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The Baker McKenzie **International Arbitration Yearbook**

Italy

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A. Legislation and rules

A.1 Legislation

Arbitration in Italy continues to be governed by Articles 806 to 840 of the Italian Code of Civil Procedure ("ICCP"), which have been significantly impacted and amended by the reform enacted with Law No. 80/2005 and Legislative Decree No. 50/2005.[3] Specifically, domestic and international arbitration are governed by Articles 806 to 832 ICCP, while the enforcement of foreign awards is governed by Articles 839 and 840 ICCP.

In recent months there has been only a minor amendment to arbitration proceedings,[4] but a wider reform is expected in future years (see the next section).

A.1.1 The work of the Alpa Commission

On January 2017, as a first step towards a wide reform of arbitration in Italy, the Commission for the Reform of Arbitration — chaired by

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[3] See *The Baker McKenzie International Yearbook* 2016-2017, pages 243-244, for the relevant analysis.

[4] See Section A.1.2.

Professor Guido Alpa — acting on the basis of a request of the Ministry of Justice, issued a draft reform proposal. This represents the first attempt to reform Italian arbitration law in 11 years, following previous reforms implemented in 1983, 1994 and 2006.

The proposed reform is intended to meet the new challenges raised by the increased number of arbitration cases, as well as to manage regulatory changes and gaps that have emerged in practice. Indeed, the reform is aimed at speeding up arbitration proceedings, in addition to extending and clarifying the scope of arbitration.

The most significant innovations of the proposed reform include: (i) in cases where the award is challenged for breach of law, the parties should be enabled to skip lower courts and challenge the award directly before Italy's Court of Cassation; (ii) the institutional arbitral tribunals should be granted the power to issue interim measures; (iii) the scope of application of arbitration proceeding in relation to employment disputes will be broadened and clarified; (iv) disputes involving public administrative bodies should be submitted to arbitration; and (v) arbitration of disputes involving consumers should generally be allowed.

Although the draft law was submitted by the Alpa Commission in January 2017, it is hard to foresee the timing of its submission to the parliament and subsequent approval.

A.1.2 Arbitration in financial matters

As regards consumer protection, in January 2017, the Italian legislature enacted a new arbitration mechanism applicable to financial matters, namely the ACF (*arbitro per le controversie finanziarie*).[5]

The ACF is governed by Consob (the Italian Securities and Exchange Commission) and it aims to provide an alternative mechanism to resolve disputes between retail investors and investment brokers. The

[5] See Legislative Decree No. 130/2015 (implementing Directive 2013/11/UE).

main features of the ACF mechanism are the following: (i) it applies only to disputes concerning breaches of some investment brokers' obligations vis-à-vis their customers (eg, breach of fairness and loyalty obligations); (ii) it is free of charge for the retail investors; and (iii) the final award is not binding on the investment broker (however, in case the investment broker does not comply with the final award, the award could provide for the publication of the decision in newspapers, on the investment broker's website and on the ACF's website).[6]

A.2 Institutions, rules and infrastructure

Although several local arbitration institutions are operating in Italy, institutional arbitration is mainly handled by the Chambers of Arbitration, where a leading role has been assumed by the Chamber of Arbitration of Milan with respect to both domestic and international disputes.[7]

Another prominent arbitration institution is the Italian Arbitration Association in Rome (AIA), which plays an important role in the interaction with many international arbitration institutions, such as the ICC and AAA. It also provides academic guidance through the editing of the most important Italian arbitration law review (*Rivista dell'Arbitrato*).[8] In this regard, it is worth mentioning that in 2016 a new AIA regulation came into force.

[6] The rules governing the ACF are similar to those that apply to the analogous mechanism called arbitration in banking (*arbitro bancario finanziario*), enacted in 2009 (Law No. 262/2005).
[7] See *The Baker & McKenzie International Arbitration Yearbook* 2014-2015, pages 190-192.
[8] See *The Baker & McKenzie International Arbitration Yearbook* 2014-2015, pages 193-194.

B. Cases

B.1 The arbitration clause does not extend its scope to disputes arising out of a different (linked) agreement

On 17 January 2017, the Court of Cassation ruled that an arbitration clause set out in an agreement cannot extend its scope to disputes arising out of any other agreement, even if such agreement is linked to the first agreement.[9]

The case concerned the possibility of referring to arbitration a dispute arising out of a sublease agreement (the sublease agreement being linked to a lease agreement, which included an arbitration clause). The Court of Cassation held that the arbitration clause included in a lease agreement covers the linked sublease agreement only if the sublease agreement expressly refers to the clause.

The judgment restates that the parties need to expressly indicate their will to extend the scope of an arbitration clause contained in a different agreement.[10]

B.2 Arbitration clauses do not extend their scope to disputes that do not have their cause of action (*causa petendi*) in the agreement

On 15 February 2017, the Court of Cassation ruled that arbitration clauses do not cover disputes where the cause of action does not arise from the agreement.[11]

The case concerned a tortious liability arising from the performance of a procurement agreement. The generic reference made by the arbitration clause contained in the procurement agreement to all the disputes arising out of it was restrictively interpreted by the Court.

[9] Court of Cassation, Judgment No. 941/2017.
[10] See also Court of Cassation, Judgment Nos. 5371/2001 and 2598/2006.
[11] See Court of Cassation, Judgment No. 4035/2017.

As the arbitration clause did not specifically refer to all the disputes finding their causal background in the procurement agreement, the tortious liability arising from the performance of the latter should not be viewed as falling within the scope of the arbitration clause, considering that it had only a factual link with the agreement.[12]

B.3 An arbitration clause and a choice-of-forum clause can both be included in the same agreement

On 14 October 2016, the Court of Cassation ruled that an arbitration clause is valid and applicable even with the presence of a choice of forum clause in the same agreement.[13]

The case concerned the interpretation of an agreement that simultaneously contained an arbitration clause and a choice of forum clause. The Court of Cassation held that the two provisions were not incompatible and their coexistence, by itself, did not envisage any form of ambiguity.

In the specific case, the Court ruled that (lacking different indication by the parties) the choice of forum provision needed to be interpreted as aimed at governing all the disputes arising out of the agreement but not falling within the scope of the arbitration clause, eg, the petition for an interim measure or disputes that cannot be submitted to arbitration by operation of law. Therefore, the Court ruled that the two provisions are compatible and, in particular, the choice of forum clause does not affect — by its very nature — the validity of the arbitration clause.

Consistently, the same Court made it clear that the coexistence of the two provisions did not entail the right of the parties to choose whether to seek a remedy before an arbitrator or the judicial authority. Pursuant to Article 808 ICCP (and lacking a different indication by the parties), all disputes arising out of an agreement that can be

[12] See also Court of Cassation, Judgment No. 1674/2012.
[13] See Court of Cassation, Judgment No. 20880/2016.

referred to arbitration should be considered as exclusively falling within the scope of the relevant arbitration clause.

B.4 The validity of an ICC international arbitration clause set out in a non-residential lease agreement

On 15 June 2017, the Court of Cassation ruled in favor of the validity of an ICC international arbitration clause contained in a non-residential lease agreement, which provided that all disputes arising out of or relating to the non-residential lease agreement shall be referred to ICC arbitration, as well as if they concern a rent indexation dispute.[14]

The Court of Cassation held that Article 14 of Law 431/98 (which introduces the possibility of referring to arbitration disputes arising out of residential leases) is to be construed as intended to repeal the provision on non-residential leases that prohibited the referring to arbitration of disputes on the determination of rent.[15]

Specifically, the Court also held that disputes on rent indexation are not prevented from being referred to arbitration. As the rent indexation does not refer to an indisposable right, the parties are free to agree that disputes on rents, including on rent determination, can be validly referred to arbitration (pursuant to Article 806 ICCP).

Indeed, although the provisions governing the rent indexation matter are mandatory,[16] the relevant disputes do not involve indisposable rights and can therefore be submitted to arbitration.

The judgment is particularly important as it finally admitted the possibility of referring to arbitration any dispute arising from non-residential leases.

[14] See Court of Cassation, Judgment No. 14861/2017.
[15] See Article 54 of Law 392/78.
[16] The rent indexation matter cannot be waived by the latter pursuant to Article 79 of Law No. 392/1978.

B.5 An arbitral award is void if its operative part contains contradictory statements

On 4 January 2017, the Court of Appeal of Milan ruled that an arbitral award is void if its operative part contains contradictory statements, while the inconsistencies within the reasoning part of the arbitral award are irrelevant, except when they make it impossible to understand the logic underlying the decision.[17]

The case concerned the validity of an arbitral award. In particular, the appellant had argued that the award was void both because its operative part was not consistent with the reasoning part and also because the reasoning part was in itself contradictory.

The Court of Appeal of Milan held that the invalidity of an arbitral award pursuant to Article 829(I) ICCP concerns only procedural errors (*errores in procedendo*), including the contradictory wording of the award.[18] However, the latter is not relevant pursuant to Article 829 ICCP if it concerns contradictions among statements only within the reasoning part of the arbitral award (except when the inconsistency makes it impossible to understand the logic underlying the decision). On the contrary, only an inconsistency within the same operative part of the arbitral award entails, by itself, the invalidity of the award.

On the other hand, the Court left open the question of whether an arbitral award shall be considered void in the case of inconsistencies between the operative and the reasoning part.[19] The point was not relevant in the case at hand as the Court did not find any contradiction between the operative and reasoning parts of the award.

[17] See Court of Appeal of Milan Judgment dated 4 January 2017.
[18] See Article 829 paragraph I, no. 11 ICCP.
[19] The case law in this regard is inconsistent.

B.6 Review of the logic of an arbitral award

On 21 April 2017, the Court of Cassation ruled that during recourse to the Court concerning the invalidity of an arbitral award, the rationale behind the interpretation given by the arbitrators to an agreement cannot be reviewed by the judicial authority.[20]

The case concerned the review of the interpretation given by the arbitrators to a lease agreement. The appellant argued that the arbitrators did not correctly interpret the will of the parties during the performance of the agreement, as the parties agreed to extend the liabilities of the lessor while the arbitrators took the opposite view.[21]

The Court of Cassation dismissed the request of the appellant, as its claim concerned a non-reviewable assessment of the arbitrators. Indeed, the arbitrators having reached their conclusion by analyzing the evidence at hand, and taking into account that the decision did not contradict the law, the Court of Cassation ruled that a judicial authority cannot review either the rationale behind the interpretations given by the arbitrators to the agreement or the rationale behind the assessment of the evidence submitted by the parties in that regard.

In other words, the Court of Cassation restated that during recourse to the Court concerning the invalidity of an arbitral award, the interpretation of an agreement given in the award can only be reviewed if it contradicts the law. On the opposite side, it would not be possible for the judicial authority to review the logic of the reasoning contained in an arbitral award or the interpretation given by the arbitrators to the will of the parties in the agreement.[22]

[20] See Court of Cassation Judgment No. 10127/2017.
[21] On the other hand, in the same judgment, the Court ruled that it is instead within the power of a judicial authority to assess and review the scope of the application of an arbitration clause (see also Court of Cassation Judgment No. 19546/2015).
[22] See also Court of Cassation Judgment No. 2717/2017.

C. Funding in international arbitration

Although arbitration funding, to the best of our knowledge, has never been used in Italy, it should be noted that in the past year the topic has gained momentum among practitioners and has started to be extensively discussed in law journals.[23]

At the moment, there are no specific laws dealing with the matter. Currently, litigation and arbitration funding are not expressly forbidden by the Italian legislature and, in particular, there are no specific disclosure obligations upon the parties. Any party wishing to be involved in arbitration funding in Italy would be subject to the general principles and laws governing the specific case at hand.

As to the provisions governing a potential funding agreement (*accordi di finanziamento alla lite*), it should be noted that in Italy contingency fees are not allowed. Thus, the client and his/her counsel cannot agree that the fees for legal advice and representation are payable only under the condition of an eventual positive collection. In other words, a lawyer cannot share the "litigation risk" with the client.[24] However, this rule does not exclude that a third party (not a lawyer) may fund an arbitration (or an ordinary litigation matter) asking as compensation a

[23] See: Francesco Machina Grifeo, *Litigation funding, la nuova via per finanziare le procedure concorsuali*, in Guida al Diritto, Il Sole 24ore, www.diritto24.ilsole24ore.com/art/guidaAlDiritto/dirittoCivile/2017-09-20/litigation-funding-finanziare-procedure-concorsuali-182758.php; Gian Marco Solas, *Third Party Litigation funding: un'allettante opportunità per garantire l'accesso alla giustizia*, in Euroconference Legal, www.eclegal.it/third-party-litigation-funding-unallettante-opportunita-garantire-laccesso-alla-giustizia/; Elena D'Alessandro, *Contratto di finanziamento della lite»: mera operazione finanziaria finalizzata a trarre profitto dal processo civile ovvero strumento che agevola l'accesso alla tutela giurisdizionale?*, in Academia.edu, www.academia.edu/31705377/_Contratto_di_finanziamento_della_lite_mera_operazione_finanziaria_finalizzata_a_trarre_profitto_dal_processo_civile_ovvero_strumento_che_agevola_l_accesso_alla_tutela_giurisdizionale; Sara Forni, Il "Third Party Funding" *nell'arbitrato internazionale*, in "I Contratti" n. 10, 2013; Pietro Bernardini, *Third party funding in international Arbitration*, in Rivista dell'Arbitrato n. 1 2017.

[24] The prohibition was removed by Law No. 248/2006 but was reintroduced with Law No. 247/2012 (governing the legal profession in Italy).

percentage of the amount eventually collected in the litigation. In fact, this seems to be the financial arrangement proposed by a few financial entities active in the sector.

Notwithstanding the marginal role of third-party litigation funding in Italy, and in particular of arbitration funding, it seems that a number of funders are interested in investing in the market and a number of experts and practitioners are confident that in the next few years litigation funding may spread in the Italian jurisdiction (in particular, litigation funding in the bank sector, private enforcement of antitrust decisions, and debt collection).[25] These developments are particularly likely if it is taken into account that in Italy just a very small percentage of potential plaintiffs are eligible for legal aid and that the only other forms of litigation funding (in the broad sense) are:

(a) Trade-union funding: aimed at giving legal aid to trade union members facing labor-related disputes. Under this mechanism, trade unions usually require employees to pay a contribution equal to a percentage of the amount eventually collected by the employee in the litigation (if any, otherwise representation is free).[26]

(b) Dispute-related insurance policies: aimed at covering the potential expenses which an individual may incur as consequence of legal proceedings.[27]

[25] See note 23.
[26] See eg, www.cgil.milano.it/servizio/servizio-vertenze-legali/.
[27] See a remarkable example in the context of an ICSID arbitration at www.lexology.com/library/detail.aspx?g=1a6a85cd-29c3-411f-8ff1-2ce50b453c0f, case *Eskosol v. Italy*, 2017, where an ICSID tribunal rejected Italy's request for a "security for costs" provision in arbitration brought by Eskosol. Italy argued that Eskosol went bankrupt, implying that there was a material risk that the firm would be unable to compensate in the event of a costs award. Furthermore, although Eskosol secured third-party funding for its arbitration, the third-party funder would not be bound by a costs award. However, Lexology reports that the tribunal found in favor of Eskosol, who argued that their insurance of up to EUR 1 million made it likely they would be able to compensate a costs award. The company also contended that neither

It is conceivable that the tardiness of litigation funding to be introduced in the Italian market is due in part to the lower cost of litigation in Italy compared to other countries, such as the UK or USA, and the reluctance of Italian courts (and also arbitrators ruling on Italian law) to award large damages. Funders are indeed inclined to intervene only when there is the chance of a large award for damages, where they may expect to receive their compensation by reference to the recoveries made, as funding is obviously a risky investment, which requires prior due diligence of the claim and of the assets of the potentially losing party in order to make the funder confident of the chances of success.

bankruptcy nor third-party funding amounts to the "extraordinary circumstances" warranted to order a security for costs.