

# ARBITRATION IN ITALY

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## 1. Legislative framework

### 1.1 Code of Civil Procedure – Book IV, Title VIII, Articles 806–840 (CPC)

1.1.1 Arbitration in Italy is governed by the CPC rules, which are structured as follows.

#### *Chapter I*

1.1.2 Articles 806–808 *quinquies* provide general rules on the arbitration agreement (i.e. formal requirements, arbitrability, effects and interpretation of the arbitration agreement) as well on the so called *arbitrato irrituale* or free arbitration.

#### *Chapter II*

1.1.3 Articles 809–815 concern the arbitrators (i.e. number, appointment, replacement, incapacity, acceptance, loss, liability, rights and challenge of the arbitrators).

#### *Chapter III*

1.1.4 Articles 816–819 *ter* give details on the arbitration procedure (i.e. seat of arbitration, procedural rules, evidence and stay of the proceedings).

#### *Chapter IV*

1.1.5 Articles 820–826 deal with the award (i.e. timing, content, effects and correction).

#### *Chapter V*

1.1.6 Articles 827–831 deal with challenging the award (i.e. grounds for setting aside, appeal, revocation and third party opposition).

#### *Chapter VI*

1.1.7 Articles 832–838 govern international arbitrations pursuant to pre-established arbitral rules (e.g. *Associazione Italiana per l'Arbitrato Resolutions*, ICC Arbitration Rules, etc).

#### *Chapter VII*

1.1.8 Articles 839–840 govern the recognition and enforcement of foreign awards and the procedure for opposing such recognition and enforcement.

### 1.2 Historical background

1.2.1 In order to modernise the procedure and incorporate the terms of several international conventions ratified by Italy, the provisions of the CPC were amended by three important laws.

#### *Law 9th February 1983, No. 28 (1983 Reforms)*

1.2.2 The 1983 Reforms represented the first attempt to reduce the rigidity of the CPC by excluding Italian nationality as a basic requirement for appointment as an arbitrator.

*Law 5th January 1994, No. 25 (1994 Reforms)*

- 1.2.3 The 1994 Reforms introduced new rules regarding international arbitration in compliance with international conventions and, in particular, with the New York Convention.

*Legislative Decree 2nd February 2006, No. 40 (2006 Reforms)*

- 1.2.4 The 2006 Reforms constituted re-drafting all of the previous CPC provisions on arbitral proceedings. The aim of the 2006 Reforms was to promote and improve recourse to arbitration as an attractive alternative to ordinary judicial proceedings.

## 2. Scope of application and general provisions

### 2.1 Subject matter

- 2.1.1 The CPC applies to all arbitral proceedings which take place in Italy, unless otherwise agreed by the parties. The CPC also contains provisions regarding the recognition and enforcement of awards rendered by arbitral tribunals seated outside Italy.
- 2.1.2 The CPC applies different rules depending on the type of arbitration.

*Domestic arbitrations*

- 2.1.3 The statutory rules governing domestic arbitrations apply in the event that the seat of the arbitration is in Italy and both parties are Italian.

*International arbitrations*

- 2.1.4 International arbitrations are governed by the provisions of applicable international regulations chosen by the parties, as no specific provision is provided by the CPC. However, when the seat of arbitration is outside Italy or the award is rendered outside Italy and the recognition and enforcement is required in Italy, certain provisions of the CPC can be invoked. In such case, the arbitration will be considered international even if one of the parties is Italian or Italian law has been chosen to govern the dispute between the parties.
- 2.1.5 In addition to the above, the Italian system distinguishes between *arbitrato rituale* and *arbitrato irrituale*. The 2006 Reforms expressly introduced the right for the parties to resort to *arbitrato irrituale* proceedings and established a right for parties to submit non-contractual disputes to arbitration, known as *arbitrato extracontrattuale*.

*Arbitrato rituale or ordinary arbitration*

- 2.1.6 *Arbitrato rituale* is the ordinary type of arbitral proceedings governed by the CPC rules that is considered in more detail below.

*Arbitrato irrituale or free arbitration*

- 2.1.7 *Arbitrato irrituale* is an alternative arbitral procedure which does not result in an enforceable award. Rather, an *arbitrato irrituale* award is binding on the parties in the same way as a contract.
- 2.1.8 The parties must specify in writing if the arbitration is to be an *arbitrato irrituale*. If the arbitration agreement does not specify the nature of the arbitration (*rituale or irrituale*) the arbitration will be deemed to be *arbitrato rituale*.
- 2.1.9 The arbitration agreement can provide that the arbitral tribunal must make a decision based on either law or *ex aequo et bono* principles. The parties can decide the procedural rules to be followed by the arbitral tribunal. The procedural rules are usually simpler than in ordinary arbitration, but, due to the adversarial nature of the proceedings, both parties have the right to be heard and to submit documents and claims.
- 2.1.10 The award issued in an *arbitrato irrituale* can be challenged only on the following grounds:
- the arbitration agreement is void;
  - the arbitral tribunal exceeded the scope of the arbitration agreement and this issue was raised as an objection during the arbitral proceedings;
  - the arbitrators were not appointed in accordance with the provisions of the arbitration agreement;
  - incapacity of the arbitrators;
  - the arbitrators breached their duties; and
  - violation of the rule *audi alteram partem*.<sup>1</sup>
- 2.1.11 *Arbitrato irrituale* awards can be challenged by applying to the competent court of first instance.
- 2.1.12 If a party does not comply with an *arbitrato irrituale* award the other party can commence an action before the competent court of first instance for breach of contract.

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<sup>1</sup> CPC, art 808 *ter*, para 2.

*Arbitrato extracontrattuale or arbitration on matters not provided for in a contract*

- 2.1.13 The 2006 Reforms of the CPC rules introduced the possibility of referring all future disputes to arbitration which may arise from one or more given relationships not provided for in a contract.<sup>2</sup> Indeed, by way of this new rule, a third type of arbitration (other than ordinary and free arbitration) was introduced. The parties are entitled to refer the dispute to arbitrators regardless of whether they are bound to each other by a contract. Such cases could occur, for example, in disputes concerning real rights, such as boundary regulations, neighbourliness or joint ownership.

## **2.2 General principles**

- 2.2.1 The CPC rules provide certain general principles, which only apply to *arbitrato rituale* proceedings.

*Due process*

- 2.2.2 The parties are entitled to equal treatment by the arbitral tribunal and must be given the opportunity to submit their requests and be heard under the same conditions. Infringement of this principle is a ground for annulment of the award.<sup>3</sup> Moreover, the arbitral tribunal has a general obligation to be impartial.<sup>4</sup>

*Autonomy*

- 2.2.3 The parties are free to agree on the subject matter of the dispute they wish to refer to arbitration, as well as on the choice of arbitrator(s), rules of procedure, seat of arbitration, applicable law, etc. The parties' autonomy is limited by certain mandatory statutory rules and matters on which national courts have exclusive jurisdiction (i.e. disputes concerning matters which cannot be submitted to arbitration such as personal status, marital status, judicial separation, divorce as well as national insurance contributions).

*Non-intervention by the courts*

- 2.2.4 As a general principle, national courts cannot intervene in arbitral proceedings, except as expressly provided for in the CPC.

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<sup>2</sup> *Ibid*, art 808 bis.

<sup>3</sup> *Ibid*, art 829.

<sup>4</sup> *Ibid*, art 829 and 815.



## 3. The arbitration agreement

### 3.1 Definition

3.1.1 The arbitration agreement is the agreement whereby two or more parties agree to submit the resolution of specific disputes to one or more arbitrators and provide for the principal rules that shall govern the arbitral proceedings (e.g. type of arbitration, appointment and constitution of the arbitral tribunal and the seat of arbitration).

### 3.2 Formal requirements

3.2.1 The arbitration agreement can be in the form of a clause within a contract or a stand-alone agreement. In either case, the arbitration agreement should be in writing and should clearly set out the subject-matter submitted to arbitration.<sup>5</sup> In the absence of writing, the arbitration agreement will be null and void.<sup>6</sup>

3.2.2 The CPC does not require that the agreement is embodied in a single document. Therefore, the agreement may arise out of an exchange of letters, telegrams, emails signed with an electronic signature, in a communication by tele-printer or by telefax.

3.2.3 In the event that the arbitration clause is embodied in a party's general terms of business, it must be explicitly confirmed in writing by the parties. However, this requirement has been relaxed in international arbitration so that an arbitration clause contained in general conditions of business or in a standard form is considered valid even without any explicit confirmation in writing by the parties.<sup>7</sup>

3.2.4 In addition, a written agreement which incorporates by reference an arbitration clause contained in the general conditions of business is considered valid if the parties were aware of the clause or should have known of its existence by exercising reasonable diligence.

### 3.3 Special tests and requirements of the jurisdiction

3.3.1 Disputes concerning inalienable rights (such as constitutional ones) or other matters such as issues concerning personal status and marital separation cannot be submitted to arbitration.<sup>8</sup>

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<sup>5</sup> *Ibid*, art 807.

<sup>6</sup> *Ibid*, art 807–808.

<sup>7</sup> See generally A Atteritano, "Art. 808 Clausola Compromissoria", *Commentario alle riforme del processo civile di Antonio Briguglio, Bruno Cappoini*, Volumi 2–3, 2009, p 512.

<sup>8</sup> CPC, art 806.

- 3.3.2 Disputes regarding individual contracts of employment can only be submitted to arbitration if expressly provided for by law (see section 11.3 below).
- 3.3.3 Any award which is made in respect of a dispute that could not have been submitted to arbitration is subject to annulment.<sup>9</sup> The Italian courts may also refuse to recognise and enforce international awards on matters which are excluded from arbitration under Italian law.<sup>10</sup>

### **3.4 Separability**

- 3.4.1 The validity of the arbitration clause is examined independently from the contract in which it is included in accordance with the recognised principles of separability. Therefore, the invalidity of the underlying contract does not necessarily render the arbitration clause invalid.<sup>11</sup>

### **3.5 Effects of a binding arbitration agreement**

- 3.5.1 An arbitration agreement duly agreed upon by the parties remains binding until the award ruling on the merits of the dispute is rendered by the arbitrators.<sup>12</sup>

## **4. The arbitral tribunal**

### **4.1 Constitution of the arbitral tribunal**

- 4.1.1 As a general rule, the parties are free to determine the number of arbitrators and the procedure governing their appointment. The parties may appoint one or more arbitrators, provided that the tribunal consists of an odd number. In the event that the parties fix an even number of arbitrators, an additional arbitrator must be appointed by the President of the Italian court in the district in which the arbitration has its seat, unless otherwise agreed by the parties.<sup>13</sup>
- 4.1.2 If no number has been fixed in the arbitration agreement and the parties have not reached an agreement on this matter, the number of arbitrators shall be three. If the parties are unable to appoint the arbitrators, the President of the Italian court in the district in which the arbitration has its seat shall proceed to make the appointments, unless the parties have provided for an alternative procedure.<sup>14</sup>

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<sup>9</sup> *Ibid*, art 806 and 829.

<sup>10</sup> *Ibid*, art 839, para 4.

<sup>11</sup> *Ibid*, art 808, para 3.

<sup>12</sup> *Ibid*, art 808 *quinquies*.

<sup>13</sup> *Ibid*, art 809, para 3.

<sup>14</sup> *Ibid*.

- 4.1.3 If, as is commonly the case, the parties do not deal with the appointment of the arbitrators in the arbitration clause, the party intending to commence arbitral proceedings – after having previously chosen its own arbitrator – shall serve a notice of appointment of its arbitrator on the other party and a request for the addressee to appoint its own arbitrator.
- 4.1.4 The respondent has 20 days to appoint its arbitrator from receipt of the request to do so. Failing such appointment, the party who has made the request may petition the President of the court in the district in which the arbitration has its seat to appoint an arbitrator. If the seat of the arbitration has not been agreed by the parties, the arbitrator shall be appointed by the President of the court in the district in which the arbitration clause was executed or, if it is abroad, by the President of the Court of Rome.<sup>15</sup>
- 4.1.5 The President of the Italian court in the district in which the arbitration has its seat shall not proceed with the appointment if the arbitration clause is clearly invalid or if it clearly provides for arbitration in a country other than Italy.<sup>16</sup> The court order by which the President appoints an arbitrator is not open to appeal.<sup>17</sup>

*Acceptance by the arbitrators*

- 4.1.6 The arbitrators' acceptance of appointment shall be given in writing by signing the arbitration agreement or shall be included in the minutes of the first arbitral hearing or shall be contained in a separate agreement in writing.<sup>18</sup>

*Capacity to act as an arbitrator*

- 4.1.7 A person who lacks legal capacity, completely or partially, cannot be appointed as arbitrator by the parties.<sup>19</sup>
- 4.1.8 By way of example, minors, persons subject to bankruptcy proceedings or those who are disqualified from holding public office cannot be appointed as arbitrators.

**4.2 Challenge of arbitrators**

- 4.2.1 Arbitrators may be challenged or replaced only in the circumstances expressly provided for under the CPC.<sup>20</sup>

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<sup>15</sup> *Ibid*, art 810, para 2.

<sup>16</sup> *Ibid*, art 810, para 3.

<sup>17</sup> Corte di Cassazione Civile (**CASS**), Sezione I, 18 May 2007, no 11665.

<sup>18</sup> CPC, art 813.

<sup>19</sup> *Ibid*, art 812.

<sup>20</sup> *Ibid*, art 811, 812 and 815.

*Challenge of the arbitrators*

4.2.2 A party may challenge the appointment of the other party's chosen arbitrator or the chair by applying to the President of the court in the district in which the arbitration has its seat in the following circumstances:

- the arbitrator does not meet the requirements agreed upon by the parties;
- the arbitrator, or the company in which the arbitrator is a director, has an interest in the proceedings or in any related proceedings;
- the arbitrator or the arbitrator's spouse has family ties up to the fourth degree of kinship, is living with or has a close friendship with one of the parties or one of their lawyers;
- the arbitrator or the arbitrator's spouse is a party to proceedings pending against, or is a creditor or debtor of, one of the parties or one of their lawyers;
- there is serious hostility arising from personal affairs between the arbitrator and one of the parties or one of their lawyers;
- the arbitrator is a tutor, agent or employer of one of the parties;
- the arbitrator has given advice, has appeared as a witness or was involved as a judge or arbitrator in the same matter previously; and
- there are serious reasons of convenience which make it advisable not to act in the proceedings, such as cases where – for any reason – an arbitrator has given an opinion on the matter before being formally involved in the case, which may be deemed to jeopardise that arbitrator's impartiality.<sup>21</sup>

4.2.3 The parties cannot challenge their own party-appointed arbitrators except on grounds that arise after the appointment of the arbitrator in question.<sup>22</sup> In any case, the time limit for filing an application to challenge the appointment is ten days from the appointment of the arbitrator or from the date of knowledge of the ground for challenge.<sup>23</sup> The decision of the President of the court cannot be challenged by the parties.

4.2.4 The application does not suspend the arbitral proceedings, unless otherwise agreed by the arbitrators. However, if the challenge is successful, the past activity of the challenged arbitrator will have no effect.

*Replacing an arbitrator*

4.2.5 An arbitrator may be replaced in case of:

- legal incapacity to act (e.g. incapacitated persons, persons declared bankrupt and some public officers);

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<sup>21</sup> *Ibid*, art 815, para 1.

<sup>22</sup> *Ibid*, art 815, para 2.

<sup>23</sup> *Ibid*, art 815, para 3.

- conflict of interest;
- failure to act properly or delaying the procedure (provided there is evidence that the parties have invited the arbitrator to remedy this and he has not done so);
- resignation by an arbitrator from office with good reason; and
- death.<sup>24</sup>

4.2.6 When, for the above reasons, one or more appointed arbitrators are no longer in office, replacement arbitrators must be appointed according to the procedure set out in the arbitration agreement or as set out in the CPC (see section 4.1 above).<sup>25</sup>

### 4.3 Responsibilities of the arbitrators

4.3.1 The 2006 Reforms provided complete and uniform regulations on the duties and liabilities owed by arbitrators to the parties.<sup>26</sup>

#### *Duties of the arbitrators*

4.3.2 The arbitrators must render their award within the time limit set by the parties or by law. If they fail to do so and the award is declared null and void due to their delay, they are responsible for any damage suffered by the parties.<sup>27</sup>

4.3.3 The arbitrators cannot withdraw from their office after having accepted it without good reason. In the absence of a good reason, they may be held liable in damages.<sup>28</sup>

4.3.4 Unless otherwise agreed, any arbitrator who fails to perform the relevant duties or fails to perform them in a timely manner can be replaced by agreement of the parties or by a third party appointed for this purpose under the terms of the arbitration agreement.<sup>29</sup>

4.3.5 Failing such replacement, within a period of 15 days after notice has been served on the defaulting arbitrator, either party may file an application with the competent court for the arbitrator's removal.<sup>30</sup>

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<sup>24</sup> *Ibid.*, art 811.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, art 813 *ter.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, art 813 *bis.*

<sup>30</sup> *Ibid.*

- 4.3.6 If the President of the court, having heard the parties, finds that the arbitrator did breach a duty, then the President of the court may remove the arbitrator from office. The court's order cannot be appealed.<sup>31</sup>

*Liability of the arbitrators*

- 4.3.7 Arbitrators may be held liable for any damages suffered by the parties in the event of:
- fraudulent or grossly negligent omission or delay in the procedure;
  - resignation without a proper cause; or
  - fraudulent or grossly negligent omission or delay in issuing the award.<sup>32</sup>
- 4.3.8 Each arbitrator is only liable for his/her own actions.<sup>33</sup> An action for damages can be brought during the arbitral proceedings on the occurrence of the first and second grounds described in paragraph 4.3.7 above.
- 4.3.9 In the absence of fraud, compensation for damages cannot exceed three times the arbitrators' fees.<sup>34</sup> Further, if an appointed arbitrator is held to be liable, the parties do not have to pay that arbitrator's fees.<sup>35</sup>

*Arbitrator immunity*

- 4.3.10 Except in the cases of liability outlined above, arbitrators have a similar immunity from liability in tort or gross negligence as judges (i.e. liability cannot arise from either the interpretation of the regulations or the evaluation of the facts or the evidence).<sup>36</sup>

**4.4 Arbitration fees**

- 4.4.1 The CPC expressly recognises that the arbitrators are entitled to fees and to reimbursement of their expenses.<sup>37</sup> Arbitrators should make reference to the schedule of fees set out in the Ministerial Decree issued by the Italian Ministry of Justice on 8 April 2004.
- 4.4.2 All parties to the arbitration are jointly and severally liable for the fees and expenses of the arbitral proceedings regardless of how the arbitrators apportion costs

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, art 813 *ter*.

<sup>33</sup> *Ibid.*, art 813 *ter*, para 7.

<sup>34</sup> *Ibid.*, art 813 *ter*, para 5.

<sup>35</sup> *Ibid.*, art 813 *ter*, paras 5–6.

<sup>36</sup> *Ibid.*, art 813 *ter*, para 2; Law 13th April 1988, no. 117, art 2, paras 2 and 3.

<sup>37</sup> CPC, art 814, para 1.

between them. If one party pays all of the fees and expenses due to the arbitrators, that party is allowed to recover the fees and expenses from the other party within the limits set out in the award.<sup>38</sup>

- 4.4.3 It is commonly accepted that the role of the arbitrators includes determining their own fees in the award and allocating the responsibility for paying those fees between the parties. However, unless the parties approve the arbitrators' determination of their fees, that determination will not be binding. Failing payment of their fees, the arbitrators may apply to the President of the court in the district in which the arbitration has its seat in order to determine their fees. The court order, although open to challenge by the parties, is immediately enforceable.<sup>39</sup>

#### *Advanced payment*

- 4.4.4 In accordance with current common practice, arbitrators can refuse to take any steps to advance the arbitral process until they have received payment in advance of the estimated arbitration costs.<sup>40</sup>
- 4.4.5 If the parties refuse to pay the advance costs within the timeframe stipulated by the arbitrators, the parties are no longer bound by the arbitration agreement with respect to the dispute.<sup>41</sup>

## 5. Jurisdiction of the arbitral tribunal

- 5.1.1 The arbitral tribunal is competent to rule on the validity of the arbitration agreement, which includes an ability to assess the capacity of the parties, determine whether or not formal requirements have been met, determine the arbitrability of the dispute and address any issues relating to the appointment of the arbitrators. The decision rendered by the tribunal on its jurisdiction is, however, subject to judicial control upon request of one of the parties.<sup>42</sup>
- 5.1.2 If a party has any jurisdictional objections they must be raised in its first submission on the merits of the dispute.<sup>43</sup>

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<sup>38</sup> *Ibid.*, art 814.

<sup>39</sup> *Ibid.*, art 814, para 3.

<sup>40</sup> *Ibid.*, art 816 *septies*.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, art 817.

<sup>43</sup> *Ibid.*

- 5.1.3 The arbitrators' jurisdiction is not excluded if the same dispute is pending before a national court, nor if it is connected to another dispute pending before a national court. However, in the court dispute, one of the parties must raise an objection concerning the lack of jurisdiction of that court in its first defence, otherwise the arbitrators will lose jurisdiction over the dispute.<sup>44</sup>
- 5.1.4 Similarly, a party must raise an objection that the pleadings of the other party exceed the limits of the arbitration agreement during the arbitral proceedings or it will lose the right to file for annulment of the award on this ground.<sup>45</sup>
- 5.1.5 Actions on the invalidity or ineffectiveness of the arbitration clause cannot be brought before the court while the arbitration is pending.<sup>46</sup>

## 6. Conduct of arbitral proceedings

### 6.1 Commencement of arbitration

- 6.1.1 The arbitral proceedings are deemed to commence when a party serves a notice of appointment of an arbitrator on the other party along with a request that the other party appoint its arbitrator.<sup>47</sup>

### 6.2 General procedural principles

- 6.2.1 The parties are free to determine the procedural rules governing the arbitration. These rules must be determined before the arbitrators accept their office. Upon acceptance, the parties may no longer modify the procedure.<sup>48</sup> It is commonly accepted that the arbitrators will have good reason to withdraw from their office if the parties insist on amending the procedural rules during the course of the arbitration.
- 6.2.2 Where the parties have not agreed on the applicable procedure, the arbitrators shall apply the rules which they deem most suitable.<sup>49</sup>

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<sup>44</sup> *Ibid*, art 819 *ter*.

<sup>45</sup> *Ibid*, art 817.

<sup>46</sup> *Ibid*, art 819 *ter*.

<sup>47</sup> *Ibid*, art 810.

<sup>48</sup> *Ibid*, art 816 *bis*.

<sup>49</sup> *Ibid*, art 816, para 3.



- 6.2.3 The only mandatory rule that the arbitrators may not exclude is their obligation to fix the time by which the parties must submit their demands, documents and replies.<sup>50</sup> This is considered to be the strict minimum to guarantee a fair process.
- 6.2.4 In the event that the arbitrators do not comply with the rules chosen by the parties, the courts may annul the award.<sup>51</sup>

### **6.3 Seat, place of hearings and language of arbitration**

- 6.3.1 The parties are free to determine the language of the arbitration.<sup>52</sup>
- 6.3.2 The parties shall also determine the seat of arbitration. In the absence of any express choice, the seat shall be determined by the arbitrators.<sup>53</sup> If neither the parties nor the arbitrators determine the seat of arbitration, it shall be the place at which the arbitration agreement was signed or, if it was signed abroad, the seat of arbitration will be Rome.
- 6.3.3 Unless otherwise agreed in the arbitration agreement, the arbitrators can carry out their functions (e.g. hold hearings) anywhere they please whether at the seat of arbitration or elsewhere.

### **6.4 Multi-party issues**

- 6.4.1 If the arbitration agreement is concluded between more than two parties, any party can commence arbitral proceedings against all or some of the other parties.<sup>54</sup>
- 6.4.2 In multi-party proceedings, the arbitrators must be appointed in one of the following ways:
- by a third party in accordance with the arbitration agreement;
  - by agreement between all of the parties; or
  - the claimant(s) jointly appoint their own arbitrator(s), the respondents jointly appoint their own arbitrator(s) or all parties jointly request a third party to make appointment on their behalf.<sup>55</sup>

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<sup>50</sup> *Ibid*, art 816 bis, para 1.

<sup>51</sup> *Ibid*, art 829.

<sup>52</sup> *Ibid*, art 816 bis, para 1.

<sup>53</sup> *Ibid*, art 816.

<sup>54</sup> *Ibid*, art 816 quater.

<sup>55</sup> *Ibid*, art 816 quater.

6.4.3 The intervention and involvement of a third party (i.e. a person or legal entity who is not party to the arbitration agreement) is only allowed with the consent of the third party, the parties and the arbitrators.<sup>56</sup>

6.4.4 Any third party who has an interest in the dispute has the right to voluntarily intervene in existing proceedings in support of one of the party's defence or to join as a legally necessary co-party, without the consent of either the parties or of the arbitrators being required.<sup>57</sup>

## **6.5 Oral hearings and written proceedings**

6.5.1 The arbitration agreement or the arbitrators may provide specific time-limits within which the parties must file their formal statements and deposit relevant documents.<sup>58</sup>

6.5.2 The content of the formal statements, as well as the choice of which documents to attach to such statements, is at the discretion of the parties.

6.5.3 The parties are not obliged to disclose relevant facts or documents that are harmful to their case and will usually only submit the facts and documents that they deem useful in order to establish their rights.

6.5.4 The parties are free to organise oral hearings or to conduct the proceedings on a documents only basis. It is common practice to exchange written submissions and then to hold a final oral hearing at which both parties have the opportunity to present their arguments.

## **6.6 Default by one of the parties**

6.6.1 The term "default" is not expressly defined by law. Therefore, it is advisable to qualify it as the inactivity or lack of participation of one party during the arbitral proceedings.<sup>59</sup>

6.6.2 The validity of the award or the arbitral proceedings is not affected by the inactivity of one of the parties, provided that the other party has duly served the notice of appointment of an arbitrator on the inactive party and a request that the inactive party appoints its arbitrator.<sup>60</sup>

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<sup>56</sup> *Ibid*, art 816 *quinquies*, para 1.

<sup>57</sup> *Ibid*, art 816 *quinquies*, para 2.

<sup>58</sup> *Ibid*, art 816 *bis*.

<sup>59</sup> See generally L Salvaneschi, "La devoluzione a un terzo della nomina di arbitri", *La nuova disciplina dell'arbitrato a cura di Sergio Menchini* (2010), p 241, footnote 13.

<sup>60</sup> M Curti, *L'arbitrato le novità della riforma D.lgs. 2 febbraio 2006*, n. 40, p 69.

## 6.7 Evidence

- 6.7.1 The parties are free to fix the rules specifying the types of evidence that will be admissible during the course of the arbitration. In the absence of any agreement between the parties, the arbitral tribunal will establish the most suitable framework for the production of evidence (often reflecting the Italian statutory rules).<sup>61</sup>
- 6.7.2 Parties and arbitrators may accept the admissibility of certain forms of evidence (e.g. email correspondence) or, on the other hand, may limit the admissible evidence (e.g. only permitting written documents).
- 6.7.3 The arbitral tribunal may delegate the decision as to whether or not certain evidence should be admissible to one of the arbitrators.<sup>62</sup>
- 6.7.4 The arbitrators may hear witnesses in a place of their choosing (e.g. at the seat of the arbitration or at the witnesses' home or office) or require a written statement of a witness's testimony.<sup>63</sup> When a witness refuses to appear, the President of the court where the arbitration has its seat can oblige him/her to appear before the arbitrators (see paragraph 8.3.2 below).<sup>64</sup>
- 6.7.5 The arbitrators can request information from public bodies which they consider to be useful for the proceedings.<sup>65</sup>

### *Interlocutory awards*

- 6.7.6 The arbitral tribunal may render interlocutory awards regarding all queries which arise during the arbitral proceedings (e.g. evidential issues or witnesses), as long as they fall within the scope of the arbitration agreement.<sup>66</sup>

## 6.8 Appointment of experts

- 6.8.1 In addition to the powers mentioned above, the arbitral tribunal may also appoint technical experts to help them resolve technical issues. Arbitrators are entitled to appoint either individuals or companies as technical experts.<sup>67</sup>
- 6.8.2 After the arbitral tribunal has appointed technical experts, the parties have the same rights provided for in the CPC as parties to ordinary proceedings before the

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<sup>61</sup> CPC, art 816 *bis* and 816 *ter*.

<sup>62</sup> *Ibid*, art 816 *ter*.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*, art 816 *ter*, para 3.

<sup>65</sup> *Ibid*, art 816 *ter*, para 6.

<sup>66</sup> *Ibid*, art 819.

<sup>67</sup> *Ibid*, art 816 *ter*.

courts. All parties are entitled to appoint their own experts who have the right to submit their own reports in response to the results put forward by the experts appointed by the arbitral tribunal.<sup>68</sup>

## 6.9 Confidentiality

- 6.9.1 Although there are no compulsory provisions on confidentiality in the CPC, arbitral proceedings generally afford parties a high level of confidentiality.
- 6.9.2 While the decisions of the ordinary courts are generally available to third parties, awards are not, unless the parties agree otherwise.

# 7. Making of award and termination of proceedings

## 7.1 Choice of law

- 7.1.1 The parties are free to choose the governing law.<sup>69</sup> In the absence of an express choice, the arbitrators shall select the law that they deem to be most appropriate.<sup>70</sup> Unless the parties authorise them to do so, the arbitrators may neither decide the dispute *ex aequo et bono* (*equità*) nor in accordance with the *lex mercatoria*.<sup>71</sup>

## 7.2 Timing, form, content and notification of award

- 7.2.1 In the absence of any contrary agreement, the arbitrators must render their decision within 240 days from the acceptance of their appointment as arbitrators.<sup>72</sup> The time limit is suspended when a petition for challenge is filed or when it is necessary to replace one or more arbitrators. In the latter scenario, the remaining time, if shorter, will be extended to a minimum of 90 days from the date on which the suspension is lifted.<sup>73</sup>
- 7.2.2 The CPC provides for different circumstances in which the above time limit can be extended with the written agreement of both parties or if so ordered by a national court, namely:<sup>74</sup>

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<sup>68</sup> G F Ricci, "La consulenza tecnica", *Arbitrato – commentario diretto da Federico Carpi* (2nd Edition, 2008), p 436; S La China, *L'arbitrato il sistema e l'esperienza* (Milano, 1999), p 139.

<sup>69</sup> CPC, art 816 *bis*.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, art 822.

<sup>72</sup> *Ibid.*, art 820, para 2.

<sup>73</sup> *Ibid.*, art 820, para 4.

<sup>74</sup> *Ibid.*

- (i) if the tribunal must admit new evidence;
- (ii) if an interlocutory award has been rendered; or
- (iii) if the composition of the arbitral tribunal has changed.

7.2.3 It is important to note, however, that an extension can only be granted once and for no longer than 180 days.

*Form and contents of the award*

7.2.4 The award must be rendered by a majority of the arbitrators (with the participation of all of the arbitrators), recorded in writing and must contain the following information:

- identity of the arbitrators;
- seat of the arbitration;
- identity of the parties;
- reference to the arbitration agreement and to the matters submitted to arbitration;
- a brief statement of the reasons for the decision;
- the decision; and
- the signatures of the arbitrators and the date of signature.<sup>75</sup>

7.2.5 The signature of a majority of the arbitrators is sufficient provided that the decision was taken with the participation of all of the arbitrators and the award expressly mentions that one or more arbitrators refused or were unable to sign the award.

*Effects and notification of the award*

7.2.6 The award has the same effect as a judgment as soon as it is signed.<sup>76</sup> The arbitrators shall issue the award in as many original copies as there are parties and notify each party by delivering an original copy of the award to each party by hand or by registered post within ten days of the date of the last signature.<sup>77</sup>

### **7.3 Settlement**

7.3.1 If the parties reach a settlement during the proceedings, it is common practice to inform the tribunal and withdraw from the arbitral proceedings. Alternatively, the parties can ask the arbitrators to issue an award which records the terms of the settlement.

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<sup>75</sup> *Ibid*, art 823, para 2.

<sup>76</sup> *Ibid*, art 824 bis.

<sup>77</sup> *Ibid*, art 824.

#### **7.4 Power to award interest and costs**

7.4.1 The arbitrators will take account of costs as well as their own fees in the award. They can also decide whether to award interest if requested to do so by the parties.

#### **7.5 Stay of the proceedings**

7.5.1 The arbitrators are required to stay the proceedings in the following circumstances:

- death, termination or loss of legal capacity of a party;
- if criminal proceedings are pending in relation to the same matter;
- if, during the proceedings, an issue arises which cannot be settled by arbitration and which must be resolved by means of a final court judgment; or
- if the arbitrators submit an issue to the Italian Constitutional Court.<sup>78</sup>

7.5.2 If neither party files an express request to lift the stay on proceedings within the time limit imposed by the arbitrators, then the proceedings shall be terminated.<sup>79</sup>

#### **7.6 Termination of the proceedings**

7.6.1 Arbitral proceedings terminate when the arbitrators render and sign their final award which has the same effect as a court judgment.

#### **7.7 Correction and clarification**

7.7.1 The parties may require the arbitrators who decided the case to rectify the award if it contains formal omissions, errors or miscalculations or when substantial formal requirements are missing.<sup>80</sup>

7.7.2 The tribunal must make a decision regarding the corrections within a period of 60 days following the request by one or more parties to do so. The tribunal has an obligation to hear the parties within this period. If the arbitrators do not comply with this time limit, the parties can request that the correction is made by the competent national court.<sup>81</sup>

7.7.3 If the award has already been filed with the competent national court for the purposes of enforcement or challenge, it shall be for that court to rule on possible rectification.<sup>82</sup>

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<sup>78</sup> *Ibid*, art 829 bis, para 1.

<sup>79</sup> *Ibid*, art 819 bis.

<sup>80</sup> *Ibid*, art 826.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid*.

## 8. Role of the courts

### 8.1 Jurisdiction of the courts and stay of court proceedings

- 8.1.1 As a general rule, if the parties agree to submit their dispute to arbitration, the national courts must decline jurisdiction on the merits if the respondent raises an objection concerning the lack of jurisdiction of the court in its first defence. The court shall decide on its jurisdiction by judgment.<sup>83</sup>
- 8.1.2 Should the respondent not raise an objection concerning the lack of jurisdiction in a timely manner, the arbitral tribunal will no longer have jurisdiction.<sup>84</sup>
- 8.1.3 The 2006 Reforms set out the consequences of disputes concerning the validity of the arbitration clause arising, which depends on whether it materialises before or after the commencement of the arbitration. In the latter scenario (pending the arbitral proceedings), no claim concerning the validity of the clause can be raised in court proceedings.<sup>85</sup> However, if the arbitral proceedings have not been commenced, the dispute shall be referred to court proceedings on the grounds that – at that stage – it only concerns the validity of an agreement (i.e. the arbitration clause). Regardless of the decision of the courts, the parties cannot enforce the CPC articles to stay or reinstate the proceedings after a decision on the competence has been taken.<sup>86</sup> New proceedings shall be commenced by the parties before the competent authority (either the arbitral tribunal or the ordinary courts).<sup>87</sup>

#### *Award rendered before the termination of the court proceedings*

- 8.1.4 Although there are no specific provisions, if the arbitral tribunal renders an award on a preliminary question before the termination of the court proceedings, the court could be asked by the parties to align its judgment with the award.<sup>88</sup> For instance, it could be the case that the court proceedings concern a payment of money that depends on the validity of an agreement between the parties. If the validity of the agreement was referred to arbitration on the grounds of an

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<sup>83</sup> *Ibid*, art 37, 819 *ter*.

<sup>84</sup> *Ibid*, art 819 *ter*, para 1.

<sup>85</sup> *Ibid*, art 819 *ter*, para 4.

<sup>86</sup> *Ibid*, art 819 *ter*, para 3.

<sup>87</sup> *Ibid*, art 819 *ter*, para 3; B Capponi, “Rapporti tra arbitri e autorità giudiziaria second oil nuovo art. 819 *ter* c.p.l.c.”, *Judicium Il processo civile in Italia e in Europa Civil Procedure in Italy and Europe*, 2007 [[http://judicium.it/news/ins\\_11\\_12\\_07/capponi%20nuovi%20saggi,%20819.ter.html](http://judicium.it/news/ins_11_12_07/capponi%20nuovi%20saggi,%20819.ter.html)] (accessed 21 December 2011).

<sup>88</sup> G F Ricci, “Esclusione della sospensione per pregiudizialità ex art. 295 c.p.c.”, *Arbitrato – commentario diretto da Federico Carpi* (2nd Edition, 2008), p513; Bove, Cecchella, *Il nuovo processo civile* (Milano, 2006), p 87.

arbitration clause within the agreement and answered by the arbitral tribunal, the court could be asked by the parties to take note of this ruling.

*Award rendered after the termination of the court proceedings*

- 8.1.5 An arbitral decision on a preliminary question of an arbitration clause has the effect of a final judgment, while a court decision on the same matter has the effect of an interlocutory judgment. Consequently, a party interested in challenging the court's judgment could start new proceedings on the grounds of the award.<sup>89</sup> Making reference to the above example, if the courts have ordered payment in favour of one party, assuming – *incidenter tantum* – that the agreement was valid, but afterwards the validity of the agreement was denied by an arbitral tribunal, the party that had been ordered to pay would be entitled to start other court proceedings in order to recoup the monies already paid.

**8.2 Interim protective measures**

- 8.2.1 National courts have exclusive jurisdiction to grant interim protective measures and seizure orders, whereas arbitrators do not.<sup>90</sup> However, applications to the national courts for interim measures do not suspend the arbitral proceedings.

**8.3 Obtaining evidence and other court assistance**

- 8.3.1 Although the CPC recognises the autonomy of the arbitral tribunal, in some cases the President of the court of the district where the arbitration has its seat has powers to provide assistance to arbitrators.

*Assistance in hearing witnesses*

- 8.3.2 When a witness refuses to appear upon the arbitrators' request, the President of the court of the district where the arbitration takes place can oblige him to appear before them.<sup>91</sup> If the arbitrators request assistance from the President, the term within which the arbitrators have to render the award is stayed until the date when the arbitrators hear the witness's testimony.<sup>92</sup>

*Other powers of the courts*

- 8.3.3 The President of the court has the power to settle conflicts which may arise during the arbitral proceedings, including the settlement of the number of arbitrators or the appointment, removal and replacement of arbitrators (see section 4 above).

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<sup>89</sup> G F Ricci, "Esclusione della sospensione per pregiudizialità ex art. 295 c.p.c.", *Arbitrato – commentario diretto da Federico Carpi* (2nd Edition, 2008), p 513.

<sup>90</sup> CPC, art 818.

<sup>91</sup> *Ibid*, art 816 *ter*.

<sup>92</sup> *Ibid*.



- 8.3.4 The arbitrators are also entitled to apply to the President of the court in the district in which the arbitration has its seat in the event that the parties fail to pay their fees in order to ask the President for a fee assessment. The court order, although open to challenge by the parties, is immediately enforceable.
- 8.3.5 The role of the court is also important whenever a query arises during the arbitral procedure that cannot be settled by arbitration under Italian law (see section 3.3).

## 9. Challenging and appealing an award through the courts

### 9.1 Jurisdiction of the courts

- 9.1.1 The parties have 90 days from being notified of the award to file an appeal with the Court of Appeal where the arbitration has its seat. Should no notification occur, the term to challenge is extended to one year from the last signature on the award.<sup>93</sup>

### 9.2 Appeal

- 9.2.1 The CPC sets out the following grounds on which arbitral awards governed by Italian law can be challenged and declared null and void by the court:
- lack of a valid arbitration agreement;
  - the arbitrators were not correctly appointed;
  - the award was rendered by an arbitrator who did not have capacity to act as arbitrator;
  - the award was beyond the jurisdiction of the arbitral tribunal or the tribunal did not render a decision on one or more issues or the award is contradictory;
  - non-compliance with formal requirements;
  - non-compliance with the time limits;
  - non-compliance with the statutory rules as determined by the parties;
  - the award is in conflict with a precedent final award or judgment between the parties, provided that the arbitrators were informed of the precedent in the course of the arbitral proceedings;
  - the award breached fair process rules;
  - the award was not determined on the merits of the dispute; and
  - non-compliance with law (unless the arbitrators were authorised by the parties to decide to the dispute *ex aequo et bono*).<sup>94</sup>

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<sup>93</sup> *Ibid*, art 828.

<sup>94</sup> *Ibid*, art 829.

- 9.2.2 In addition to the grounds set out above, the parties may agree on other situations in which the award can be challenged.
- 9.2.3 Challenge of the award for non-compliance with the law is always permitted, even when not provided for by law or agreed as a separate ground by the parties, in the following cases:<sup>95</sup>
- non-compliance with Italian public policy;
  - disputes regarding employment issues; and
  - disputes on issues which cannot be settled by arbitration (see section 3.3 above).
- 9.2.4 A petition to set the award aside does not automatically suspend the enforcement of the award. That said, upon the request of the parties, the Court of Appeal may suspend the enforceability of the award.<sup>96</sup>

### 9.3 Challenge

- 9.3.1 If the award is declared null and void, unless otherwise agreed by the parties, the Court of Appeal is also entitled to decide the dispute on the merits.<sup>97</sup>
- 9.3.2 The above power is granted to the Court of Appeal only if the award was declared null and void on one of the following grounds:
- formal requirements (e.g. reasons for the decision, order, seat or signature) were not respected in the award;
  - non-compliance with the time limits;
  - non-compliance with the statutory rules as determined by the parties;
  - the award is in conflict with a precedent final award or judgment between the parties;
  - the award breached fair process rules;
  - the award does not decide one or more questions raised by the parties; or
  - non-compliance with law.<sup>98</sup>
- 9.3.3 If a party has its residence or its registered office abroad, the Court of Appeal can decide the dispute on the merits only if expressly agreed by both parties.<sup>99</sup>

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<sup>95</sup> *Ibid*, art 829.

<sup>96</sup> *Ibid*, art 830.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid*, art 830.

9.3.4 Should the award be declared null and void, but the Court of Appeal is not entitled to rule on the merits on the grounds of the above, the dispute must be re-submitted to arbitration for a ruling on the merits, provided that the invalidity of the arbitration agreement is not the reason for the award being declared void.<sup>100</sup>

#### 9.4 Revocation

9.4.1 The award may be revoked within 30 days of a party becoming aware of one of the following events:<sup>101</sup>

- the award is the result of a fraud committed by a party;
- the award has been rendered on the basis of false evidence;
- subsequently, one or more relevant documents have been discovered, which were not disclosed due to the behaviour of one of the parties or due to force majeure; or
- the award is the result of a fraud committed by one of the arbitrators.

#### 9.5 Third party opposition

9.5.1 A third party can challenge the award within 30 days from the date upon which he became aware of the award if:<sup>102</sup>

- (i) it affects that third-party's rights; or
- (ii) it is the result of a fraud against that third-party, in order to prevent it from recovering its credit or from claiming for a purchased right.

## 10. Recognition and enforcement of awards

### 10.1 Domestic awards

10.1.1 The enforcement of domestic awards is subject to an application to the competent national court where the arbitration has its seat. Upon assessment of the formal requirements of the award, the court shall issue an execution order (*exequatur*).<sup>103</sup>

10.1.2 The parties can file a complaint with the court if it denies enforcement of the domestic award. The court must decide on the merits of the complaint within 30 days from the date of notification of the court's decision to the parties.<sup>104</sup> The decision of the court is final and is not open to appeal.<sup>105</sup>

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<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*, art 831, paras 1 and 2.

<sup>102</sup> *Ibid.*, art 831, para 3.

<sup>103</sup> *Ibid.*, art 825.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

## 10.2 Foreign awards

- 10.2.1 The 1994 Reforms introduced a recognition and enforcement regime which applies to all foreign awards unless more favourable provisions are available in an international treaty. The relevant Italian provisions on recognition and enforcement of foreign awards comply almost entirely with the provisions of the New York Convention.<sup>106</sup>
- 10.2.2 In order to enforce a foreign award in Italy, a party must file an application with the President of the Court of Appeal where the other party has its residence, and if the other party is not resident in Italy, with the Court of Appeal of Rome.<sup>107</sup>
- 10.2.3 The party must provide the President of the Court of Appeal with an original copy of the foreign award and the arbitration agreement, together with a certified Italian translation.<sup>108</sup>
- 10.2.4 Upon assessment of the above formal requirements, the President of the Court of Appeal must declare the award enforceable in Italy, unless he establishes *ex officio* that:
- (i) the subject-matter of the dispute cannot be settled by arbitration under Italian law; or
  - (ii) the award is contrary to public policy.<sup>109</sup>
- 10.2.5 Italian courts will apply an international concept of public policy applied under the New York Convention, which is intended as a body of universal principles aimed at the protection of fundamental human rights, and is often embodied in international declarations or conventions.<sup>110</sup>
- 10.2.6 A party may challenge the decision of the Court of Appeal if that party proves that:
- one of the parties to the arbitration agreement was under some incapacity, the agreement was not valid under the law chosen by the parties or under the law of the state in which the award was rendered;
  - the applicant party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present its case;

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<sup>106</sup> See CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>107</sup> CPC, art 839, para 1.

<sup>108</sup> *Ibid*, art 839, paras 2 and 3.

<sup>109</sup> *Ibid*, art 839.

<sup>110</sup> See generally P Biavati, "Le condizioni per l'efficacia del lodo straniero", *Arbitrato – commentario diretto da Federico Carpi* (2nd Edition, 2008) p 884.

- the award deals with a dispute not provided for or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;<sup>111</sup>
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the law governing the arbitration; or
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.<sup>112</sup>

## 11. Special provisions and considerations

### 11.1 Corporate arbitration

11.1.1 In 2003 the Italian Government introduced a new procedural law to be applied to company disputes<sup>113</sup> concerning all corporate relations, including disputes arising out of or in connection with incorporation, modification, winding-up, liability actions against managing and auditing bodies of all kinds of companies and share transfers.<sup>114</sup> The Decree came into force as of 1 January 2004.

#### *Arbitration clause*

- 11.1.2 The arbitration clause must provide for the number of arbitrators and set out the procedure for their appointment.<sup>115</sup>
- 11.1.3 The power to appoint all the arbitrators must be conferred on a third party unconnected with the company, otherwise the clause is null and void. If the third party fails to fulfil its duty to appoint the arbitrators, then the President of the court of the district in which the company has its registered office has the authority to make the appointment and will proceed accordingly.<sup>116</sup>
- 11.1.4 Appointment of arbitrators by third parties is the main difference between these arbitral proceedings and those governed by the provisions of the CPC and is aimed at promoting impartiality and fairness in the choice of arbitrators.

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<sup>111</sup> Note that where decisions on matters submitted to arbitration can be separated from those not so submitted, the part of the award containing decisions on matters submitted to arbitration may be enforced.

<sup>112</sup> CPC, art 840.

<sup>113</sup> With the exception of those companies operating in the venture capital market.

<sup>114</sup> Legislative Decree 17 January no. 5/2003 on corporate, banking and finance proceedings (**Decree**).

<sup>115</sup> Decree, art 35, para 2.

<sup>116</sup> *Ibid.*

*Arbitrability*

- 11.1.5 The memorandum of association of a company may include clauses submitting disputes to arbitration which concern disposable rights relating to the by-laws of the company and which may arise:
- (i) between shareholders; or
  - (ii) between the company and its shareholders.
- 11.1.6 The object of the clause may relate to disputes concerning the existence, the qualification or the regulation of the by-laws of the company or rights deriving from them.
- 11.1.7 The mere inclusion of an arbitration clause in the company's memorandum renders such clause binding on the company and on all of its shareholders, including those who contest their status as such.<sup>117</sup>
- 11.1.8 Each and every amendment to the memorandum that introduces or deletes an arbitration clause, needs to be approved by shareholders representing at least two thirds of the company's capital. Those shareholders who do not vote or participate in the decision are entitled to withdraw from the company within 90 days following the decision.<sup>118</sup>
- 11.1.9 If specifically provided for in the memorandum, the clause may also deal with those disputes initiated by or against directors, liquidators and auditors. Such a clause will automatically be binding on such persons upon acceptance of their post.<sup>119</sup>
- 11.1.10 Disputes requiring the intervention of the Public Prosecutor may not be submitted to arbitration (e.g. disputes concerning the appointment and the removal of liquidators).<sup>120</sup>

*Arbitral proceedings*

- 11.1.11 Procedural aspects which are not expressly provided for in the Decree are governed by the provisions of the CPC. The provisions of the Decree that differ from ordinary arbitral proceedings are as follows:

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<sup>117</sup> Decree, art 34, para 3.

<sup>118</sup> *Ibid*, art 34, para 6.

<sup>119</sup> *Ibid*, art 34, para 4.

<sup>120</sup> *Ibid*, art 34, para 5.

- the arbitration application must be filed with the company’s registry and be made available to all of the company’s shareholders;<sup>121</sup>
- third parties may intervene in company arbitral proceedings;<sup>122</sup>
- *ex parte* intervention (available for the benefit of third parties who are not shareholders)<sup>123</sup> and intervention by virtue of court order (available for shareholders)<sup>124</sup> are also permitted;
- arbitrators may admit new evidence and extend the period within which they are obliged to render their final award; and
- when the dispute concerns the validity of shareholder resolutions, the arbitrators may always suspend the effects of those resolutions as a preventive measure.<sup>125</sup>

## 11.2 Consumers

11.2.1 The arbitrability of disputes concerning consumer protection claims has always been under debate in Italy.

### *Before the Consumers’ Code*<sup>126</sup>

11.2.2 Legal commentators and case law were divided into those who totally excluded the arbitrability of consumers’ claims<sup>127</sup> and those who conceded the possibility of the submitting consumer disputes to *arbitrato rituale*, deeming that recourse to *arbitrato irrituale* or free arbitration did not offer enough protection to consumers.<sup>128</sup>

### *After the introduction of the Consumers’ Code*

11.2.3 The Consumers’ Code, in relation to the submission of a consumer claim to out-of-court dispute resolution in general (e.g. arbitration or alternative dispute resolution such as mediation), expressly states that consumers should always have the right to submit their claims to the courts, regardless of the results of the out-of-court decision.<sup>129</sup>

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<sup>121</sup> *Ibid*, art 35, para 1.

<sup>122</sup> CPC, art 105.

<sup>123</sup> *Ibid*, art 106.

<sup>124</sup> *Ibid*, art 107.

<sup>125</sup> *Ibid*, art 35, para 5.

<sup>126</sup> Legislative Decree 6th September 2005, no. 206 (**Consumers’ Code**).

<sup>127</sup> See generally G De Nova, *Le clausole vessatorie* (1996), p 26; R Marengo, “Clausola compromissoria e contratti dei consumatori”, *Rivista dell’arbitrato*, 2006, p 73; Court of Ancona, 28th April 2003, *Foro italiano*, 2004, I, c. 307.

<sup>128</sup> See generally G Gabrielli, “Clausola compromissoria e contratti per adesione” *Rivista di diritto civile*, 1993, I, p 555; Court of Rome, 8th May 1998, *Foro italiano*, 1998, I, c. 1989.

<sup>129</sup> Consumers’ Code, art 140, para 6.

11.2.4 Therefore, although the Consumers' Code does not expressly rule on the relationship between consumer protection and arbitration, recourse to *arbitrato rituale* has now generally been admitted by legal commentators, but without prejudice to the right of consumers to submit their claims to the courts, regardless of the decision rendered by the arbitral tribunal.<sup>130</sup>

11.2.5 The above interpretation seems to be in conflict with the principle introduced by the 2006 Reforms, whereby arbitral awards have the same binding effect as court judgments. This conflict has not yet been resolved.

### 11.3 Employment Law

11.3.1 The 2006 Reforms introduced recourse to *arbitrato irrituale* or free arbitration in relation to employment disputes, which was previously excluded by law and in collective labour contracts.

11.3.2 The matter has been reformed recently<sup>131</sup> through general reform of the Italian employment law system, which aimed at promoting recourse to arbitration in order to lessen the burden on the labour courts.

11.3.3 The new regulation expressly introduces the following cases of *arbitrato irrituale* or free arbitration in relation to labour disputes:

- before making an application to the labour court, pending or following a genuine attempt of conciliation as required by law, the parties are entitled to refer the dispute to arbitration appointing the conciliation panel already involved in the matter as the arbitral tribunal;<sup>132</sup>
- the arbitration must be conducted in compliance with the rules set forth by the collective labour contracts put forward by the major trade unions;<sup>133</sup> and
- without prejudice of the right to recourse to the labour courts or to the conciliation panel, the parties are entitled to refer the dispute to a panel of three arbitrators, the first two appointed by the parties and the third one chosen by legal university professors or by lawyers who are qualified to appear before the High Courts.<sup>134</sup>

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<sup>130</sup> See generally E Zucconi Galli Fonseca, "La convenzione arbitrale e i consumatori", *Arbitrato – commentario diretto da Federico Carpi* (2nd Edition, 2008), p 96.

<sup>131</sup> Law no. 183 4th November 2010, art 31.

<sup>132</sup> CPC, art 412.

<sup>133</sup> *Ibid*, art 412 *ter*.

<sup>134</sup> *Ibid*, art 412 *quater*.



## 12. Conclusion

### 12.1 Main features of arbitration in Italy

12.1.1 The number of disputes resolved out-of-court and by arbitration is exponentially increasing in Italy. In the past few years, the applications have more than tripled. Indeed, such proceedings are constantly becoming widespread among Italian people, acquiring more and more consideration as an effective option to safeguard their rights.

12.1.2 In the light of the above, it is useful to summarise the main advantages and disadvantages that recourse to arbitration can imply.

### 12.2 Main advantages

#### *Neutrality and expertise of the arbitrators*

12.2.1 The parties may choose to resolve a dispute which has arisen between them through a private third party or, more frequently, a panel of private arbitrators. Generally, each party selects their own arbitrator and, jointly, both arbitrators appoint a third one to act as chair of the panel.

12.2.2 The powers of the arbitrators are granted directly by the parties. The appointed arbitrators are generally private individuals with expertise on the specific subject matter of the dispute. The advantage of this is that they may assess not only the legal aspects of the case but also the general commercial framework of the dispute.

#### *Brevity and less formality*

12.2.3 Arbitration is a flexible means of resolving a dispute and is often procedurally simpler than ordinary civil proceedings, although it can differ depending on which type of arbitral proceedings the parties choose.

12.2.4 The rules concerning Italian arbitral proceedings are formal but they are not as strict as the procedural rules which govern ordinary litigation.

12.2.5 Arbitration is often a quicker method of dispute resolution because, generally, arbitral proceedings terminate at first instance. Proceedings can last longer in the event that the parties breach or refuse to enforce the binding award. In this case, a party must file an application to a competent court which, after assessing the formal requirements of the award, can issue an execution order (i.e. *exequatur*).

*Confidentiality*

- 12.2.6 Arbitration assures parties a high level of confidentiality. While the decisions of the ordinary court are generally accessible to third parties, the same does not apply to arbitral awards, unless the parties agree otherwise.

*Possibility of ruling out the jurisdiction of the adverse party*

- 12.2.7 In international agreements, the parties may expressly exclude certain jurisdictions by providing for this in the arbitration clause. Such a solution has practical advantages, such as avoiding the application of different local procedural rules which could prove time-consuming for multi-national companies.

**12.3 Disadvantages**

*Costs of the proceedings*

- 12.3.1 The main disadvantage of arbitration is the high costs involved, compared to the costs incurred in ordinary civil proceedings. This disadvantage is compensated in other areas, such as the lesser degree of formality, the confidentiality and the brevity mentioned above.

*Interim protective measures*

- 12.3.2 Arbitrators do not have powers to grant seizure orders nor grant other urgent preventive measures. In order to obtain such measures, the parties need to file the relevant application with the competent courts.

*Challenge of the award before the court*

- 12.3.3 As can be inferred from section 9.2 above, statutory rules on challenging arbitral awards are particularly restrictive and only permit a challenge when there has been a procedural error.

## 13. Contacts

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