

## ITALY

### DELOS GUIDE TO ARBITRATION PLACES (GAP)

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#### JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Italian arbitration law is a so-called “monistic” system, whereby the same set of rules applies to both domestic and international arbitrations. Most provisions governing arbitration are contained in the Code of Civil Procedure. In 2006, the arbitration law was entirely revamped to better reflect the principles of the UNCITRAL Model Law.

Ever since, the legislator has continued to make efforts to favour the recourse to arbitration. For example, tailored rules for arbitration in specific sectors have been adopted, such as the rules for arbitration concerning public contracts or arbitrations founded on arbitral clauses contained in companies’ bylaws. In addition, in 2014, the legislator has introduced the possibility to “migrate” from court proceedings to arbitral proceedings.

Overall, Italy can thus be considered as offering an arbitration-friendly environment.

Key places of arbitration in the jurisdiction	Milan, Rome.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Not explicitly provided.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Parties are free to determine their own rules on the taking of evidence.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The Code of Ethics of the Italian National Bar Association prevents lawyers from applying contingency fees only. However, lawyers are allowed to calculate part of their fees on the value of the compensation awarded.  Third-party funding is reserved to entities meeting certain legal requirements (such as banks or financial institutions).
Party to the New York Convention?	Yes. Italy has been a party to the New York Convention since 1969 with no reserves.
Other key points to note	Arbitrators are deprived of any power to issue interim measures, except where otherwise provided by the law.
WJP Civil Justice score (2017-2018)	0.65

## ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	<p>The main source for arbitration law in Italy is the Code of Civil Procedure, which entered into force in 1942.</p> <p>The Legislative Decree n° 40/2006 revamped the arbitration law in 2006.</p>
UNCITRAL Model Law? If so, any key changes thereto?	<p>Italian arbitration law embodies most of the principles of the UNCITRAL Model law.</p> <p>The only notable differences with the UNCITRAL Model Law are that (i) Italian law does not allow arbitrators to grant interim measures and (ii) there is no exclusion of liability for arbitrators.</p>
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. Arbitration-related matters usually fall within the jurisdiction of the Civil Court of the district of the seat of the arbitration.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Arbitrators are deprived of any power to issue interim measures. However, parties can have recourse to national courts to obtain interim measures with the view of commencing arbitral proceedings.
Courts' attitude towards the competence-competence principle?	<p>The law explicitly empowers the arbitrators with the ability to decide on their own jurisdiction. State courts abide by this rule.</p> <p>However, if a party starts court proceedings despite a valid arbitration agreement, the defendant must raise the jurisdictional objection in the first statement of defence.</p>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Yes. The award can also be set aside if it (i) does not decide the merits of the dispute (and it is not an interim or partial award), (ii) does not provide sufficient reasoning, (iii) is missing the signature of the arbitrators (iv) is missing the operative part (v) is in contradiction with a previous award or judgement having the force of <i>res judicata</i> and such decision was raised by one of the parties during the arbitral proceedings.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	There is no case-law on the matter.
Other key points to note?	One of the most prominent characteristics of Italian arbitration law is the distinction between <i>arbitrato rituale</i> and <i>arbitrato irrituale</i> . The difference between the two types of arbitration lays in the effects of the award: while the decision issued at the end of an <i>arbitrato rituale</i> is a binding award, the <i>arbitrato irrituale</i> results in an award having the effect of a binding contract.

## JURISDICTION DETAILED ANALYSIS

### 1. The legal framework of the jurisdiction

#### 1.1 Is the arbitration law based on the UNCITRAL Model Law?

The main sources of law for arbitration proceedings are the provisions contained in Title VIII of Section IV of the Code of Civil Procedure (Articles 806-840), as amended from time to time.<sup>1</sup> These provisions are not explicitly based on the UNCITRAL Model Law, although they embody most of the principles laid out in the Model Law.

#### 1.2 When was the law revised last?

The Code of Civil Procedure underwent a reform in 2017, but the last amendments specifically relating to Title VIII of Section IV date back to 2 February 2006, when the Legislative Decree n° 40/2006 was adopted.

The 2006 reform rewrote much of the provisions on arbitration introducing, for example, the possibility to have recourse to arbitration for non-contractual disputes.

Subsequently, Legislative Decree n° 132 of 12 September 2014 introduced the possibility for parties involved in civil court proceedings to “migrate” to arbitration.<sup>2</sup> Parties willing to take advantage of this possibility have to file a joint request to the court. Before granting such request, the court will verify whether the subject-matter of the dispute falls within the category of “arbitrable” disputes. If so, the judge will submit the file to the president of the Bar association of the district where the litigation is taking place. The members of the arbitral tribunal will be appointed jointly by the parties, in cooperation with the president of the bar association.

### 2. The arbitration agreement

#### 2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

In accordance with Article V §1 of the New York Convention, the Italian courts first look at whether the parties have specified the law governing the arbitration agreement. Failing such indication, they apply the law of the seat of the arbitration.<sup>3</sup>

#### 2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. Article 808 § 2 of the Code of Civil Procedure sets out a general principle of autonomy and independence of the arbitration clause vis-à-vis the contract in which it is contained.

#### 2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Italian law does not appear to be over formalistic regarding the requirements for an enforceable arbitration clause. However, it must be made in writing.

Article 807 of the Code of Civil Procedure requires the arbitration clause to: (i) be in writing (regardless of the form); and (ii) determine the subject matter of the dispute.

<sup>1</sup> For the sake of completeness, it is worth mentioning that special rules on arbitration are also contained in:

- Legislative Decree of 17 January 2003 n° 5 – concerning arbitration in corporate law;
- Legislative Decree of 18 April 2016 n°50 – concerning arbitration in public procurement.

<sup>2</sup> See article 1 of Legislative Decree n° 132/2014.

<sup>3</sup> Corte di Cassazione, n. 615/1982.

In this regard, if the arbitration agreement concerns non-contractual disputes that have not yet arisen, the clause must also identify the non-contractual relationship giving rise to the dispute.

The law sets out additional requirements for arbitration clauses contained in general terms and conditions or in a standard form contract. In these cases, the clause must also be specifically approved in writing with a separate signature (Articles 1341 and 1342 Civil Code). To this purpose, it is not uncommon to find, in the general terms and conditions or standard contracts, a double signature of the party accepting said conditions: the “first signature” is for the approval of the general contract and the “second signature” is for the specific approval of the arbitration clause therein contained.

When assessing the scope of the arbitration clauses, two interpretative rules apply:

- Article 1367 of the Civil Code, according to which, in case of doubt, the contract or the individual clauses shall be interpreted in favour of their effectiveness;
- Article 808-*quater* of the Code of Civil Procedure according to which the arbitration agreement shall always be interpreted extensively. Therefore, if the arbitration clause refers to all disputes arising out of the contract, the arbitral tribunals will have jurisdiction over any dispute resulting from the contractual relationship (thus excluding, for example, disputes on unfair competition<sup>4</sup>).

#### **2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?**

In line with the general theory of privity of contract, only the parties to the arbitration agreement are deemed to be bound by the arbitration clause.

An exception to said principle occurs in case of contract in favour of a third party under article 1411 of the Civil Code: in such hypothesis, when the third parties declare to take advantage of the contract executed in their interest, they also become bound by the arbitration clause contained therein.<sup>5</sup>

After the litigation has arisen, a third party can be bound by an arbitration agreement in the following cases:

- voluntary intervention upon agreement: if the third party, the parties to the proceedings and the arbitrators agree, the third party can be joined to the arbitration (Article 816-*quinquies* § 1, Code of Civil Procedure);
- voluntary intervention necessary for the adjudication of the dispute: the voluntary intervention of the third party in the proceedings is always admissible and does not require the prior approval of the parties to the litigation when such a third party's right is dependent and/or related to the subject matter of the dispute (Articles 816-*quinquies* and 105 Code of Civil Procedure);<sup>6</sup>
- in any case, and even without the prior approval of the other parties to the proceedings, where the absence of a third-party amounts to a breach of due process (Articles 816-*quinquies* and 102 Code of Civil Procedure).<sup>7</sup> An example of this occurs when the dispute concerns a good that is subject to concurrency estate, and not all of the owners are part of the proceedings.

<sup>4</sup> Corte di Cassazione, n. 20673/2016.

<sup>5</sup> Corte di Cassazione, n. 13474/2000; Corte di Cassazione n. 2384/1997.

<sup>6</sup> The participation of a third party whose rights are dependant and/or related to the rights asserted in the arbitration allows the third party to protect its rights without waiting for the outcome of the proceedings to challenge the award, pursuant to the procedure laid down in Article 404 Code Civil Procedure. See F. EMANUELE and M. MOLFA “Selected issues in International Arbitration: the Italian Perspective”, Thomson Reuters, London 2014, pp. 128 ff.

<sup>7</sup> Allowing the participation of a party that is necessary for the adjudication of the dispute is aimed at ensuring that basic due process requirements are met. See F. EMANUELE and M. MOLFA “Selected issues in International Arbitration: the Italian Perspective”, *Ibidem*.

In addition, if during the arbitral proceedings, the contract containing the arbitration clause is assigned, the proceedings continue between the original parties, but (i) the original parties can request the assignee to be joined in the proceedings (Articles 816-*quinquies* and 111 Code of Civil Procedure) and, (ii) the assignee may request to be joined.

## **2.5 Are there restrictions to arbitrability? In the affirmative:**

Article 806 of the Code of Civil Procedure provides some limited restrictions on arbitrability.

### **2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?**

Article 806 of the Code of Civil Procedure states that disputes concerning "*rights of which the parties may not dispose or where arbitration is otherwise prohibited by statute*" cannot be referred to arbitration. The former includes, most notably, disputes that cannot be the subject matter of a transaction, such as those concerning one's personal status, those falling under the exclusive jurisdiction of the administrative courts, those concerning tax issues or requiring the use of public force (such as enforcement procedures).

With respect to IP law disputes, although jurisdiction concerning disputes the nullity of a trademark or a patent is reserved to national courts, the issue over the validity of a trademark can be referred as a preliminary question to an arbitral tribunal in counterfeit proceedings.<sup>8</sup> Contrariwise, Italian courts have admitted that a dispute concerning antitrust matters can be referred to an arbitral tribunal.<sup>9</sup>

Concerning employment disputes, Article 806 of the Code of Civil Procedure provides that employment disputes "*may be submitted to arbitration only to the extent that this is allowed by statute or by collective bargaining agreement*".

## **3. Intervention of domestic courts**

### **3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?**

The court will stay litigation only if a party raises a jurisdictional objection in its first statement of defence, filed no later than 20 days prior to the first hearing.<sup>10</sup> Failing a timely objection, the court can decide on the merits of the case (Articles 38 and 819-*ter* Code of Civil Procedure).<sup>11</sup>

The place of arbitration (whether within or outside the jurisdiction) is irrelevant to the question of a stay of court proceedings.

### **3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?**

In Italy, there is a general prohibition on arbitrators issuing any form of interim measures, pursuant to Article 818 of the Code of Civil Procedure. Should the arbitrators attempt to order that the courts stay proceedings, the courts will ignore such injunction.

However, if a party starts civil court proceedings after an arbitration has already commenced on the basis of a valid arbitration clause, the civil court can be expected (upon a request by the other party) to decline its jurisdiction in favour of the arbitral tribunal, except when the dispute concerns the validity of said arbitration agreement.<sup>12</sup>

<sup>8</sup> Award of an Arbitral Tribunal, seated in Genoa, 23 November 1992, in *Rivista dell'Arbitrato*, 1995. P. 511 and ff.

<sup>9</sup> Court of Appeals of Milan, 13 September 2002, n. 2090, in *Rivista dell'Arbitrato*, 2004, pp. 105 ff.; Court of Appeals of Milan, 15 July 2006, n. 1897, in *Rivista dell'Arbitrato*, 2006, pp.744 ff.

<sup>10</sup> Corte di Cassazione, Sez. Unite, n. 10617/96.

<sup>11</sup> Corte di Cassazione, n. 22748; Corte di Cassazione, Sez. Unite, n. 1005/14.

<sup>12</sup> For the sake of completeness, it is worth mentioning that Italian law recognizes the doctrine of *kompetenz-kompetenz* also for arbitral tribunals. Article 817 Code of Civil Procedure states to this purpose that: "*Should the validity, content or scope of*

### 3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions but not only)

Anti-suit injunctions are extraneous to the Italian legal system. There is no case law referring to this kind of measures.

Arbitrators can resort to state courts to compel a witness to appear before them (Article 255 Code of Civil Procedure). Furthermore, Italian courts' involvement is always required for issuing provisional or urgent measures to be enforced in Italy pending the arbitration proceedings and regardless of the seat.

National judges may also have a role for the constitution of the Arbitral Tribunal seated abroad: according to article 810 of the Code of Civil Procedure, failing an agreement between the parties for the appointment of the president of the Arbitral Tribunal, the parties may submit a request to the president of the Tribunal of Rome to appoint the president.

## 4. The conduct of the proceedings

### 4.1 Can parties retain outside counsel or be self-represented?

Article 816-*bis* of the Code of Civil Procedure provides that parties may either be self-represented or retain a counsel. In the latter case, it is irrelevant whether the counsel is a foreign or Italian qualified attorney. In practice, parties in Italy tend to choose their legal counsel in the light of the subject-matter and applicable law. It is therefore not uncommon for foreign lawyers to represent parties in arbitrations seated in Italy.

### 4.2 How strictly do courts control arbitrators' independence and impartiality?

*For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?*

Under Italian law, there is no explicit duty of disclosure of conflicts or circumstances that might affect the arbitrator's impartiality. Some authors believe that such duty is implied in the general obligation to perform the contract in good faith (Article 1375 Civil Code) or in the obligation to act with the necessary diligence in the performance of one's mandate (Article 1710 Civil Code).<sup>13</sup>

Article 815 of the Code of Civil Procedure sets forth the criteria for the challenge of an arbitrator:

- the arbitrator does not have the qualifications agreed by the parties;
- the arbitrator or an entity under their control has an interest in the outcome of the case;
- the arbitrator or their spouse is a relative of one of the parties or lives with one of the parties, is their legal representative and/or the party's counsel;
- the arbitrator or their spouse acts against or is hostile to one of the parties, a company controlled by one of the parties or the person controlling one of the parties' company;

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*the arbitration agreement or the regularity of the arbitrators' appointment be challenged in the course of the arbitration, the arbitrators shall decide on their own jurisdiction.*

*This provision shall apply also in case the arbitrators' powers are challenged in any venue for whatever reason which has supervened in the course of the proceedings.*

*The party that does not object in the first statement of defense subsequent to the arbitrators' acceptance that they lack jurisdiction by reason of the non-existence, invalidity or ineffectiveness of the arbitration agreement, may not challenge the award on this ground, except in case of a non-arbitrable dispute.*

*The party which, during the arbitration proceedings, fails to raise the objection that the other parties' pleadings exceed the limits of the arbitration agreement may not, on this ground, challenge the award."*

<sup>13</sup> R. TUCCILLO, *L'imparzialità dell'arbitro: profili comparatistici*, 2012, pag. 230, <http://eprints.luiss.it/1057/1/tuccillo-20120301-tesi.pdf>

- the arbitrator is employed or acts as consultant to one of the parties, to a company owned by one of the parties, to its controlling entity or to a company subject to common control;
- the arbitrator is the legal guardian of one of the parties;
- the arbitrator acted as a consultant or an advisor, or represented one of the parties during a precedent phase of the same case or has testified as witness during the same.

#### **4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?**

Pursuant to Article 810 of the Code of Civil Procedure, the parties are entitled to submit a request to the president of the tribunal of the district of the seat of the arbitration for the appointment of the arbitrators. As mentioned above (paragraph 3.3), if the seat of the arbitration is outside the jurisdiction, the Tribunal of Rome has exclusive jurisdiction.

If the parties have not established the seat of the arbitration, it is for the president of the tribunal of the Italian district where the arbitration agreement was executed to appoint the arbitrators. If the arbitration agreement was executed abroad, the president of the tribunal of Rome makes the appointment.

In addition, the court can intervene (upon request of the initiating party) when a respondent has failed to appoint a co-arbitrator within 20 days from the receipt of the initiating party's notice of appointment.

The same rules apply if, in the course of the proceedings, one or more arbitrators have to be replaced and the party or parties fail to appoint the new member(s) of the arbitral tribunal promptly.

#### **4.4 Do courts have the power to issue interim measures in connection with arbitrations?**

Yes. Since arbitrators are deprived of any power to issue interim measures, injunctions and provisional measures (Article 818 Code of Civil Procedure), parties must address their requests for interim measures to courts, regardless of whether the arbitration has effectively started.

##### **4.4.1 If so, are they willing to consider *ex parte* requests?**

Yes. Requests for interim measures are generally made *ex parte*. The decisions can also be issued on an *ex parte* basis. Subsequently, a party has the right to object within 15 days before the same court,<sup>14</sup> which can either revoke or confirm the interim measures already granted.

#### **4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?**

Rules concerning the conduct of the proceedings can be found in:

- Title VIII, Section IV, Chapter III (Articles 816-819 Code of Civil Procedure) on the conduct of *ad hoc* proceedings;
- Title VIII, Section IV, Chapter IV (Article 820-826 Code of Civil Procedure) on the award;
- Title VIII, Section IV, Chapter VI (Article 820-826 Code of Civil Procedure) on the conduct of administrated arbitrations.

##### **4.5.1 Does it provide for the confidentiality of arbitration proceedings?**

There is no specific provision in the Code of Civil Procedure concerning the confidentiality of arbitration proceedings.

<sup>14</sup> The court will be the same, but the objection will be decided by a three-judge chamber that cannot include the judge that issued and/or refused the interim measure.

However, such absence does not imply that the counsel and the arbitrators are not expected to keep the proceedings and the award confidential.<sup>15</sup> In particular, Italian-qualified attorneys are subject to an obligation of secrecy regardless of whether they are acting as counsel<sup>16</sup> or as arbitrators.<sup>17</sup>

#### 4.5.2 Does it regulate the length of arbitration proceedings?

Article 820 of the Code of Civil Procedure provides that the arbitral tribunal has to issue the award no later than 240 days (about 8 months) from the arbitrators' acceptance of the appointment.

The time limit can be extended by the tribunal to 420 days (an additional 180 days or about 6 months)<sup>18</sup> in the following cases:

- if the arbitral tribunal needs additional evidence;
- if an expert is appointed by the arbitral tribunal;
- if the arbitral tribunal issues a partial or interim award;
- if the sole arbitrator or one of the members of the arbitral tribunal is replaced in the course of the proceedings.

In any case, the time limit can be extended by any length of time:

- if all the parties agree in writing;
- by the national court where the arbitration is seated, before the expiration of the time-limit, upon the parties' or arbitrators' request.

The time-limit is rarely respected, as it is very common for parties to request an extension of time. There are no statistics available on the average duration of *ad hoc* arbitration proceedings,<sup>19</sup> but they usually last for about 18 months.

The excessive duration of the proceedings is not *per se* one of the grounds for the annulment of the award envisaged by Article 829 of the Code of Civil Procedure. However, if the time limit to render the award is not extended pursuant to Article 820 and 821 Code of Civil Procedure, the parties can request, before the award is rendered, that the arbitral tribunal be considered *functus officio*.

If the party relies on the termination of the arbitrators' authority, the arbitrators, having verified the expiry of the time-limit, shall declare the proceedings extinguished (Article 821 Code of Civil Procedure).

#### 4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Article 816 § 3 of the Code of Civil Procedure provides that, unless otherwise prescribed in the arbitration agreement, the arbitrators may hold hearings and/or meetings in places other than the seat of the arbitration (including abroad).

<sup>15</sup> To this regard, the rules of the Milan Chamber of Commerce provide an exception: article 8 of the rules specifically provides that the parties and the members of the Arbitral Tribunal are subject to an obligation of confidentiality.

<sup>16</sup> Article 13 of the Professional law.

<sup>17</sup> Article 61 of the Professional law.

<sup>18</sup> The extension can be granted once for each single cause. See Corte di Cassazione, n. 12950/2016.

<sup>19</sup> M. E. ARMANDOLA "Durata dei procedimenti e rapporti tra arbitri e autorità giudiziaria", in *La Nuova Procedura Civile*, Vol. 5, 2016, available at <http://www.pavia-ansaldo.it/wp-content/uploads/2016/10/Durata-dei-procedimenti-e-rapporti-tra-arbitri-e-autorit%C3%A0-giudiziaria.pdf>

#### 4.5.4 Does it allow for arbitrators to issue interim measures?

No. Article 818 of the Code of Civil Procedure explicitly prohibits arbitrators from issuing interim measures. Aware of the fact that said prohibition is likely to dissuade some parties to have recourse to arbitration and/or chose Italy as a seat for an arbitration, in its 2017 annual report, the National Bar Association suggested to the Ministry of Justice to grant to the arbitrators the power to issue interim measures, in line with the legislation of most EU countries.<sup>20</sup>

There is, however, one exception to this rule. Pursuant to Article 35 of the Legislative Decree n° 5/2003 concerning arbitration on corporate matters, if the dispute concerns the validity of a shareholder's resolution, the arbitral tribunal has the authority to suspend, "by way of interim relief", the effects of said resolution pending the proceedings.

In any event, nothing prevents the parties from voluntarily complying with any interim order issued by the arbitrators, since the parties' conduct in the course of the proceedings is one of the elements that arbitral tribunals take into account when allocating costs.

#### 4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

No. Pursuant to Article 816-*bis* of the Code of Civil Procedure, the parties are free to determine rules on the taking of evidence.

It is generally believed that, in the absence of a specific determination of the rules on the taking of evidence, the arbitrators have to refer to the rules governing the administration of evidence before the national courts.<sup>21</sup>

However, more and more arbitral tribunals also make reference to the IBA Rules on the Taking of Evidence for international cases.

##### 4.5.5.1 For example, are there any restrictions to the presentation of testimony by a party employee?

Not specifically. Article 247 of the Code of Civil Procedure, applicable before domestic State courts, does not allow the testimony of anyone having an interest in the case. However, it has become more common to see employees testifying in favour of their own employers pursuant to the general practice in international arbitration.

#### 4.5.6 Does it make it mandatory to hold a hearing?

Given the freedom granted to parties to set the procedural rules, there is also no provision as to where the hearings should be held or if they should be held at all. Consequently, if the parties decide to hold hearings, they are free to decide on the place that they find most suitable (including outside Italy).

#### 4.5.7 Does it prescribe principles governing the awarding of interest?

Not specifically. However, if claimed, interest is generally awarded and is calculated on the basis of criteria set forth in Article 1284 of the Civil Code.

<sup>20</sup> 2017 Annual Report of the Italian National Bar Association (Consiglio Nazionale Forense), p. 12. Available at <http://www.consiglionazionaleforense.it/documents/20182/246419/Rapporto+annuale+2017+ONPG.pdf/7ad64f73-9378-451d-aed7-11c98ffef91d>

<sup>21</sup> S. LA CHINA, *L'arbitrato il sistema e l'esperienza*, Milan, 2007, p. 166; M. BOVE, "L'istruzione probatoria nel giudizio arbitrale", in *Il Giusto Processo Civile*, 1/14, pp. 961 *et ff.*; adde F. AULETTA, "L'istruzione probatoria", in *Diritto dell'arbitrato rituale*, 2<sup>nd</sup> éd., Turin, 2000, p. 197. *Contra* S. SATTÀ, *Contributo alla dottrina dell'arbitrato*, Milano, 1931, p. 34 *et seq.*

#### 4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Article 91 of the Code of Civil Procedure lays out the general principle according to which the unsuccessful party must pay the legal costs to the successful party. Italian arbitrators commonly allocate costs according to this principle, and quantify them according to the parameters set in the Ministerial Decree n° 55/2014, although they have ample discretion in this regard.<sup>22</sup>

Recoverable costs include administrative fees, legal fees and documented expenses. The allocation of costs has to be reasoned.

#### 4.6 Liability

##### 4.6.1 Do arbitrators benefit from immunity to civil liability?

No. Article 813-ter of the Code of Civil Procedure provides that arbitrators are held liable only for acts committed with intent or gross negligence.

Specifically, arbitrators are held liable for all damages suffered by the parties when they have, with intent or gross negligence:

- omitted or postponed an act, thus causing the forfeiture of the act;
- resigned without a reasonable justification; and/or
- completely omitted the release of the award or postponed it beyond the deadline.

There is a presumption of gross negligence when the arbitrators have:

- manifestly violated the law;
- affirmed the existence of a fact, the existence of which is unquestionably rebutted by the evidence filed in the proceedings; and/or
- denied the existence of a fact, the existence of which is unquestionably demonstrated by the evidence filed in the proceedings.

The arbitrator cannot be held to be grossly negligent in their interpretation of the evidence in the case,<sup>23</sup> unless such interpretation falls within the categories identified above.

##### 4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Not specifically. However, following the formalization of the jurisdictional nature of arbitral proceedings by the Legislative Decree n. 40/2006,<sup>24</sup> some commentators consider that criminal provisions relating to the corruption of judges might extend to arbitral tribunals.<sup>25</sup>

Experts and witnesses cannot be criminally liable for false statements. They have no obligation to take the oath.

<sup>22</sup> This is, of course, the case when the arbitration is not administrated.

<sup>23</sup> Corte di Cassazione, Sez. Unite n. 9839/2011; Corte di Cassazione n. 17466/2016.

<sup>24</sup> In this respect, see also the judgement of the Constitutional Court n. 223/2013.

<sup>25</sup> R. POLIDORI, "Arbitrato rituale e questioni penali: corruzione di arbitri, falsa testimonianza e falsa perizia", in *Rivista dell'Arbitrato*, Vol. 2 (2016), pp. 399 *et seq.*

## 5. The award

### 5.1 Can parties waive the requirement for an award to provide reasons?

There is no explicit prohibition of waiver to the requirement to provide reasons. However, under Article 829 (read in conjunction with Article 823) of the Code of Civil Procedure, it is possible for a party to apply to the court to set aside an award on the basis that it contains insufficient reasoning, regardless of any waiver by the parties.

### 5.2 Can parties waive the right to seek the annulment of the award?

Pursuant to Article 829 of the Code of Civil Procedure, despite any waiver, the parties are always entitled to seek the annulment of the award on the basis of the grounds contained in this provision. See paragraph 5.4 below.

#### 5.2.1 If yes, under what conditions?

See paragraph 5.2 above and 5.4 below.

### 5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

When rendering an award in Italy, arbitrators have to keep in mind the difference between *arbitrato rituale* and *irrituale*, which is a particular feature of Italian law.

*Arbitrato irrituale* (article 808-ter Code of Civil Procedure) aims at resolving a dispute by adopting a binding contractual agreement rather than an award. The decisions rendered at the end of an *arbitrato irrituale* take the form of simple contractual agreements between the parties and therefore are not immediately enforceable.

There are no atypical mandatory requirements for *arbitrato rituale*.

### 5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No. Pursuant to Article 827 of the Code of Civil Procedure, the only available avenues for challenging an arbitral award are (i) filing for annulment (by a party); (ii) revocation of the award (by the arbitral tribunal), and (iii) third-party opposition.

#### 5.4.1 Annulment

Pursuant to Article 829 of the Code of Civil Procedure, a filing for annulment is allowed in the following cases:

- a) invalidity of the arbitration agreement (provided that this objection was raised in the course of the proceedings);
- b) breach of the rules on the appointment of the arbitrators (provided that this objection was raised in the course of the proceedings) or their ineligibility;
- c) breach of due process;
- d) the award does not contain a brief statement of the reasons or the statement therein contained (i) does not allow the parties to fully understand the Tribunal's reasoning, (ii) is contradictory (iii) fails to decide on the merits where it should have, (iv) fails to decide on some of the parties' claims or defences (and is not an interim or partial award);
- e) the dispositive section of the award is missing;
- f) the award is not signed (the signature of the majority is sufficient);

- g) the award was rendered after expiry of the time limit (provided that the party has given notice to the other parties and the arbitrators during the proceedings);
- h) the arbitrators have breached the formalities prescribed in the arbitration agreement.

The award can also be challenged for breach of substantive provisions of law, but only if:

- the arbitration agreement provides so;
- the award violates public policy;
- the arbitration concerns an employment dispute;
- the breach of substantive law provisions relates to a preliminary matter that cannot be subject to arbitration.

Pursuant to article 808-ter of the Code of Civil Procedure, the grounds for the annulment of a decision rendered in an *arbitrato irrituale* are limited to cases of:

- invalidity of the arbitration agreement;
- breach of the rules relating to the appointment of the arbitrators;
- ineligibility of the arbitrators;
- breach by the arbitrators of the formalities prescribed in the arbitration agreement for the validity of the decision; and
- breach of due process.

#### **5.4.2 Revocation**

Pursuant to Articles 831 and 395 of the Code of Civil Procedure, revocation is allowed only if:

- the award is the result of one of the parties' fraud, collusion or corruption;
- the award was rendered on the basis of forged documents or evidence;
- new decisive documents, unavailable during the proceedings, have been discovered after the award was rendered; and/or
- the award is the result of one of the arbitrators' fraud, collusion or corruption and such fraud, collusion or corruption has been established by a definitive judicial decision.

#### **5.4.3 Third-party opposition**

Pursuant to articles 404 and 831 of the Code of Civil Procedure, a third-party challenge may be filed by any third parties alleging that their rights are jeopardised by the award.

### **5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?**

#### **5.5.1 Domestic award**

To start enforcement proceedings on the basis of a domestic award, a successful party must deposit a certified copy of the award by a public officer and a copy of the arbitration agreement at the registry of the court of the district where the arbitration was seated. After verification that the arbitration agreement and the arbitral award satisfy all mandatory formality requirements, the court will release a certificate of enforceability, on the basis of which the party will be able to start the enforcement proceedings. Pursuant to

Article 824-*bis* of the Code of Civil Procedure, the local award has the same effects as a judicial decision from the date of its filing with the court.

### 5.5.2 Foreign award

Article 839 of the Code of Civil Procedure mirrors the provisions of the New York Convention.

The party wishing to enforce a foreign award in Italy must file an application before the president of the Court of Appeal having jurisdiction over the award, providing a certified copy of the award as well as the arbitration agreement (translated into Italian if not already in that language).

The president of the Court will declare the award enforceable in Italy provided that:

- the dispute concerns a subject-matter that can be decided in arbitration; and
- the award does not contain any provision which is contrary to the Italian public order.

This decision may be challenged within 30 days (Article 840 Code of Civil Procedure).

### 5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

No. Pursuant to a general principle of Italian law, any decision issued at first instance is always enforceable even if an appeal or annulment proceeding is initiated.

However, the party seeking the annulment of the award can address a request for suspension to the Court of Appeal if:

- there are, *prima facie*, solid grounds to grant the application for the annulment of the awards (so-called *fumus boni iuris*); and
- the enforcement of the decision is likely to cause an irreparable harm (so-called *periculum in mora*).

In particular, if the award is subject to annulment proceedings at its seat, the party seeking to avoid the enforcement may address to the Italian court a request of suspension of the opposition proceedings until the annulment proceedings pending abroad are not concluded.

In any case, Italian courts enjoy discretion as to whether they should grant such request of suspension.<sup>26</sup>

### 5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

The annulment of the award at its seat does not *automatically* preclude the enforcement of the award in Italy,<sup>27</sup> but it is one of the grounds on which the party against whom the award should be enforced can file by writ of summons an opposition against the decree granting the recognition and/or enforcement of such award (Article 840 § 3 n. 5 Code of Civil Procedure).

### 5.8 Are foreign awards readily enforceable in practice?

Italian courts tend to look favourably upon foreign awards and recognize their enforceability in most cases.

<sup>26</sup> Authoritative doctrine has excluded that the commencement of annulment proceedings at the seat automatically obliges the Italian judge to suspend the procedure for opposition in Italy C. CONSOLO and F.P. LUISSO "*Codice di Procedura Civile Commentato*", Rozzano (MI), 2007, p. 6156.

<sup>27</sup> P. MEINERI ET AL. "Il riconoscimento dei lodi annullati: l'emergere di un giudizio di compatibilità tra l'ordinamento nazionale e la sentenza estera di *vacatur*", *Rivista dell'Arbitrato*, 2/2017, pp. 406 *et ff.*

In this respect, the limit of respect of public order set out in articles 839 and 840 Code of Civil Procedure has to be interpreted restrictively; the control has to be limited to the operative part of the decision<sup>28</sup> and the judge must refer to the domestic public order only<sup>29</sup> assessing compliance with the provisions of the Italian Constitution<sup>30</sup> and the core of EU law principles.<sup>31</sup>

## 6. Funding arrangements

### 6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Funding arrangements are not specifically regulated under Italian Law.

That being said, pursuant to Article 106 of the Italian Banking Law (*Testo Unico Bancario*), lending is a regulated activity reserved to banks and financial intermediaries.

#### 6.1.1 If so, what is the practical and/or legal impact of such restrictions?

The abovementioned restriction on lending activities is one of the reasons – together with the fact that court litigation in Italy is relatively inexpensive – why third-party funding remains under-developed in Italy.

## 7. Is there likely to be any significant reform of the arbitration law in the near future?

On 18 February 2017, the Commission for the Study of Reforms released a report suggesting a series of amendments to the Code of Civil Procedure, in order to favour arbitration over civil court proceedings, namely:

- in the case of a challenge to the award where the ground for annulment is procedural (and not merits-based), the possibility of “skipping” the Court of Appeal and starting proceedings directly before the Supreme Court (*Corte di Cassazione*);
- inclusion of provisions for the arbitration of company matters in the Code of Civil Procedure, in order to guarantee the consistency of the different provisions;
- extension of the possibility of migrating from civil court proceedings to arbitral proceedings for employment-related disputes.

At this stage, it is not clear whether Parliament will follow the Commission’s advice and, if so, what the timeline for any reforms will be.

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<sup>28</sup> Corte di Cassazione, n. 6947/2004.

<sup>29</sup> F. CARPI AND M. TARUFFO “Commentario breve al Codice di Procedura Civile”, 2015, Padova, p. 3055; C. PUNZI, *Disegno sistematico dell'arbitrato*, 2015, Padova, p. 329

<sup>30</sup> Corte di Cassazione n. 17349/2002.

<sup>31</sup> Court of Appeals of Florence, 21 march 2016.