Trends and Developments

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The Reform of Arbitration in Italy

The recent Legislative Decree No 149 of 10 October 2022 has finally put in motion the so-called Cartabia Reform, implementing the principles set forth by Delegation Law No 206 of 26 November 2021 (the "Delegation Law") and followed by the Italian government in the reform of civil proceedings.

To make arbitration a more attractive dispute resolution method in Italy and to build a more transparent and efficient system, Article 1, paragraph 15 of the Delegation Law, wholly dedicated to arbitration, has been transposed into Article 3, paragraphs 51-56 of Legislative Decree No 149/2022. The new provisions will enter into force on 28 February 2023 and will apply to arbitrations commenced after that date.

The declaration of impartiality and independence of the arbitrators

Article 815 of the Italian Code of Civil Procedure provides a list of grounds for challenging an arbitrator. Until now, such grounds were specific and mostly related to the arbitrator's relationship with the parties. With a view to strengthening the guarantees of impartiality and independence of arbitrators, the reform added a broader ground for the challenge: "serious reasons of convenience."

In addition, the reformed Article 813 of the Italian Code of Civil Procedure introduces the obligation, upon each arbitrator, to declare all the circumstances that might compromise their own impartiality and independence in writing.

The omission of such disclosure prevents the validity of the acceptance. Should an arbitrator fail to report the circumstances under which they might be challenged under Article 815 of the Italian Code of Civil Procedure, they shall forfeit the assignment.

Although the requirements of disclosure are often worded in general terms in the international arbitration rules of many arbitral institutions, it may be hard to apply and co-ordinate these provisions. Indeed, the "serious reasons of convenience" are unspecified and will have to be assessed on a case-by-case basis.

Disclosure requirements are already known in international best practice (IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 3) and in the arbitration rules of major Italian and international institutions (Article 20 of the CAM Arbitration Rules; Article 11(2) of the ICC Arbitration Rules; Article 13 of the SIAC Rules). Therefore, the impact of such innovation on institutional arbitration may be limited.

On the other hand, Italy has a strong tradition of ad hoc arbitrations, which represent a considerable proportion of arbitral proceedings. These proceedings are not subject to arbitration rules except those in the Italian Code of Civil Procedure, and ordinary courts decide arbitrators' challenges. The new provisions could therefore be helpful to strengthen the guarantees of impartiality and independence, which are essential to ensure a fair trial.

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Arbitrators' power to grant interim measures

By overcoming the restriction established by the old Article 818 of the Italian Code of Civil Procedure, the new Article 818 empowers arbitrators to grant interim measures. This is an innovation for the Italian legal framework, which had remained "de facto" isolated from other European legal systems that have long recognised the power of arbitrators to grant interim measures.

The magnitude of this innovation, however, must be checked. Arbitrators will have this power only if expressly given to them by the parties in the arbitration agreement or in a subsequent written agreement before the commencement of the arbitration proceedings. This solution is, indeed, opposite to the one generally adopted in many other legal systems, where the power of the arbitrators to issue provisional measures is the general rule, but the parties may agree to limit such power.

The wording of the new Article 818 has answered the question posed by practitioners after the approval of the Delegation Law – ie, whether the reference to the rules of an arbitral institution providing for this power will be deemed sufficient to meet the condition set forth in the Delegation Law. Article 818 now clarifies that the choice of the parties can be made expressly or by referring, in the arbitration agreement, to a set of arbitral rules providing for the power of the arbitrators to issue interim measures. Since the rules of primary institutions currently entitle the arbitrators to issue interim measures, this should ease the implementation of the new mechanism, at least in the case of institutional arbitrations.

Article 818 of the Italian Code of Civil Procedure has also been redesigned to grant an exclusive power to arbitrators.

In particular, when the parties give the arbitrators the power to issue provisional/interim measures, the ordinary courts shall be empowered to take such measures only if applications in court have been filed before the arbitrators have accepted their appointment. After this moment, ordinary courts will irremediably lose such power.

It is a remarkable change: the Italian system will shift from one in which the courts have exclusive jurisdiction on interim measures to one in which the arbitrators have exclusive power in this area, becoming more "arbitration-friendly" than many foreign legal systems, which leaves the parties the choice of which authority to address. Leaving such choice to the parties seems preferable because they may thereby assess the authority to address their request based on the nature of the measure requested or other circumstances of the case.

Interim measures granted by arbitrators will be challenged before the competent Court of Appeal, limited to the grounds referred to in Article 829, paragraph 1 of the Italian Code of Civil Procedure – ie, those for annulment of arbitral awards – as well as to cases where interim measures are contrary to the public order.

The implementation of the interim measures shall, instead, be carried out under the supervision of the ordinary court of first instance. In this respect, Legislative Decree No 149/2022 has enacted the brand-new Article 818-ter, which provides that interim measures granted by arbitrators shall be enforced under the control of the court in whose district the arbitration seat is located. If the seat of arbitration is not in Italy, the competent court will be that of the place where the interim measure must be implemented.

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The enforceability of a decree recognising and enforcing a foreign award

The recognition and the enforcement of a foreign award has traditionally been governed by Articles 839 and 840 of the Italian Code of Civil Procedure, which replicate the content of Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In the Italian system, the appearance of the opposing party in the procedure is deferred and merely potential because the proceedings develop as follows.

- In the first phase, it is established that there are no conditions preventing the recognition of the foreign award. The President of the competent Court of Appeal can issue a decree to declare the effectiveness of the foreign award.
- In the second (potential) phase, one party can challenge the decree. The appeal can be submitted by the applicant if the recognition has been denied, or by the counterparty if it has been granted.

Before the reform, it was unclear whether the foreign award including an order for payment was immediately enforceable after the issuance of the decree of the President of the Court of Appeal. The majority case law had come to hold that any enforcement had to be suspended until the expiration of the term for the appeal of the decree issued by the Court.

The matter has now been solved by the amended Article 839, which now expressly provide that the decree declaring the effectiveness of a foreign award will be immediately enforceable.

For the same reasons, Article 840 has also been amended, in that the second paragraph now reads that, following the opposition, the Court of Appeal may suspend the award's enforceability/enforcement.

Corporate arbitration

The provisions regarding corporate arbitration, previously governed by Legislative Decree No 5/2003, have now been moved into the Italian Code of Civil Procedure.

The overall result is a mere formal rewriting of the legal regulation included initially in Articles 34, 35, 36 and 37 of Legislative Decree No 5/2003.

The only relevant innovation consists of the possibility to challenge before the Court of Appeal the orders suspending the effectiveness of shareholders' meeting resolutions, where such a possibility was expressly precluded prior to the reform.

Until today the interim measures issued by the arbitrators were not open to challenge before the judicial authority but could only be revoked or amended by the arbitrators themselves. The new Article 838-ter allows them to be challenged under Article 818-bis – ie, by the same method provided for the interim measures.

The "translatio iudicii"

The so-called "translatio iudicii" from arbitration proceedings to ordinary proceedings and vice-versa is now governed by the brand-new Article 819-quater.

In all cases where jurisdiction is declined (by the judge in favour of the arbitrator and/or vice versa), it is now possible for the parties to preserve the substantive and procedural effects of the claim by taking all the necessary steps to institute the proceedings before the competent entity.

If the ordinary court has declined its jurisdiction, the parties can carry out the activities inherent to the appointment of the arbitrators, according to Article 810 of the Code of Civil Procedure. If the jurisdiction is declined by the arbitral tribunal, the parties will instead have to carry out the formal resumption of the case pursuant to Article 125 of the Italian Code of Civil Procedure.

In both cases, the parties shall resume the case within three months after the judgment or the arbitral award become final.

The new Article 819-quater established that, after the "translatio iudicii", the procedural activity already performed will be kept in consideration. In particular, evidence gathered in the arbitration or ordinary proceedings may constitute evidence in the following proceedings (Article 116, paragraph 2, Code of Civil Procedure).

Other provisions

In order to promote the substantial equivalence, in terms of effects, of arbitration proceedings with judicial proceedings, Article 816-bis.1 now expressly states that the substantive effects of a request for arbitration are equivalent to those of a statement of claim.

Article 810 of the Italian Code of Civil Procedure, firstly, requires the appointing authorities to respect criteria that ensure transparency, rotation and efficiency: it will be up to the individual judicial authorities to flesh out these criteria, including by drawing up lists of arbitrators.

It also imposes a precise duty of information, which consists in publishing the appointments on the website of the judicial office, which will give all practitioners the opportunity to verify compliance with the indicated criteria.

Article 822 of the Italian Code of Civil Procedure now expressly provides that the parties may indicate and choose the applicable law. If they do not, the arbitrators shall apply the rules or law identified under the conflict criteria deemed applicable.

The term for challenge for annulment of an arbitration award has been reduced from one year to six months, while the 90-day term to petition for the annulment of an award when served by the opponent has not changed. The first term now matches the term for the appeal of judicial decisions when not served by the counterparty. The second term is longer than the 30-day term for the appeal of judicial decisions which have been served.

Conclusion

The outcome of the reform seems to be positive: alongside some redundant provisions, the effort to reorganise the matter and, above all, the express empowerment for arbitrators to grant interim measures are to be welcomed. Of course, it is too early to tell how the new provisions will be put into practice; it will be a task for practitioner to assess how to apply such innovations successfully, in such a way that Italy becomes among the more appealing countries for arbitration.

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LCA Studio Legale is an independent law firm with offices in Italy (Milan, Genoa and Treviso) and in the UAE, where it operates in interna-tional partnership with IAA Law Firm. It is ac-tive in all main areas of commercial, corporate, banking, finance, restructuring, tax, criminal, real estate, labour and administrative law and, more generally, in all aspects of business law – including IP, new technologies, transportation, sport, art and food law – and in the protection of family assets. LCA has over 120 professionals who mainly serve corporate and financial clients and work for industrial, financial and insurance groups, investors and banks, as well as SMEs, family businesses and individual entrepreneurs. The firm advises Italian companies on their in-ternationalisation processes, and foreign cor-porations interested in investing or expanding in Italy, as well as multinational corporations in-volved in multi-jurisdictional transactions. LCA represents clients in court proceedings, arbitra-tions and alternative dispute resolution, espe-cially in the areas of corporate and commercial law.

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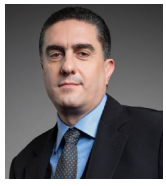

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