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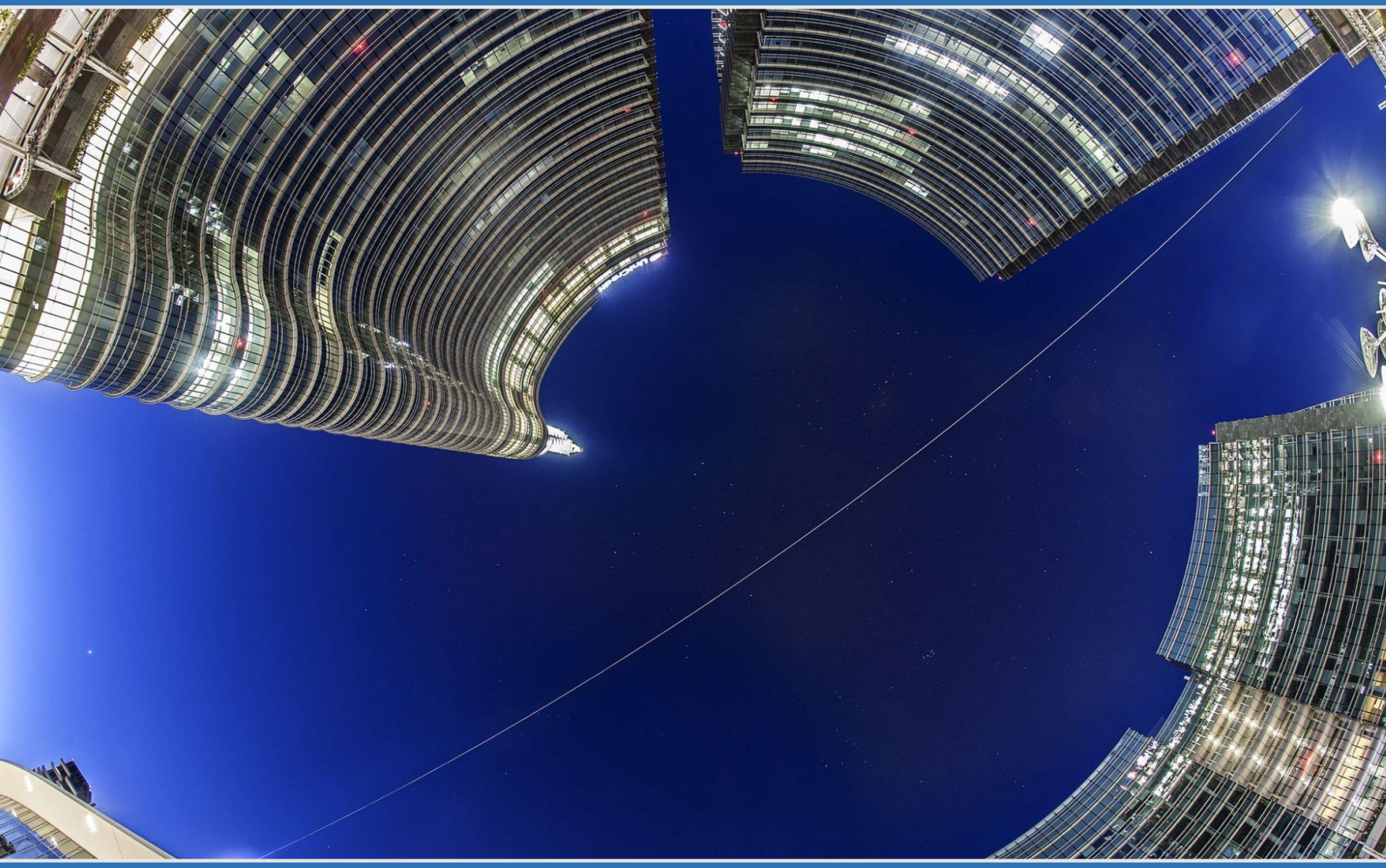

Italian arbitration report

by Roberto Oliva

Second half 2022

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✸ EXECUTIVE SUMMARY

This report contains a very concise description of Italian law rules governing arbitration proceedings seated in Italy, focusing on new legislation or case law.

Indeed, 2022 has been an exciting year for Italian arbitration practitioners.

First, in 2022 was enacted the **reform of Italian arbitration law**, which will enter into force on 30 June 2023. It is the first significant reform since that passed in 2006. It is worth immediately noting that:

(i) Italian arbitration law will impose **specific disclosure duties on the appointed arbitrators**. The influence of international best practices is evident, and the fulfilment of the said duties will likely avoid the occurrence of events such as those discussed in BEG v. Italy, and

(ii) Italy finally leaves the restricted club of jurisdictions not allowing arbitrators to issue **interim measures**.

Second, Italian practitioners had to brush up on seasoned precedents on the arbitrability of **disputes involving a party affected by trade sanctions**. Italian Courts dealt with this matter concerning the sanctions against certain Iraqi entities; the same principles will likely apply to the sanctioned Russian entities.

Third and eventually, **Italian institutional arbitration is in sharp expansion**. The time is still far when Italian administered arbitrations will outnumber ad hoc proceedings. Nonetheless, Italian arbitral institutions, particularly the leading institution (Milan Chamber of Arbitration), significantly contributed to shaping the landscape for domestic and international cases.

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GENERAL PRINCIPLES

Arbitrability

Law rules

Under Italian law, as a general rule, a dispute may be referred to an arbitral tribunal **if the parties are allowed to dispose of its subject matter**.

The consequence of the above is that **not all disputes concerning an economic interest may be referred to arbitrators**.

Significant case law

Italian Courts maintain that only State Courts have jurisdiction over a dispute involving a party affected by trade sanctions if its subject matter is within the scope of application of the said sanctions (Court of Appeal of Genoa, 7 May 1994, and Italian Supreme Court, 23 November 2015, both concerning the sanctions enacted against Iraq, but laying down principles that can also apply for the recent sanctions enacted against some Russian entities).

Italian Courts also maintain that only State Courts have jurisdiction over a dispute concerning the deliberation approving a company's financial statements if the claimant's claim concerns the content of these statements (while the dispute may be referred to arbitrators if it concerns other aspects, such as the formalities of the shareholders' meeting: Court of Milan, 17 March 2022).

Validity

🕮 *Law rules*

The arbitration agreement shall be in **writing**. A **specific signature** is required if the arbitration agreement is inserted **in a serial contract** (*i.e.*, a contractual text prepared by a party for an indefinite series of possible relationships, such as the model contract of a general contractor). In other words, such contracts require a double signature.

⚖ *Significant case law*

A lower Court's decision (Court of appeal of Milan, 5 August 2022) held that the above-mentioned double signature is not required in international contracts. For the time being, this principle has neither been upheld nor denied by the Italian Supreme Court.

Separability

🕮 *Law rules*

Italian law recognises the **separability principle** (*i.e.*, the validity/invalidity of the underlying contract does not affect the validity/invalidity of the arbitration agreement).

⚖ *Significant case law*

Italian case law only applies the separability principle to "*rituale*" arbitration (Italian Supreme Court, 29 March 2012).

In this respect, it is worth noting that Italian law distinguishes between "*rituale*" and "*irrituale*" arbitration proceedings. In a nutshell, "*rituale*" arbitration is the "normal" arbitration resulting in an enforceable award, whereas "*irrituale*" arbitration is an ADR mechanism, as the "*irrituale*" award has the effects of a binding contract (and, as a consequence, the arbitral agreement for "*irrituale*" arbitration does not require the double signature mentioned in **Validity**: Court of Bolzano, 10 February 2022).

Construction

Law rules

If doubts arise as to the **scope of the arbitration agreement**, it has to be **construed as extending to all the disputes arising out of the contract or the relationship to which it refers**.

Significant case law

Italian case law narrows the scope of the above-mentioned construction rule, as it distinguishes between claims directly arising out of the contract or relationship and claims concerning which the contract or relationship is a mere chronological antecedent. In the latter case, the said construction rule does not apply. On several occasions, this distinction is made for a specific claim provided for by Italian law (the claim for severe defects in a building), which Italian case law construes as a tortious claim. As a result, the arbitral tribunal provided for by the construction contract does not have jurisdiction over the claim concerning alleged severe defects, and it is not relevant whether the claimant is the principal or a third party (Italian Supreme Court, 24 October 2022).

In addition, if doubts arise as to the nature of the arbitration, Italian Courts usually construe the arbitration agreement as providing for a "*rituale*" arbitration (Court of Florence, 30 November 2022).

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THE ARBITRAL TRIBUNAL

Number and appointment of arbitrators

Law rules

The **number of arbitrators shall be odd**, and, as a general rule, the **parties enjoy considerable freedom for the appointment of the arbitrators** (with a few exceptions, such as corporate arbitration).

A notable exception to this rule is in corporate arbitration, as **the arbitral agreement contained in a company's articles of association is required to provide for the appointment of the arbitrators by a third party**. Otherwise, it is not enforceable.

Significant case law

In the years immediately following the reform of Italian company law (2003), some scholars and a line of cases of lower Courts maintained that in corporate matters, it was possible to have arbitration proceedings under the newly enacted rules (with arbitrators appointed by a third party) as well as arbitration proceedings under the general rules (with arbitrators appointed by the parties). The Italian Supreme Court settled the matter, stating that only arbitration under the newly enacted rules is possible. The decisions issued by lower Courts strictly adhere to the principles laid down by the Supreme Court (Court of Florence, 9 March 2022).

Challenge of arbitrators

Law rules

As it currently stands, Italian law provides a closed list of grounds for challenging an arbitrator. The reform enacted in 2022

(Legislative Decree No. 149/2022), which will enter into force on 30 June 2023, added a general clause ("other serious reasons"). The reform also imposed on the appointed arbitrators **specific disclosure duties**.

⚖ *Significant case law*

Under the law currently in force, Italian case law laid down the principle that an arbitrator may be challenged only before the issuance of the award and that grounds for challenging an arbitrator do not convert into grounds for setting aside the award (Italian Supreme Court, 23 July 2022). It is worth noting that the newly enacted rules might impact this principle.

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THE PROCEDURE

Tribunal powers

Law rules

Arbitral Tribunals are granted with **Kompetenz-Kompetenz power**.

Moreover, under Italian law, all issues arising in the course of the proceedings shall be decided by the arbitrators with an order which is not subject to filing and may be modified unless they elect to issue an interim award.

Significant case law

Notwithstanding the above, if a State Court declared that jurisdiction lies with an arbitral tribunal based on a theoretically unenforceable arbitral agreement, and the State Court's decision is no longer subject to appeal, the arbitral tribunal retains jurisdiction over the matter (Court of appeal of L'Aquila, 4 July 2022, and Court of appeal of Messina, 28 November 2022).

Interim measures

Law rules

As Italian law currently stands, arbitral tribunals are not allowed to issue interim measures; nonetheless, they can issue specific interim measures in the case of corporate arbitration.

The **reform of arbitration law**, which will enter into force in June 2023, **allows arbitrators to issue interim measures** if the arbitral agreement grants such power. Major Italian arbitral institutions will likely amend their rules to grant this power.

The interim measures issued by the arbitrators are subject to appeal before the State Court for grounds concerning the procedure and due process.

Significant case law

Also in the case of international arbitration, State Courts have the power to issue interim measures, and the relevant petition cannot be construed as a breach or a waiver of the arbitration clause (Court of Udine, 25 July 2022).

Court intervention and assistance

Law rules

Should the parties fail to appoint one or more arbitrators, they may request the president of the Court of first instance of the seat of the arbitration to make the appointment.

Should a witness refuse to appear before the arbitral tribunal, the latter may request the president of the Court of first instance of the seat of the arbitration to order their appearance before it.

As Italian law currently stands, during arbitration proceedings (and even before their commencement), the parties may request the State Courts to issue interim measures. Following the 2022 reform's entry into force (June 2023), if the arbitrators are allowed to issue interim measures, State Courts retain jurisdiction for issuing such measures only before the constitution of the arbitral tribunal.

Significant case law

If the arbitral tribunal is entitled to issue interim measures (such as in the case of corporate arbitration), State Courts may issue such measures before the constitution of the arbitral tribunal (Court of Perugia, 29 July 2022).

Multi-party arbitration

Law rules

Italian law **expressly regulates multi-party arbitration**: should the same arbitration agreement bind more than two parties, each party may request that all or some of them be summoned in the same arbitral proceedings if the arbitration agreement defers to a

third party for the appointment of the arbitrators, if the arbitrators are appointed by agreement of all parties or if the other parties, following the appointment by the first party of an arbitrator or the arbitrators, appoint by joint agreement an equal number of arbitrators or entrust to a third party their appointment.

⚖ *Significant case law*

A binary arbitration clause may be applied in a multi-party arbitration if, based on a post-factum assessment, the parties are grouped into two homogeneous groups (Italian Supreme Court, 11 March 2022).

▙ Third-party joinder

🕮 *Law rules*

The **joinder of a third party is allowed** only with the agreement of *(i)* the third party; *(ii)* the parties; and *(iii)* the Arbitral Tribunal.

⚖ *Significant case law*

The joinder of a necessary party ("*litisconsorte necessario*") is always allowed. Nonetheless, the arbitration proceedings cannot proceed if one of the original parties refuses its consent, even if the third party expressly accepts the already appointed arbitral panel (Arbitral Tribunal, 7 February 2011).

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THE AWARD

Requirements

Law rules

The awards shall contain: *(i)* the name of the arbitrators; *(ii)* the indication of the seat of the arbitration; *(iii)* the indication of the parties; *(iv)* the indication of the arbitration agreement and of the claims of the parties as set out in the final pleadings; *(v)* a brief statement of the reasons; *(vi)* the decision of the issues; *(vii)* the signature of the arbitrators; *(viii)* the date of the signatures.

Significant case law

See under **Setting aside**.

Res judicata

Law rules

As from the date of its last signature, the award (in the case of "rituale" arbitration) has the **same effects as a judgment issued by a State Court**.

Significant case law

In the case of joint and several debtors, the debtor that was not a party to the arbitration proceedings may enjoy the effects of the award, as its effects also concern their position under the same mechanism applying to a decision issued by a State Court (Italian Supreme Court, 26 May 2014).

An award declaring that a right exists or does not exist can become res judicata (Court of appeal of Rome, 18 January 2022).

Setting aside

Law rules

The award may be challenged on the **grounds of nullity, revocation or third-party opposition**. Grounds for nullity are: *(i)* if the arbitration agreement is invalid; *(ii)* if the arbitrators have not been appointed in the proper form and manner; *(iii)* if the award has been rendered by a person who could not be appointed as arbitrator; *(iv)* if the award exceeds the limits of the arbitration agreement, or has decided the merits of the dispute in all other cases in which the merits could not be decided; *(v)* if the award does not comply with its requirements; *(vi)* if the award has been rendered after the expiry of the prescribed time limit; *(vii)* if during the proceedings the formalities prescribed by the parties under express sanction of nullity have not been observed and the nullity has not been cured; *(viii)* if the award is contrary to a previous award which is no longer subject to recourse or to a previous judgment having the force of res judicata between the parties, provided such award or such judgment has been submitted in the proceedings; *(ix)* if the adversarial principle has not been respected in the arbitration proceedings; *(x)* if the award terminates the proceedings without deciding the merits of the dispute and the merits of the dispute had to be decided by the arbitrators; *(xi)* if the award contains inconsistent provisions; *(xii)* if the award has not decided some of the issues and objections raised by the parties in conformity with the arbitration agreement.

Significant case law

In arbitration proceedings, the issue of a possible violation of due process must be examined not from a formalistic point of view but as part of an assessment to ascertain whether the parties' right to present their cases has actually been impaired. Consequently, an arbitral award might be set aside only if the Court is satisfied that a party was prevented from presenting its case (Italian Supreme Court, 5 January 2022).

In proceedings for the setting aside of an award, the Court is not allowed to review the merits. In fact, assessing if there is a ground for setting aside the award is required. Only in the affirmative can it also examine the merits (Court of appeal of Milan, 17 January 2022).

If the parties did not object to the jurisdiction of the arbitral tribunal during the arbitration proceedings, they are barred from raising a such objection in the proceedings for the setting aside of the award. Nonetheless, this principle does not apply if the

parties claim that they never entered into an enforceable arbitration agreement (Italian Supreme Court, 25 January 2022).

An inconsistency between the grounds and the operative part of the award, or between different parts of the grounds, may lead to setting aside only if it is impossible to understand the decision's logical and legal reasoning (Italian Supreme Court, 26 January 2022).

Recognition of foreign awards

Law rules

Italy is a party to the **New York Convention** and incorporated its provisions in the code of civil procedure.

Recognition of a foreign award is sought by an *ex parte* motion. The award debtor is entitled to oppose the Court's order providing for award recognition. The 2022 arbitration law reform established that such *ex parte* order is **provisionally enforceable**.

Significant case law

The violation of public policy, preventing the recognition of a foreign award, only concerns exceptional cases in which fundamental principles are breached. In other words, not every breach of foreign procedural law concerning due process amounts to a violation of public policy, but only those breaches that jeopardise the parties' right to present their cases. Consequently, the fact that arbitration proceedings were conducted in a foreign language (in particular, in Russian) does not constitute a violation of public policy (Italian Supreme Court, 19 January 2022).

The Court shall assess whether a foreign award is contrary to public policy in the light of the content of its operative part. In this respect, provisions contrary to public policy may consist of awards directly contrary to it (e.g. the order to marry or not to marry a specific person). Nonetheless, they may also consist of neutral awards (e.g. the order to pay a sum of money) if the relevant reasons are contrary to public policy (*e.g.* the payment of compensation for the killing of a person) (Italian Supreme Court, 2 February 2022).

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✸ THE AUTHOR

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