The recent amendments to Italian Arbitration legislation: an opportunity to increase Italy's appeal in the international arbitration market

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On 25 November 2021 the Italian Chamber of Deputies approved the Enabling Act for the reform of the civil procedural law, presented as part of the Italian National Recovery and Resilience Plan (Piano Nazionale di Ripresa e Resilienza, NRRP)[3]. The guiding principles and criteria contained in the Enabling Act shall be implemented by the Italian government, in the form of Legislative Decrees, within one year from the entry into force of the Act.
Notably, within the Enabling Act, the Parliament enabled the Government to amend some provisions of the Italian Arbitration legislation, and provided its

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[3] The NRRP is the plan presented by Italian government, envisaging several investments and a consistent reform package, to the European Union as one of the conditions for having access to the funds of the "Next Generation EU" programme, namely the € 750 billion package that the European Union negotiated in response to the pandemic crisis

guiding principles on which the amendments shall be based. Even though the Enabling Act is not a trigger for a comprehensive reform of the Italian Arbitration Law, still its provisions are expected to result in substantive improvements of the legislation.
Here follows a short summary of the main amendments to the arbitration legislation that the Government is enabled to adopt, provided under Article 1 Par. 15 of the Enabling Act

(a) Increase the guarantee of impartiality and independence of the arbitrators

Within the Italian legal framework, arbitration is primarily regulated by provisions of the Italian Code of Civil Procedure ("CPC"), namely Artt. 806-840. Within the text of those articles, there is no express reference to the word impartiality ("imparzialità") and only once the text alludes to the arbitrator's duty not to have its independence ("indipendenza") compromised. Indeed, within the text of the law, the topic is addressed under Art. 815 of the CPC, which enumerates the reasons for which an arbitrator may be challenged. Those being, inter alia, (i) if the arbitrator does not have the qualifications expressly agreed by the parties; (ii) if the arbitrator or an entity, association or company of which the arbitrator is a director, has an interest in the case; (iii) if the arbitrator or their spouse is a relative up to the fourth degree or a cohabitant or a habitual table-companion of a party, one of its legal representatives or counsel; (iv) if the arbitrator or their spouse has a pending suit against or a serious enmity to one of the parties, one of its legal representatives or counsel; (v) if the arbitrator is linked to one of the parties, to a company controlled by that party, to its controlling entity or to a company subject to common control by a subordinate labour relationship or by a continuous consulting relationship or by a relationship for the performance of remunerated activity or by other relationships of a patrimonial or associative nature which might affect their independence; (vi) if the arbitrator is a guardian or a curator of one of the parties; or (vii) if the arbitrator has given advice, assistance or acted as legal counsel to one of the parties in a prior phase of the same case or has testified as a witness.
That does not mean, however, that arbitrator in Italy would be exempted from complying with their duties of impartiality and independence, as those are in any case often provided by the arbitration rules to which the arbitrator would also be subject, in case of administered arbitrations. For instance, the Camera Arbitrale di Milano ("CAM") Arbitration Rules provide in their Art. 20 an obligation upon the arbitrators to disclose the events that may affect their impartiality of independence. Likewise, Art. 11 of the International Chamber of Commerce ("ICC") Arbitration Rules establishes that "[e]very arbitrator must be and remain impartial and independent of the parties involved in the arbitration".
To further clarify the issue, the amendment in question now proposes to strengthen the guarantees of impartiality and independence of the arbitrator by reintroducing not only the right of objection for reasons of convenience, but also the obligation of the arbitrators to issue, at the time of acceptance of the appointment, a declaration containing all the factual circumstances relevant to the above guarantees. In addition, the new addition also provides for the invalidity of an arbitrator's acceptance in the event of omission of the declaration and, in particular, forfeiture if, at the time of accepting the appointment, the arbitrator has failed to declare the circumstances that, pursuant to Art. 815 of the CPC, can be invoked as grounds for objection.

(b) Rule on the enforceability of the decree of recognition of foreign arbitral awards in the Italian territory

The Italian procedure for the recognition and enforcement of foreign arbitral awards reflects the 1958 New York Convention. Under Art. 839 of the CPC, a foreign award is recognized by way of a decree by the Court of Appeal, to be issued having confirmed the "formal regularity" of the award unless (i) the subject matter is not capable of determination by arbitration under Italian law; or (ii) the award contains provisions contrary to Italian public policy. The

decree shall be served by the requesting party to the counterparty, which has the right to file opposition within 30 days from the date of the service. The filing of the opposition determines the rise of ordinary judicial proceedings before the Court of Appeal, only aimed at assessing the existence of any of the grounds for refusal of the recognition and enforcement of the award provided under Article 5 of the New York Convention, and replicated by Art. 840 CPC.
The enforceability of the decree issued under Art. 839 CPC is debated by scholars and case-law. Someone argues that the decree is immediately enforceable since the date of its issuance, some others maintain that the enforceability should come only after the expiry of the date for filing opposition, or only if and when the opposition is rejected. In practice, this means that a party wishing to enforce a foreign arbitral award in Italy may be able to proceed with the enforcement in few weeks or after years of proceedings, only depending on the trend followed by the Court of Appeal where the case is pending.
Finally, after years of debate and uncertainties, the Italian legislator addressed the matter in the Enabling Act. Expectedly, the Government will amend the current provisions of the CPC and expressly provide the immediate enforceability of the decree under Art. 839 CPC since the date of its issuance. This would be a great incentive to recognize and enforce foreign arbitral awards in Italy, as the requesting party would be put in the position to enforce its award in Italy in a relatively short period of time and even pending the term for the opposition against the decree under Art. 839 CPC.

c)Allow arbitrators to issue interim relief when expressly allowed by the parties

One of the particularities of arbitration in Italy has always been that, in accordance with Art. 818 of the CPC, arbitrators seating in Italy are prohibited to issue provisional or interim measures unless otherwise provided by law (which was the case, for instance, with corporate arbitrations where arbitrators do have the power to stay the effects of a corporate resolution disputed in the arbitration). While it is possible for those same arbitrators to grant interim protection by means of procedural orders, that did not reveal in to be enough to surmount the problem. That is because the lack of enforceability of said orders often meant that, were a party not to comply with the arbitral tribunal's instructions voluntarily, the other party would still be constricted to bringing the issue before the Italian Courts.
With the proposed change, arbitrators shall have the power to issue interim measures, although only in the event of the parties' express intention to do so. According to the amendment, said intention has to be manifested in the arbitration agreement or in a subsequent written instrument. In such cases, the Italian courts should retain power only in cases where the request was made prior to the acceptance of the arbitrators. The change, of course, will require the need to revise the system in order to include also those interim measures in the hall of decisions subject Art. 829 of the CPC, which deals with grounds of nullity, as well as implementing measures allowing for the possibility to guarantee the enforceability of such decisions under the auspices of the Italian Courts. Still, the change is welcome as it would place Italy closer to the common international practice and to the most arbitration-friendly legislations.

d)Introduce an express reference to the parties' possibility to choose the applicable law to the dispute

Art. 816 bis CPC provides, inter alia, that the parties may establish in the arbitration agreement, or in a separate document, the rules that the arbitrators must apply in the proceedings. However, so far, there is no reference in the Italian arbitration legislation to the possibility for the parties to decide the law applicable to the merits of their dispute, as it is provided in all the sets of arbitration rules established by the major arbitral institutions.
The change proposed expressly provides that, in case a decision shall be reached by means of rules of law (as opposed to arbitration decided on the basis of

equity), the parties shall have the power to indicate and choose the applicable law to the dispute.

e)Reduce to six months the term for challenging arbitral awards in arbitrations seated in Italy.

Under Art. 828 CPC, the challenge against an arbitral award in Italy shall be filed before the Court of Appeal where the arbitration has its seat within 90 days from the service the award. If no service has been made, challenge shall be filed within one year from the date of the last signature of the award. It is worth to clarify that, under Italian law, there are limited grounds for setting aside an award, including for instance the invalidity of the arbitration agreement, the violation of due process in the arbitration, or the contradiction between the award and another award or judgement having res judicata effect. According to recent statistics soon to be published, the success rate of a challenge of arbitral award before the Italian Courts of Appeal is less than 10%.
The Parliament requests the Government to reduce the one year-term to six months, in line with the term for filing appeals against domestic judgements. On top of its practical implications, this amendment would have also a symbolic purpose, as it would represent a clear statement in favour of the stability of the arbitral awards in the Italian legal system.

g)Regulate the continuation of proceedings (so-called "translatio iudicii") between arbitrations and court proceedings

Under Italian CPC, if a case is brought before a judge who declares his lack of competence, each of the parties has the right to bring again the case before the competent court within a specific term, determining the continuation of the proceedings and preserving the substantial and procedural effects of the action.
Under the Italian CPC, Art. 819-ter, the continuation of proceedings was not allowed in cases involving courts and arbitral tribunals. This provision was addressed by a decision from the Italian Constitutional Court (Decision No.223 dated 19 July 2013), which declared it in contrast with the principles of the Italian Constitution.
After the ruling by the Constitutional Court, the issue was never addressed by the Italian legislator. With the Enabling Act, the Government is now expressly required to lay down specific rules governing the continuation of the proceedings between court proceedings and arbitrations.
The continuation of proceedings has a practical relevance, as it preserves the rights of the party in cases when it would otherwise be time barred if it had to start the proceedings again. The introduction of a specific set of rules concerning court proceedings and arbitrations will represent a positive improvement in the Italian Arbitration law welcome by the practitioners.

In addition to the above, the Enabling Act requires the Government to introduce some further amendments to the Arbitration law and to reorganize the arbitration-related provisions. The amendments include the transfer within the CPC of the provisions on arbitration in corporate matters, currently within the Legislative Decree No. 5/2003 (letter f), and the introduction of a specific provision stating that the appointments of arbitrators by national courts shall be guided by the principles of transparency, rotation and efficiency (letter h).

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