Italian law of arbitration

Italian provisions on arbitration are contained in Book IV, Section VIII of the Code of Civil Procedure (hereinafter the "**Code**") (from article 806 to article 840). These provisions have been lastly amended by Legislative Decree n. 40 dated 2 February 2006 (entered into force as of March the 2nd, 2006).

Italy is also part of the major multilateral conventions: in particular, the 1958 New York Convention on Recognition and Enforcement of Foreign Awards; the 1961 European Convention on International Commercial Arbitration; and the 1965 Washington ICSID Convention.

The Provisions of the Code of Civil Procedure apply to both domestic and international arbitration, whereas an exception is provided for the recognition and enforcement of arbitral awards as the rules applicable to Italian and foreign awards differ to a considerable extent.

The most important features of Italian law of arbitration can be thus summarized:

1. Arbitration agreement and arbitrability

As to arbitrability of disputes, article 806 of the Code provides that only disputes involving rights which can be disposed of can be submitted to arbitration unless there is a special law provision that prohibits it. Parties may agree to arbitrate contractual or non-contractual matters. Labour disputes can be submitted to arbitration if the law or a collective labour agreement allows it.

The scope of the arbitration agreement can cover either future disputes or disputes which have already arisen between the parties.

Two formal requirements apply to Arbitration agreements: (i) arbitration agreements shall be made in writing, including cases in which the parties intention is expressed by telegram, telex, telecopier or electronic message in accordance with the applicable statutes and regulations; and (ii) arbitration agreements shall clearly

determine the subject matter of the dispute (article 807 of the Code of Civil Procedure).

Article 808 of the Code of Civil Procedure provides that - when the arbitral clause is part of an agreement - it must be considered a separate agreement from the rest of the contract ("separability principle"). Thus, the validity of the arbitration agreement shall be subject of an independent evaluation with regard to the contract. In any case, the person authorized to sign the contract is also authorized to sign the arbitration clause.

The arbitration agreement may refer to a set of pre-existing rules issued by arbitral institutions (article 832 of the Code of Civil Procedure). Rules contained in the arbitration agreement prevail over the rules of the Code if not mandatory.

The peculiarity of "Arbitrato irrituale"

Italian arbitral law provides a particular kind of arbitration (*arbitrato irrituale*) in which the awards are binding only at contractual level. Article 808-ter of the Code provides that the choice of this particular mean of resolving disputes must be express and in writing.

This kind of award cannot be enforced as a judgment by means of a court exequatur. Instead, the validity of this "contractual award" can be challenged before national courts following normal contractual proceedings. The only difference is stated by art. 808-*ter* of the Code which restricts the grounds to contest the validity of the "contractual award" in respect to "normal" contracts.

2. Appointing of arbitrators

The arbitration agreement shall provide for the appointment of the arbitrators or else for the determination of their number and for the manner in which they are to be appointed.

Italian law requires an odd number of arbitrators. If the parties have not determined the number of arbitrators and have not reached an agreement on it, the arbitral tribunal shall be composed of three members.

The arbitration agreement may provide that arbitrators can be appointed by the parties themselves, by a third-party or by the Court. If there are delays in the appointment of an arbitrator, a party may request that the appointment be made by the President of the Court at the seat of the arbitration. If however no seat has been established - at the request of a party - the President of the Court where the arbitration agreement has been signed shall appoint the arbitrator. If the arbitration agreement was signed abroad, the appointment shall be made by the President of the Court in Rome.

The appointment through the above recourse to the Court takes place unless the arbitration agreement is manifestly inexistent or else refers to a foreign arbitration.

Article 816 *quarter* of the Code provides for the appointment of arbitrators in multiparty arbitration.

An arbitrator can be replaced if he delays in performing or fails to perform his duties (article 813 *bis* of the Code).

Article 815 of the Code lists the specifics grounds for challenging the arbitrators. These grounds can be summarized in two categories: (i) lack of independence or (ii) lack of the requirements (requested by the parties).

Art 813-*ter* contains specifics provisions for the liability (towards the parties) of arbitrators who (i) fraudulently or with gross negligence have omitted or delayed their acts and, for this reason, have been replaced; or (ii) have renounced to their appointment without a justified cause; or (iii) fraudulently or with gross negligence have failed to render the award in a timely manner.

3. Arbitral proceedings

The parties can freely determine the rules, the language and the seat of the arbitration. If the parties do not establish those rules, arbitrators may regulate the performance of the proceedings determining also the language and the seat of the arbitration. However, arbitrators shall respect the mandatory rule of due process, granting equal rights to the parties to be heard and to defend themselves during the arbitral proceedings.

Arbitrators will decide the merit of the dispute applying the relevant rules of law unless the parties authorized them to decide on the basis of equity (art. 822).

The expression rules of law refers to the Italian legal system or else to foreign legal systems deemed applicable under the conflict of law rules or following a choice of the parties.

In case of international arbitrations having their seat in Italy (and being under the Italian law on arbitration *as lex loci arbitri*) art 822 of the Code will imply (if no different choice is made by the parties) the application of the Italian law including the law n. 218 dated 31st of May 1995 (on private international law). According to this law: (i) if Italy has entered into International conventions applicable to the dispute, the dispute shall be decided according to those conventions (art 2 of the law n. 218/1995); (ii) in case no convention exists and contractual obligations are concerned, the 1980 Rome Convention would apply to find the law applicable to the merit of the dispute (art 57 of the law 218/1995). Therefore, without an express choice of the parties, the law applicable to the merit of the dispute will be the one of the country having the closest connection with the contract (article 4.1. of the 1980 Rome Convention). Recognition has been given by case law and legal authorities also to the so called *lex mercatoria:* i.e. to a body of rules which are not part of national and/or international legal systems built through the institutional activity of ad hoc legislative bodies.

These criteria to determine the law applicable to the merit of the dispute might change in case the arbitration agreement (according art 832 of the Code) makes reference to the rules of a particular arbitral institution which contain a specific rule

for finding the law applicable to the merit of the dispute when the parties did not choose one.

Arbitrators, during the proceedings, can issue procedural orders, partial awards, interim awards and definite awards. According to art 827 of the Code only definitive awards that decide (even partially) the merit of the dispute can be immediately challenged. Awards addressing to (normally procedurals) issues without deciding (at least partially) the merit of the dispute can be challenged only together with the definitive award.

As to evidentiary matters, arbitrators are allowed to hear witness testimony in witness' residence or office and they can also authorize written testimonies.

If a witness refuses to appear before the arbitral tribunal, the arbitral tribunal can request to the President of the Court at the seat of the arbitration, to order the witness to appear before the arbitral tribunal.

Arbitrators can be assisted by experts and can also request written information to the public administration.

A third-party can take part to the arbitral proceedings only with consent of (i) the third party himself, (ii) the (originals) parties and (iii) the arbitrators. Intervention in case of compulsory joinder or limited to supporting the claim of one of the parties is always permitted.

Article 819-bis of the Code provides for cases of stay of the arbitral proceedings. In particular, proceedings must be stayed in case of a preliminary issue that (i) should decided by criminal court or that (ii) cannot fall under the scope of the arbitration agreement and must be decided only with a final judgement.

4. Jurisdiction of an arbitral tribunal

Italian provisions allow to a certain extent, parallel proceedings between arbitration and national courts (art. 819-*ter of* Code). In case an arbitration is pending, the

parties cannot ask the national courts to decide on the validity and/or effectiveness of the arbitration clause (agreement).

Arbitrators shall rule on the validity, content and extension of the arbitration agreement (art. 817 of the Code), thus, they can decide on their own jurisdiction according to the *kompetenz-kompetenz* principle. Once the arbitral proceedings are pending, no further actions on the validity or (in) effectiveness of the arbitral agreement may be brought before a court (art 819-ter Code).

The Party - who does not object arbitrator's lack of jurisdiction in his first submission after arbitrators' acceptance of the appointment – cannot challenge the award on this ground, unless the challenge is based on the non-arbitrability of the dispute (art. 817 of Code).

5. Preliminary relief and interim measures

Art. 818 of the Code prevents arbitrators from granting interim measures. Thus, preliminary relief and interim measures shall be requested to the Italian Courts.

However an exception is provided by Legislative decree n. 5/2003 (corporate arbitration) related to disputes regarding the validity of shareholders' meetings resolutions. In this case, arbitrators can suspend the effectiveness of such resolution.

6. Award

Parties may determine a time limit for rendering the award in the arbitration agreement or in a separate document previous to the arbitrators' acceptance. Arbitrators shall render the (final) award in 240 days from arbitrators' acceptance of their appointment unless the arbitration agreement provides otherwise. Under certain specific circumstances provided by the law (art. 820 Code), such time limit may be extended.

Once the award is rendered it has the same effectiveness of a Court decision (art. 824-bis of the Code).

7. Correction of the award

The parties may request the rectification of the award, based on omissions or formal mistakes including incorrect calculations. Integration of the award with one of its substantial elements (arbitrators' name, the seat of the arbitration, the parties' name, the arbitral agreement and the parties' conclusions) may also be requested by the parties (art. 826 of the Code).

8. Setting aside the award

Article 829 specifies the grounds for challenging an award:

1. if there is an invalid arbitration agreement, provided that said objection has been raised in the first submission after the arbitrators' acceptance of the appointment;
2. if the arbitrators have not been appointed according to the provisions of the Code, provided that said objection has been raised during the arbitral proceedings;
3. if the award has been rendered by a person who could not be appointed as an arbitrator, as provided for by article 812 of the Code;
4. if the award exceeds the scope of the arbitration agreement, provided that said objection has been raised during the arbitral proceedings; or if the award decides the merits of the dispute when the merits could not be decided;
5. if the award does not include the reasons on which the award is based, the arbitrators' decision (relief) and the signature by the arbitrators;
6. if the award has been rendered after the expiration of the time-limit, provided that the party's intention to set aside the award on this ground has been notified to the others parties and to the arbitrators before the issuing of the award;
7. if the formalities required by the parties - under express sanction of nullity - have not been complied with, and the nullity has not been cured;
8. if the award is contrary to a previous award or judgment having the force of *res judicata* between the same parties, provided that said award or Court decision has been brought to the attention of the arbitrators during the proceedings;
9. if the principle of due process has not been observed during the arbitration proceedings;

10. if the award concludes the arbitral proceedings without deciding the merits of the dispute and the merits had to be decided;
11. if the award contains contradictory provisions;
12. if the award has not pronounced on some of the claims and counterclaims falling under the scope of the arbitration agreement.

Unless the parties (in the arbitral agreement) or mandatory law expressly provide otherwise, the award cannot be challenged on the basis of mistakes of law made in deciding the merit of the dispute.

There are two exceptions of said rule: it is possible to challenge an award on the ground of mistake of law in deciding the merits of the dispute in cases of labour disputes, and in cases where the violation of law concerns the determination of a preliminary and non arbitrable matter.

It is always possible to challenge the award if it is contrary to public policy.

Beside the request to set aside the award for the nullity, the award can also be challenged with two to other mechanisms: (i) the revocation of the award and (ii) the opposition to the award by a third party.

Revocation of the award is an extraordinary means of setting aside an award because serious vices affect it. Article 395 of the Code provides that the revocation is possible in case of fraud of a party, forgery, discovery of unknown documents and if there is an award affected by a fraud of the arbitrator.

Third parties can oppose to the award and request its setting aside if the award prejudices their rights. Creditors may present an opposition to the award in case of fraud (art. 404 of the Code).

9. Recognition and enforcement

There are different rules respectively applicable to (i) Italian and (ii) foreign awards.

If the award is rendered in Italy, the recognition and enforcement in Italy is subject to the deposit of the award before the competent Court (Court of first instance at the seat of the arbitration). The Court will check the formalities of the award and shall declare it effective with an order (art. 825). The Court order may be challenged before the Court of Appeal.

If the award is rendered abroad, the recognition and enforcement in Italy is subject to a special proceeding provided for by articles 839 and 840 of the Code.

The request for recognition of a foreign award shall be filed before the President of the Court of Appeal. The President shall evaluate the compliance with the formal requirements, the arbitrability of the dispute under Italian law, and the non infringement of Italian public policy; and then shall order the recognition and enforcement of the award.

The order that grants the recognition and enforcement of the award may be challenged before the Court of Appeal based on the grounds set forth in article 840 of the Code. The grounds for refusal under art. 840 of the Code are the same provided for by article V of the 1958 New York Convention on Recognition and Enforcement of Foreign Awards (in any event, last paragraph of this article provides that international conventions shall prevail over Italian law).

Finally, the decision of the Court of Appeal may be challenged before the Court of Cassation based on limited grounds.

10. Corporate arbitration

There are special rules on corporate arbitration, provided by Legislative decree n. 5/2003. Those rules are applicable to disputes on corporate matters between shareholders or between shareholders and companies, and to disputes concerning directors, auditors and liquidators.