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# The Baker McKenzie **International Arbitration Yearbook**

# Italy

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## A. Legislation and rules

### A.1 Legislation

#### A.1.1 Arbitration law reform

Arbitration in Italy is governed by Articles 806 to 840 of the Civil Procedural Code (CPC), which have been significantly impacted and amended by the reform enacted with Law No. 80/2005 and Legislative Decree No. 40/2006. The most significant innovations of this reform have been: (i) the recognition of the possibility of entering into an arbitration agreement by fax or IT means (Article 807 of the CPC); (ii) the formal recognition of the so-called "informal" arbitration[3] (Article 808(3) of the CPC); (iii) the substitution of a broad general rule concerning the power of the parties to challenge the appointment of the arbitrators with the provision of a list of specific grounds for challenge[4] (Article 815 of the CPC); (iv) the introduction of certain simplification in the taking of evidence stage[5] (Article 816(3) of the CPC); (v) the recognition of the arbitrators' power to decide issues

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[3] See *International Arbitration Yearbook* 2007 for the relevant definition.

[4] See *International Arbitration Yearbook* 2008 for the relevant analysis.

[5] Allowing the possibility for arbitrators: (i) to delegate the taking of single evidence to one member of the panel; (ii) to hear witnesses at their premises or to have written depositions; (iii) to obtain an order from the president of the court to compel witnesses to appear before them; and (iv) to obtain information from public authorities.

relating to their own competence and to decide set-off claims that are not covered by the agreement to arbitrate (Articles 817 and 817(2) of the CPC); (vi) the granting to the award of the same effects as a judicial decision (Article 824(2) CPC), and (vii) the abrogation of provisions governing international arbitration (Articles 833 to 838 of the CPC), since then governed by the same provisions applicable to domestic arbitration.

Although this reform took place in 2005 and 2006, the relevant case law started only in 2007 and 2008.

### A.1.2 Bankruptcy law reform

Pursuant to Articles 35 and 83(2) of the Italian Bankruptcy Law,[6] as amended by Legislative Decrees No. 5/2006 and No. 169/2007, the following principles apply in the arbitration field:[7]

The validity of an existing arbitration agreement and the continuation of pending arbitration proceedings are exclusively linked to the trustee's decision (in which respect he is granted broad discretion; (see Article 72) to continue or terminate the underlying agreement, whereas they are not impacted by the commencement of an insolvency proceeding.

The trustee, subject to prior authorization of the creditors' committee (or — depending on the value in dispute — of the supervising judge), may enter into new arbitration agreements and, accordingly, may be a party of new arbitration proceedings.

### A.1.3 Mediation

Legislative Decree No. 28/2010 (as amended by Law No. 98/2013),[8] aimed at reducing the overload on the Italian judicial system, introduced a mandatory mediation procedure for all disputes relating

[6] Royal Decree n. 267/1942.
[7] See *International Arbitration Yearbook* 2010-2011.
[8] See *International Arbitration Yearbooks* 2011-2012, 2012-2013 and 2013-2014 for an in-depth analysis of the subject matter.

to the following subjects: insurance, banking and financial agreements, rights *in rem*, division of assets, hereditary succession, family agreements, leases, gratuitous loans, condominium, leases of going concerns, and compensation for damages deriving from medical liability or defamation.

Mandatory mediation is a precondition for the commencement of court proceedings in all disputes listed above, which means that a judicial action begun without the parties having previously tried to find an agreement by way of mediation must be stayed by the judge, upon a party's request, in order to allow the mediation to take place.

For matters not included in the above list, the judge may still order the parties to a pending ordinary proceeding — appeals included — to resort to mediation, without the need to obtain their prior consent. Also, in these cases, mediation would be a necessary prerequisite for any subsequent judicial act.

The mediation procedure must be performed with the support of a lawyer and can only be brought before authorized mediation bodies located in the venue of the judge competent for the judicial action.

Although the law does not apply to arbitration, Article 5 provides that when the contract or the bylaws of a company provide for a two-step settlement mechanism combining mediation and arbitration, and no attempt has been made to mediate the dispute, the arbitrator, upon request of a party, should invite the parties to attempt to settle their dispute through mediation within 15 days. The arbitrator will not decide the case unless the parties have previously tried to resolve the dispute by mediation.

### A.1.4 Law No. 162 of 10 November 2014

In 2014, new measures were introduced, which again aimed to alleviate the ordinary jurisdiction's backlog and speed up the settlement of disputes.

#### A.1.4.1 Assisted negotiation

Pursuant to this new ADR mechanism, the parties enter into an agreement undertaking to cooperate in good faith to settle the dispute with the assistance of their lawyers. Any settlement reached in this way will be endowed with the same legal force as a court judgment. This procedure is mandatory with regard to disputes related to compensation for damages arising from road accidents, as well as any dispute aimed at obtaining payment of amounts up to EUR 50,000 (without prejudice to the possibility of asking the ordinary court for a payment injunction order).

Since formal arbitration is deemed equivalent to ordinary judicial proceedings, although case law still does not exist, future decisions deeming assisted negotiation applicable also to disputes submitted to arbitration cannot be excluded.

#### A.1.4.2 Switch to arbitration pending an ordinary proceeding[9]

During the course of an ordinary judicial proceeding, appeals included, the parties may decide to devolve the dispute to arbitration, provided that it involves "disposable" rights (ie, rights that can be assigned and waived).

The main feature of this type of arbitration is that the process will continue before the arbitrators from the same stage reached in the ordinary court.

### A.2 Institutions, rules and infrastructure

The arbitration law reform introduced a special provision dedicated to institutional arbitration providing, among others: (i) that in case of conflicts, the arbitration agreement will prevail over the institutional rules; and (ii) that the institutional rules in force at the beginning of the proceedings will apply, irrespective of any possible subsequent amendment (see Article 832 of the CPC).

[9] This reform has been highly criticized; see *International Arbitration Yearbook* 2015-2016.

Institutional arbitration in Italy is mainly handled by the Chambers of Arbitration, which was established by the Chambers of Commerce, in which a leading role has been assumed by the Chamber of Arbitration of Milan with respect to both domestic and international disputes.

In 2010, a new regulation of the Chamber of Arbitration of Milan came into force and it is worth mentioning that recently, this institution reduced its arbitrator's tariffs by 15% and has introduced a specific set of assistance services for the handling of *ad hoc* arbitrations governed by UNCITRAL Rules.

Another prominent arbitration institution is the Italian Arbitration Association in Rome, which plays an important role in the interaction with many international arbitration institutions, as the ICC and the AAA, and in providing academic guidance through the editing of the most important arbitration law magazine (*Rivista dell'Arbitrato*).

## B. Cases

### B.1 Agreement to arbitrate

#### B.1.1 Formal and informal arbitration

By Decision No. 10353 of 5 May 2009, the Supreme Court held that the principle of "autonomy" of an arbitration clause with respect to the substantive contract is applicable only to formal arbitration, and not to so-called informal arbitration. In the first case, the parties, by entering into the arbitration agreement, express their intention to resolve the disputes arising from their substantive agreement through a procedure that is an alternative to ordinary court proceedings. In the second case, "informal arbitration" is only a "phase" of the contract, and the "dictum" of the arbitrators constitutes a modification of the contractual determinations of the parties. From this principle, the court drew the conclusion that the invalidity of the agreement extends to the arbitration agreement, as it affects the very same source of power of the arbitrators.

In a decision dated 2 February 2014, the Court of Reggio Emilia held that when an arbitration clause exists, absent a contrary express indication in the clause, the will of the parties must be interpreted as a recourse to formal arbitration, which is regulated by the Civil Procedure Code, rather than to informal arbitration, which is a form of dispute resolution whose purpose is to achieve an award having the value of a contractual determination. Similar principles have been stated by Decision No. 6909 of 7 April 2015, where the Supreme Court ruled that in case of doubts over the actual intention of the parties, in light of the exceptional nature of informal arbitration, arbitration clauses have to be interpreted as a recourse to formal arbitration.

### B.1.2 Written requirement

By Judgment No. 13916 of 14 June 2007, the Supreme Court addressed the issue of the validity of an arbitration clause in an agreement concluded by exchange of faxes. The court argued that the scope of the New York Convention is to facilitate international trade and that the reference in Article 2 to the "exchange of letters or telegrams" is aimed at making possible the conclusion of arbitration agreements at a distance. The requirement of Article 2 is therefore satisfied if there is a written document containing the arbitration agreement signed by the parties, while the use of the fax pertains only to the transmission of the document to the other party, which is one of the possible ways to exchange correspondence. In spite of the fact that the original agreement was not exchanged between the parties, the court upheld the validity of the arbitration clause, holding that a signed document exchanged by fax falls within the concept of "written agreement" under Article 2 of the New York Convention. The court further noted that in such a case, a court has to verify, as a separate issue, that the fax containing the signed agreement originated from the contracting party. While providing a wide opening to electronic means of transmission, the court did not include email on its list, but the distinction between the "creation" of a written document and its "transmission" suggests the conclusion that a signed document sent by

PDF should qualify as a "written agreement" under the New York Convention.

By Judgment No. 13231 of 16 June 2011, the Supreme Court held that in an international contract, reference to general terms and conditions that include an arbitration clause is sufficient to make such a clause valid and enforceable. The Supreme Court based this decision on the interpretation of Article 2 of the New York Convention, which extends the meaning of the term "written agreement" to "an exchange of letters or telegrams." The court held that this also includes a reference to a standard form, even if this form is not signed by the parties.

### B.1.3 Multiparty arbitration and binary clause

By Judgment No. 14788 of 26 June 2007, the Supreme Court upheld an award issued in a dispute between three parties. In that case, the arbitration clause contemplated a three-member arbitral tribunal, one appointed by each of the parties and the third designated by the two party-appointed arbitrators, and acting as chairman of the tribunal (the so-called binary arbitration clause). The challenge that not all three parties were adequately "represented" in the arbitral tribunal was rejected on the grounds that two parties had concurrent interests and submitted parallel claims to the tribunal, so that they could be deemed to constitute a single center of interest.

By Judgment No. 12825 of 23 July 2012, the Supreme Court similarly held valid and effective a binary arbitration clause inserted in a multilateral franchising contract in a case where only some of the parties decided to refer their dispute to arbitration. The Supreme Court based its decision on the consideration that, although there were three parties in the contract, the interests of two of them were polarized. Therefore the parties were substantially two and the binary arbitration clause could apply.

The same principles have been recently confirmed by the Supreme Court Decision No. 6924 of 8 April 2016.

### B.1.4 Underlying agreement's disclaimer

By the recent Judgment No. 13616 of 5 July 2016, the Supreme Court ruled that if a party denies having entered into a contract containing an arbitration clause, disputes relating to such contract have to be decided by ordinary courts. The Court explained that recourse to arbitration is possible only if the actual execution of the contract is undisputed between the parties.

## B.2 Procedural rules

By Judgment No. 2717 of 7 February 2007, the Supreme Court stated that arbitrators are bound to follow the procedural rules set out in the CPC only if the arbitral agreement makes reference to such rules. Otherwise, they are free to conduct the arbitral procedure as they deem appropriate, provided the right of the parties to be heard is safeguarded. The same principle has been affirmed by several recent decisions of the Supreme Court (see for example, Nos. 3917 of 17 February 2011 and 17099 of 10 July 2013).

## B.3 Peremptory terms

By the recent Judgment No. 1099 of 21 January 2016, the Supreme Court ruled that arbitrators cannot grant the parties peremptory terms for the submission of their allegations or evidence if this is not provided for in the arbitration clause or in a separate specific agreement or, in any case, if parties are not made aware of the nature of the deadline and of the consequences of its expiration.

## B.4 Interim measures

By Judgment No. 26 of 28 January 2010, the Constitutional Court held Article 669(14) CPC to be unconstitutional, in that it did not permit recourse to the ordinary courts to obtain a preliminary investigation order in cases reserved for arbitration. The Constitutional Court held that such limitation infringes both the right of defense and the right of equality provided for in the Constitutional Chart (respectively at Articles 24 and 3), entailing an unjustified

disparity between state court and arbitral proceedings with respect to the ability of the parties to obtain evidence. In claims submitted to arbitration, prior investigation measures may be authorized by the state court that would have had jurisdiction but for the arbitration agreement.

### B.5 Award

#### B.5.1 Legal effects

By Judgment No. 3047 of 23 May 2011, the Supreme Administrative Court ruled that after the arbitration law reform, an arbitration award has the same effect as an ordinary judgment and, therefore, the successful party may enforce it against the public administration using a special accelerated administrative procedure called *giudizio di ottemperanza.*

#### B.5.2 Challenge

By Judgment No. 6986 of 22 March 2007, the Supreme Court decided a case where the applicant had asked for annulment of an arbitral award based on the (alleged) inadequacy and inconsistency of the reasons for the award. The challenge was rejected on the grounds that the annulment of an award can only be granted if no reasons are given for the award or the reasons appear to be contradictory, to the extent that it is impossible to understand the rationale of the decision**.**

Similarly, by a judgment dated 20 February 2013, the Court of Appeals of Rome, before which the enforcement of an arbitration award was challenged, ruled that an award is to be deemed void if the grounds are totally absent or are so poor that is impossible to understand the *ratio decidendi*.

## C. Trends and observations

Italian legislation over the past decade has been significantly amended, with the aim of supporting and promoting not only arbitration, but all types of ADR in general. This approach was justified, on the one hand, by the need to reduce the overload of

ordinary courts and, on the other hand, by the full recognition of arbitration proceedings having the same relevance and dignity as ordinary litigation.

It is easy to predict that this trend will continue in the coming years, although the status of the legislation on arbitration has reached a degree of maturity which makes it unlikely that significant amendments to the law will be introduced in the near future.

The number of cases where an arbitration award is challenged before the ordinary courts has been significantly reduced in recent years. Since most arbitration awards remain confidential, counsel and arbitrators are often uncertain about the interpretation of arbitration rules and proceedings. This is one of the reasons why growth of arbitration cases has not been less than was expected, in view of the various reforms we analyzed in Section A.