Proposed Reform of Italy's Arbitration Act: One Step Forward, Two Steps Back?

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The long-yearned for reform of the Arbitration Act has finally gotten off the starting block. An ad hoc commission has submitted its reform proposal (Proposal), to the scrutiny of the Ministry of Justice (for the full text of the Proposal see here; see also Guido Alpa et al., *Un progetto di riforma delle ADR*, Jovene, 2017). When and if it passes the scrutiny, the Proposal will be submitted to parliament for approval. It will no doubt be a long time coming — and the process might suffer some delays given the impending elections — but it is not too early to start questioning whether the Proposal heads in the right direction. This article focuses on two key aspects of the Proposal that raise such question:

> Arbitral tribunals being able to issue interim measures

> Challenges of awards being able to go directly before the Italian Supreme Court.

In some respects, the Proposal heads in the right direction, especially by addressing the much debated issue of interim measures, but its timidity is self-evident and, if approved, the reform could end up being a missed opportunity.

For Italy to be a more attractive venue, it would be wiser to bring the Arbitration Act even more into line with international standards, for example, by aligning it to a greater extent to the UNCITRAL Model Law on International Commercial Arbitration.

For more details, read the rest of the article below!

Power to grant interim measures

The Italian Arbitration Act is notorious for being particularly conservative when it comes to interim measures. Parties have to look to the courts if they want interim measures, as arbitral tribunals "may not grant attachments or other interim measures, unless the law provides otherwise" (Art. 818 of the Civil Procedure Code, "CPC"). Currently, the only narrow exception to this prohibition is the power of arbitrators to suspend the effectiveness of shareholders' resolutions in corporate arbitrations.

The commission's attempt to improve things falls short by some way. It empowers arbitral tribunals to issue interim measures only – and by way of exception – when the applicable "arbitration rules" (*regolamento arbitrale*) so allow. This would be the case, for example, with ICC arbitrations (Art. 28 of the ICC rules allows so).

The Proposal aims to encourage administered arbitrations by discouraging ad hoc ones. However, the Proposal would not necessarily succeed in this aim. Indeed, an uncertainty exists as to what is exactly meant by "arbitration rules" as no definition is provided. This term could encompass rules of minor, inactive or extinct institutions or even rules that the parties decide to classify as such. Furthermore, the adoption of "arbitration rules" does not automatically imply that the arbitration is administered by an arbitral institution, as the parties are free to adopt arbitration institutional rules without involving the arbitral institution. This would be the case of the UNCITRAL Rules of Arbitration which can be used both in an ad hoc arbitration as well as in administered arbitration.

Moreover, the concise formulation of the Proposal leaves space for doubts about the regime of interim measures. First, based on the wording of the Proposal, it is unclear whether a party has the possibility to choose between requesting the interim measure to the arbitral tribunal or to the competent judge. Second, the Proposal fails to specify whether a form of assistance by state court is envisaged, for example in case of non-compliance by the party with the interim measure. Third, the Proposal is silent about the possibility to request again an interim measure that was once denied. The new regime could be drafted more in detail and provide for this possibility, should circumstances change or should new factual or legal grounds be deduced – as provided for interim measures issued by state courts (Art. 669-septies CPC).

In addition, the Proposal expressly states that interim measures cannot be challenged. Therefore, different rules would apply to interim measures granted by the state courts (which may be challenged under the provisions of Article 669-terdecies CPC) and to those granted by arbitral tribunals (which cannot be challenged).

In a nutshell, the Proposal seems to partially miss an opportunity to bring Italy into line with international standards. Indeed, arbitral tribunals in almost all other countries may freely grant interim measures – in both ad hoc and administered arbitrations.

Challenging awards

Challenges of awards must first go before the Court of Appeal. Subsequently, assuming there are grounds to do so, the Court of Appeal's decision can be also challenged before the Supreme Court.

The commission has attempted to shorten and simplify the process by introducing a shortcut: in particular circumstances challenges for the annulment of awards could be brought directly before the Supreme Court. The Parties might agree in writing (either before or after the award has been rendered) on the possibility to directly challenge for the annulment of the award before the Supreme Court.[fn]This possibility is offered only if the parties did not agree, at the time of the arbitration agreement, on the possibility to challenge the award based on the violation of provisions of law concerning the merits (a possibility that has to be expressly agreed by the parties).[/fn]

In principle, the commission's intention is commendable, as awards would become final and binding more quickly. On the other hand, the usefulness of the Proposal is questionable: it is hard to imagine that the Parties would be willing to renounce to an additional step for challenge, especially if the dispute has already arisen. Moreover, the amendment would result in an increase in the Supreme Court's already heavy caseload – and thus run counter to efforts made in the last decades by the Italian legislatures to reduce its caseload.

An additional concern regards the interplay between the new shortcut and the related provisions under the CPC. Indeed, where 'gaps' in the Proposal exist, the provisions on challenges before the Supreme Court – when compatible – are to be referred to. Besides the many holes that remain with this 'gap-filling', defining the regime applicable to the direct challenges could prove to be rather

problematic. This is because, for example, during the proceedings for the challenge of the award, even if courts do not analyse the merits of the case, they nonetheless may have to carry out activities such as the collection of evidence, the finding of facts and/or the evaluation of factual evidence (e.g. to prove that a party was not given a proper notice of the arbitral proceedings or was unable to present its case). However, in Italy, the Supreme Court is prevented from carrying these out whereas the Court of Appeal can engage in similar activities. And albeit true that the practical concerns might find resolution in case law, it is unfortunate that the commission failed to make the wording clearer and 'gap-less' so as to prevent such issues.

For the reasons above, it seems that the proposed amendment may not be an appropriate way to improve the current rules for setting aside awards and that the parties could be potentially less prone to agree on the direct challenge than expected.

Finally, in Italy the grounds for challenging the awards are considerably more than in the other countries: no fewer than 12 grounds are listed under Art. 829 of the CPC. Despite the number, the grounds are in fact, taken as a whole, very similar, if not almost identical, to the ones provided by Art. 34 of the UNCITRAL Model Law. Nonetheless, it would be better to streamline the current grounds in order to bring them into line with the UNCITRAL Model Law, thus increasing the appearance of Italy as an "arbitration friendly" legislation. It is a fact that Italian judges have proved to be favourable to arbitration as rarely any challenge of the award is successful,[fn]According to a recent survey, following proceedings for the setting aside of arbitral awards before the Italian Courts of Appeal of Brescia, Genoa, Turin and Milan, only four out of 99 awards were set aside. This survey took into consideration 27 per cent of the overall number of decisions on challenge of awards – both national and international – issued from 1 January 2007 to 30 June 2014.[/fn] thus Italy is currently a substantially "arbitration-friendly" seat as far as the challenge of awards is concerned.

Conclusion

Though the commission's Proposal is a partially missed opportunity, it is a valuable first approach to the much needed reform of Italy's Arbitration Act. It puts in light the areas where reform is compelling and it will serve as a starting point to reach the final version of the reform. However, many improvements are necessary, including above all bringing the national regime closer to the UNCITRAL Model Law.