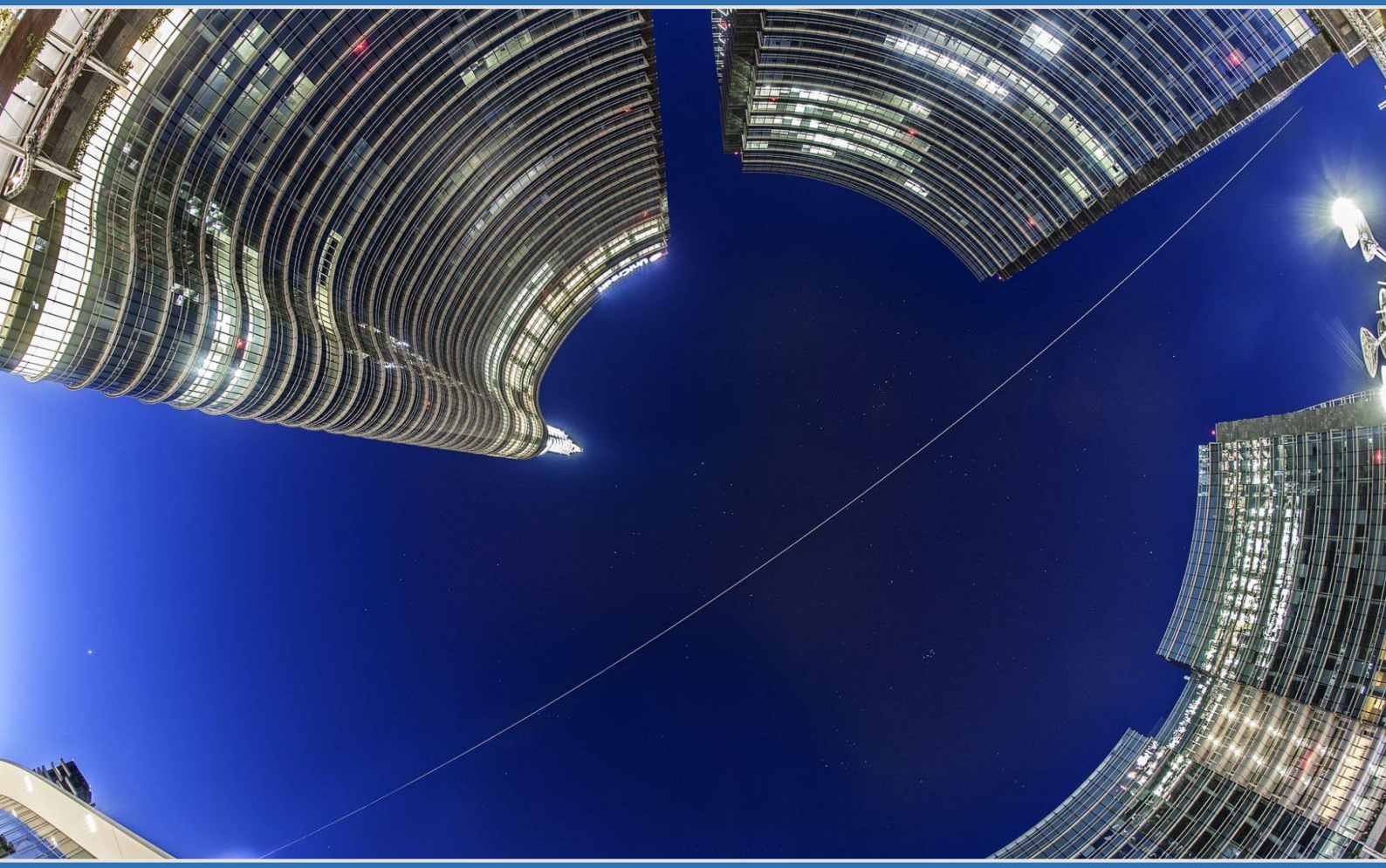
ISSN 2732-5687



Italian arbitration report

by Roberto Oliva

First half 2024

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Published in July 2024 by
Arbitration in Italy Ltd
61 Bridge Street
HR5 3DJ Kington
United Kingdom

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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.

Also the first half of 2024 has been exciting for Italian arbitration practitioners.

First, in March 2023 entered into force the **reform of Italian arbitration law**. It is the first significant reform since that passed in 2006. It is worth immediately noting that:

(i) Italian arbitration law now imposes **specific disclosure duties on the appointed arbitrators**. The influence of international best practices is clear, 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**. This was also triggered by the said reform, which resulted in the publication of **new arbitration rules** by Italian arbitral institutions, particularly the leading institution (Milan Chamber of Arbitration).

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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 sanctions provided for by Council Regulation (EU) No. 833/2014, as amended).

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 (Court of Milan, 10 January 2023, Court of Turin, 21 February 2023, Court of Venice, 14 April 2023, and Italian Supreme Court, 5 April 2023), while the dispute may be referred to arbitrators if it concerns other aspects, such as the formalities of the shareholders' meeting (Court of Naples, 8 May 2023, and Court of Milan, 9 June 2023).

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*

Italian Courts maintain that the mere acceptance of a bill of lading does not fulfil the requirement of the arbitration agreement being in writing (Court of Bari, 28 June 2023).

It is worth noting that the double signature requirement only applies in case of serial contracts, while it does not apply if a party merely drafted the contract (Court of Naples, 23 January 2023, and Court of Taranto, 15 March 2023).

A couple of lower Court's decisions (Court of Appeal of Milan, 5 August 2022, and Court of Naples, 24 April 2023, although the latter in *obiter*) 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*

In applying the separability principle, Italian Courts maintain that the arbitral tribunal has jurisdiction over disputes arising even after the termination of the relevant underlying contract (Italian Supreme Court, 2 March 2023).

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 (Court of Lecco, 13 March 2023). 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).

On the other hand, if the parties referred to non-existent arbitration rules, the arbitration agreement is still enforceable (Court of Venice, 24 February 2023).

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, and Court of Appeal of Salerno, 14 June 2023).

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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

Italian law no longer provides for a closed list of grounds for challenging an arbitrator. Indeed, the reform entered into force

on 1 March 2023, added a general clause ("other serious reasons").

The reform also imposed on the appointed arbitrators **specific disclosure duties**.

⚖ *Significant case law*

Under the previous law, 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. For the time being, there are no reported precedents applying the new law.

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THE PROCEDURE

Tribunal powers

Law rules

Italian 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).

In case of related claims, if the arbitral tribunal has jurisdictions over some of them, and State Courts over other of them, each authority (arbitral tribunal and State Courts) retains its jurisdiction, and it is not possible to have a sole procedure over the whole matter (Court of Venice, 30 March 2023, and Court of Appeal of Naples, 31 March 2023).

Interim measures

Law rules

The **reform of arbitration law**, which entered into force in March 2023, **allows Italian arbitral tribunals to issue interim**

measures if the arbitral agreement grants such power, also by reference to institutional rules.

Major Italian arbitral institutions amended their rules to grant this power. It is worth noting that, under the rules of the leading Italian institution (Milan Chamber of Arbitration), arbitral tribunals are vested with the power to issue interim measures starting from 1st March 2023, regardless of the time when the arbitral agreement was entered into.

Arbitral tribunals under the arbitration rules of Milan Arbitration Chamber are also allowed to issue *ex parte* interim orders. The said rules also provide for emergency arbitration.

The above solutions appear to be in line with Italian law rules on institutional arbitration, but needs to be confirmed by Italian case-law.

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).

For the time being, there are no reported decisions on the new law allowing Italian arbitral tribunal to issue interim measures.

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, 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. On the other hand, if the arbitrators are not vested with the power to issue interim measures, during arbitration proceedings (and/or before their commencement), the parties may request the State Courts to issue such measures.

⚖ ***Significant case law***

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

If a party failed to abide by the obligations arising out of the arbitration agreement, the non-breaching party is entitled to damages (Court of Appeal of Brescia, 5 April 2023).

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 tribunal (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. In addition, the award can be set aside if it is contrary to Italian public policy.

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 particular, an award cannot be set aside only because the Tribunal did not allow the party to file final written submissions nor scheduled a hearing to discuss the case (Court of Appeal of Milan, 17 February 2023).

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 (Court of Appeal of Salerno, 2 February 2023; Italian Supreme Court, 2 March 2023).

In assessing whether an award is contrary to Italian public policy, only its operative part has to be considered, if appropriate in the light of the relevant reasons (Court of Appeal of Milan, 24 January 2023; see also under **Recognition of foreign awards**).

Raising a clearly groundless claim that an award is contrary to Italian public policy in order to seek a re-examination on the merits amounts to an abuse of process (Court of Milan, 21 February 2023).

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, which is **provisionally enforceable**. The award debtor is entitled to oppose the Court's order providing for award recognition.

⚖ *Significant case law*

The foreign award rendered on the basis of an arbitration clause contained in a party's general terms and conditions may be recognized under the New York Convention, provided that arbitration clause is enforceable under the applicable law (Court of Appeal of Milan, 22 May 2023).

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 and Court of Appeal of Venice, 28 February 2023).

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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Law journal published by
Arbitration in Italy Ltd