relief (a catch-all provision), namely, a residual remedy that can be obtained, provided that prima facie evidence of the existence of the relevant right and evidence of an imminent danger of irreparable damages is given, all the times when other interim measures do not apply.

Relief orders obtained before the commencement of the arbitral proceedings will lose their efficacy if the notice of arbitration is not served by one party upon the other within the deadline set forth by the judge (no more than 60 days from the issuance of the order) or

by the law (60 days), or if the arbitration, once commenced, is then extinguished. This is not the case when the relief orders, as a matter of fact, anticipate all the effects of the possible future award. Seizure and attachment orders will lose their efficacy if they are not enforced within 30 days from their issuance.

Interim remedies will ultimately lose their efficacy if the final decision on the merits denies the existence of the right or interest allegedly threatened.

27 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The arbitrators have no authority to grant interim or conservatory relief. The only exception is given by the New Corporate Procedural Law, according to which the arbitrators can order the stay of resolutions of shareholders' meetings of an unlisted company, whose validity is the subject of the dispute.

Awards

28 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences if an arbitrator refuses to take part in a vote or sign the award?

The decisions by the arbitral tribunal can be made by a majority of all its members.

The award is valid and effective even if only signed by the majority of the arbitrators, provided that it states that the decision was taken with the participation of all arbitrators and that the one or more arbitrators who did not sign could not or did not wish to do so.

29 Form and content requirements

What form and content requirements exist for an award? Does the award have to be rendered within a certain time limit?

The award must be issued in writing and signed at least by the majority of arbitrators.

It shall contain:

- names or arbitrators;
- seat of the arbitration;
- names of the parties;
- indication of the arbitration agreement and of the issues submitted for decision;
- brief statement of the reasons;
- decision of the issues;
- signature of the arbitrators, or of the majority of same (with the above-mentioned specification that the decision was taken with the participation of all arbitrators); and
- date of the above signatures.

30 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Unless the parties have agreed otherwise, the arbitrators shall render the award within 240 days from the acceptance of their appointment. Within such time limit the arbitrators shall draft one or more originals of the award; the same, or certified copies thereof, shall then be sent to the parties, by registered mail, within the following 10 days.

The above-mentioned time limit may be extended, prior to its expiry, by means of written declaration by all parties to the arbitrators, or by the competent president of tribunal, upon justified request of the arbitrators or of one of the parties.

Furthermore, the above-mentioned time limit can be postponed, no more than once, if evidence must be taken, or if a tribunal-appointed expert must render his report, or an interlocutory award has been rendered, or if one arbitrator is replaced. The time limit is suspended when the arbitral proceedings are suspended and, in any case, may be extended up to 90 days if, when the proceedings are resumed, the remaining time is shorter.

31 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may render:

- a partial award, when it settles one or some of the issues under dispute;
- an interim award, to settle one or more preliminary, procedural or substantive issues, or in any case allowed by the rules applicable to the proceedings; and
- the final award.

It is worth noting that the AIA Rules provide for the possibility of an award by consent, if the parties so request to the arbitrators in writing and the arbitrators agree to do so (article 29).

32 Termination of proceedings

By what other means than an award can proceedings be terminated?

If the award is not rendered within the above-mentioned time limit and one party objects before the award is rendered, the arbitrators shall declare the arbitral proceedings terminated. Apart from such case, proceedings can be terminated by mutual consent of the parties, or because a settlement has been reached. In such cases a written confirmation by the parties to the arbitrators is needed.

33 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

There are no specific rules in Italian law governing the allocation of costs in arbitration. Therefore, unless otherwise agreed, the arbitrators shall allocate the legal costs of the parties, if so requested, as deemed appropriate. The rules for cost allocation in domestic courts (CCP, articles 91ff) may have some influence on cost allocation in arbitration. The relevant general rule is that the winning party can have its reasonable litigation costs refunded by the losing party, as assessed by the court, although the courts have the power to allocate the costs differently for justified reasons.

As to attorneys' fees, in lack of specific agreements between the lawyer and the client, national tariffs, as approved by the National Bar and fixed by Ministerial Decree, generally apply to Italian lawyers.

34 Interest

May interest be awarded for principal claims and for costs and at what rate?

An arbitral tribunal may award interest to the extent that a claim in this respect is filed and the applicable substantive law allows such a claim. Where Italian law is applicable, it is worth noting that the legal interest at present is at a rate of 2.5 per cent, while higher commercial interest, as per Law No. 231/2001, may be awarded for debts between entrepreneurs relating to supply of goods or services.

Proceedings subsequent to issuance of award

35 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

On request of a party, the award may be corrected by the same arbitrators, for omissions, errors or miscalculations, as well as for completing the award if no reference were made in it as to names of arbitrators or parties, seat of arbitration, the relevant arbitration agreement and issues under dispute. If arbitrators do not make the requested corrections the same can be requested to the competent tribunal. If the award has already been filed, the request for correction is presented to the relevant tribunal.

The issue whether the arbitral tribunals have the power to interpret their award is debatable in Italy, lacking specific relevant provisions and jurisprudence.

36 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The award may be subject to recourse for setting aside, for revocation or third party opposition.

An award may be annulled if:

- the arbitration agreement is invalid, but a party may avail itself of this ground only if the invalidity issue was timely raised during the arbitration proceedings;
- the arbitrators were not duly appointed, provided that this objection was raised during the arbitration;
- the award was rendered by a person who, having no legal capacity, could not have been appointed as arbitrator;
- the award exceeds the limits of the agreement to arbitrate, provided that this objection was raised during the arbitration;
- the award does not contain the reasons for the decision, or the decision, or the arbitrators' signature (but a majority of the arbitrators' signature will suffice if the award acknowledges that it was deliberated with the participation of all arbitrators and the other arbitrators could not or did want to sign it);
- the award is rendered after the expiry of the prescribed time-limit, on condition that the party's intent to claim nullity on this ground was notified to the other party and the arbitrators before the award;
- during the proceedings certain formalities requested by the parties under penalty of nullity were not observed and if the nullity was not cured;
- the award is contrary to a previous award that is no longer subject to recourse, or to a previous judgment having the force of res judicata between the parties, provided that such award or judgment was on record in the arbitration proceedings;
- the due process principle of audiatur et altera pars was not respected during the arbitration proceedings;
- the final award fails to decide on the merits of the case, on which the arbitrators should have decided;
- the award contains contradictory provisions; or
- the award fails to decide on any of the issues submitted to arbitration.

Arbitral awards may not be challenged on the ground of violation of the applicable substantive law, unless otherwise agreed by the parties, or so mandated by law (eg, in labour disputes or when the violation relates to a decision over a preliminary question that could not be arbitrated). The violation of rules of public policy may always be invoked.

While the means of recourse cannot be waived in advance, a party may not rely on a ground for nullity if it was directly responsible for its occurrence, or if it failed to raise a timely objection as regards the failure to comply with a procedural rule, or if it waived its right to object thereto.

Revocation is available in exceptional circumstances, namely when the award is the result of fraud by one party or by the arbitrator, when the award is based on evidence later recognised as forged, or decisive documents are discovered after the award. Third-party opposition is limited to cases when the award prejudices a third party's rights, or is the result of fraud or collusion to the detriment of the successors in title or creditors of one of the parties.

The time limit for filing an action, before the Court of Appeal, to annul the award is 90 days from its notification (or one year after its signature). Revocation and third-party oppositions have a time limit of 30 days.

37 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

As seen above, an award may be subject to recourse for setting aside, to be filed before the competent Court of Appeal. The judgment rendered by the Court of Appeal can be appealed before the Supreme Court, but such court cannot judge over the merit of the case and can only consider the correct application of rules of law by the Court of Appeal and whether the subject dispute is arbitrable or not.

The proceedings before the Court of Appeal and before the Supreme Court generally take one to three years to come to a decision.

The rules for cost allocation provided for by articles 91ff CCP apply, that is, the losing party is generally ordered to pay the legal costs of the other party, as liquidated by the court. The lawyer's fees, in particular, are liquidated on the basis of national tariffs linked to the value of the dispute; however, the amounts liquidated by the Court of Appeal and the Supreme Court, to be paid by the losing party, may be lower than the actual legal fees paid by the winning party to its lawyer. Furthermore, it is worth noting that the courts have the power to allocate the costs differently from the 'loser pays' principle (up to the case where each party bears its own costs) for justified reasons.

38 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The party wishing to enforce a domestic award in Italy shall file the award and the arbitration agreement with the competent tribunal, which shall merely verify the formal regularity of the former and the existence of the latter to declare (or refuse) the enforceability. The relevant decree may be appealed before the Court of Appeal within 30 days from communication of the order.

The party wishing to enforce a foreign award in Italy must file its request with the president of the court of appeal in the district where the other party has its domicile (if that party has no domicile in Italy the Court of Appeal of Rome shall have jurisdiction). The original, or a certified copy, of the foreign award and of the arbitration agreement must be provided to the court, as well as a certified translation. The president of the court, having ascertained the formal regularity of the award, shall declare the enforceability, unless the subject matter is not arbitrable under Italian law or the award contains provisions contrary to public policy. The relevant decree may be subject to complaint before the same Court of Appeal within 30 days from com-

munication of the order on the basis of the same grounds provided for by the New York Convention.

39 What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Pursuant to article 840 CCP, third paragraph, No. 5, and consistent with article V.1(e) of the New York Convention, the recognition or the enforcement of a foreign award is refused by the competent Court of Appeal if it is proved that such award has been set aside by a competent authority of the country in which, or under the law of which, that award was rendered.

40 Cost of enforcement

What costs are incurred in enforcing awards?

The costs incurred in enforcing awards include administrative fees for the filing, the register tax, as well as attorney's fees and costs.

Other

41 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Italy is a civil law country and therefore there are no provisions for discovery, nor is there a tendency towards US-style discovery. Party officers cannot testify as proper witnesses but can be examined. Declarations by a party officer favourable to the represented party are deemed to have no legal effect. However, the judge must take into consideration all the answers, together with the general behaviour of the party during the proceedings, when evaluating the evidence as a whole.

While international arbitration proceedings in Italy adhere to international standards, the domestic proceedings may be more substantially influenced by the domestic procedural rules, although there is a recent trend, also in domestic proceedings, to a more active case management.

42 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

It is worth noting that an award is subject to register tax, which may amount to 3 per cent of the value of the rights or credits awarded. However, if the award is voluntarily executed before its filing with the competent tribunal no tax applies.

UGHI E NUNZIANTE

STUDIO LEGALE

Angelo Anglani **a.anglani@unlaw.it**

Via Venti Settembre
1 – 00187
Rome

Tel: +39 06 474831
Fax: +39 06 4815912 / 4870397
www.unlaw.it