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Challenging partial awards in Italy: when is it possible?

Since early 1994, when the possibility of challenging partial awards was introduced in the Italian arbitration law, there has always been debate as to when and under what conditions a challenge is possible. The discussion arises from the fact that partial awards can be immediately challenged in Italy only if they rule on questions relating to the merits of the case. By contrast, partial awards that rule on preliminary questions may only be challenged together with the final award. The matter was addressed in a recent decision of the Italian Supreme Court (*Suprema Corte di Cassazione*) dated 26 March 2012 (Decision no. 4790).

Legal framework: sections 816-bis, 820 and 827 of the Italian Code of Civil Procedure

As a preliminary matter, it is worthwhile to discuss when a partial award can be rendered by an arbitral tribunal. Partial awards are referred to in three sections of the Italian Code of Civil Procedure (which also governs arbitration proceedings): section 816-bis, section 820 and section 827.

Under section 816-bis, arbitrators shall decide on all questions arising during the arbitration proceedings in revocable orders, unless they deem it necessary to rule on them by a non-definitive award (ie, a partial award). Although the provision does not clearly set out the requirements of such orders, the prevailing view is that all issues concerning the course of the proceedings and on which the arbitrators do not intend to revisit at a later stage of the arbitration (by issuing a new order replacing the previous one) should be dealt with in an order. The most common example of revocable orders is a decision rendered on evidentiary issues, such as the admission of witness evidence, the production of documents, etc.

Section 820 provides for an extension of the time limit within which arbitrators shall render awards when a partial award is issued. The extension is for a 180-day period and can only be granted once during the arbitration proceedings, which means that arbitrators are entitled to render only one partial award during the entire proceedings.

Finally, section 827 addresses the challenge of partial awards, distinguishing between the following two cases:

- awards partially ruling on the merits of the dispute; and
- awards ruling on other issues that have arisen during the proceedings and that do not relate to the merits of the dispute.

The first category of awards must be challenged immediately, whilst awards falling within the second category may only be challenged together with the final award.

In order to determine whether a partial award is immediately challengeable, it is therefore crucial to clarify whether it falls within the first or the second of the above-mentioned categories. While section 827 distinguishes between these two categories, it does not provide any criteria to determine which category applies. Following a long debate by Italian scholars, the matter has now been settled by case law, most recently in the 2012 Supreme Court decision mentioned in the introduction to this article.

Awards partially ruling on the merits of the dispute must be challenged immediately

Only those awards that partially rule on the merits of the dispute are immediately challengeable. This is the case where the partial award decides a merits issue where it would affect the final adjudication of the dispute, be it logically, legally or technically. In other words, the object of such partial award is a claim that could have been submitted in an autonomous suit, and the adjudication of which (regardless of the outcome) is such as to impact the final ruling on the merits.¹ This definition, even if largely shared by legal scholars, could be characterised as too theoretical and, therefore, difficult to apply to a given case by parties or courts. This is the reason why the March 2012 Supreme Court decision deserves particular attention. The decision, even though aligning itself with the position of the majority of Italian authors and courts, identified the conditions under which a partial award can be immediately and autonomously challenged, that is, without having to wait for the final award.

Based on the Supreme Court decision, an immediate challenge would be required whenever the arbitrators have ruled on some, but not all, of the claims submitted by the parties. A typical illustration of a partial award capable of being autonomously

challenged is an award on liability only (eg, a ruling that the contract was breached and that the claiming party is entitled to claim damages), and the referral of all other claims to the final award (eg, the quantum of the damages). This often occurs when, once the legitimacy of a right has been declared, further assessments are required to finally solve all the pending claims, such as an expert report or other investigations, which will be dealt with during the second stage of the arbitration ending in the final award.² An award falling within the above category must be challenged within one year from the date of its signing by the arbitrators or, should one party serve it upon the counterparty, within 30 days from the date of service. If the partial award is not challenged within those time limits, it becomes final, without any further opportunity to challenge it.

Awards ruling on questions that have arisen during the proceedings but that do not concern the merits of the dispute may only be challenged with the final award

Having clarified when an award partially rules on the merits and, therefore, is immediately challengeable, it is easier to identify the other types of 'non-final' awards that are not immediately challengeable. Both Italian scholars and courts have taken a rather consistent approach in identifying such awards as those ruling on (i) preliminary exceptions concerning the arbitral procedure, and (ii) preliminary exceptions concerning the merits. To clarify, the former covers all the issues that are within the arbitral tribunal's jurisdiction (as opposed to the ordinary courts' jurisdiction), such as the validity of the arbitration clause, the composition of the arbitral panel, or the lack of the claimant's right to make a claim in arbitration. The latter (preliminary exceptions concerning the merits) includes, for example, situations where one of the parties contends that the claim is barred by the statute of limitation, has lapsed or no longer exists due to a set-off. This position is confirmed in the March 2012 Supreme Court decision, according to which a ruling on such issues relates only to the admissibility or the procedure of the arbitration. In short, the main feature of a partial award that cannot be immediately challenged is that it does not rule on the specific object of the claim, but merely rules on pre-conditions that must be decided before the claim itself.³ Such partial awards,



which do not rule on the merits of the dispute, can only be challenged together with the final award. Consequently, the parties will not be entitled to challenge their content before the end of the arbitration proceedings.

Comments

The distinction between partial awards that can be challenged immediately and those that can only be challenged with the final award was introduced to reach a compromise between the need not to disrupt the arbitration proceedings, on the one hand, and the need to safeguard the losing party's interests, on the other hand. It led to the solution where only partial awards ruling on the merits of the case can be challenged immediately. This is logical since such awards are immediately enforceable against the losing party and, therefore, may be enforced against its assets, unless it has been challenged and a stay of its enforceability has been granted. Such a risk does not exist in relation to partial awards that only rule on preliminary questions. That being said, the pursued purpose is not always met: the winning party does not always have an interest in immediately enforcing a partial award, and the losing party does not always have an interest in challenging it immediately. Even so, the losing party will, as a matter of law, be obliged to challenge the partial award, failing that, it will become final.

It would have been more reasonable to grant the losing party the right to challenge a partial award ruling on the merits at a later stage, together with the final award, at a time when it could have better evaluated the overall outcome of the arbitration. Had an immediate challenge not been compulsory, as it is in Italy, it would have been the losing party's choice either to challenge the partial award while the arbitration is still continuing, or to wait for the final award. Many authors tried to propose such a possibility, but there is no legal provision entitling the parties to do so (in contrast to court proceedings, where this possibility is expressly recognised in the context of appeals against partial judgments rendered by ordinary courts in Italy). Considering the time and costs of challenge proceedings, this issue should have deserved more careful attention.

Notes

- 1 A Trinchì, *Questioni aperte in tema di impugnabilità del lodo parziale non definitivo avente ad oggetto la sola statuizione sull'an debeat*, in *Rivista dell'arbitrato*, 2004, 3, 505; L P Camoglio, *Lodo parziale e lodo non definitivo dopo le ultime riforme*, in *Rivista di diritto processuale*, 2009, 3, 599.
- 2 Corte Suprema Di Cassazione, 7 February 2007, No 2715.
- 3 D Di Gravio, *Il lodo parziale nell'arbitrato dopo la riforma del 1994*, in *Giur Merito*, 2001, 03, 791.