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Is Italy on the Right Track to Become a Truly Attractive Seat for International Arbitrations?

C. Ferdinando Emanuele, Chiara Capalti, Anna Chiara Amato (Cleary Gottlieb) · Friday, January 21st, 2022

As part of the complex set of reforms that Italy presented to the EU institutions to access the Next Generation EU program, the Italian Parliament recently approved Law No. 206/2021 ("Law 206"). Among other things, Law 206: (i) establishes "*principles and directions*" aimed at enhancing the "*efficiency of civil proceedings and amending the rules concerning*" arbitration and other methods for the alternative resolution of disputes in Italy; and (ii) delegates the Italian Government to implement these "*principles and directions*" in ensuing decrees. Law 206 was published in the Italian official bulletin on December 9, 2021 and entered into force on December 24, 2021.

The "*principles and directions*" set forth in Law 206 impact on the Italian arbitration statute in various respects, the most noteworthy of which are: (A) the requirements of impartiality and independence of the arbitrators; (B) the recognition and enforcement of foreign awards; (C) the power of arbitral tribunals to issue interim measures; and (D) the possibility for the parties to choose the law applicable to the dispute.

A. Impartiality and Independence of Arbitrators

Article 1(15)(a) of Law 206 introduces the duty for arbitrators to issue at the time of appointment a statement disclosing all "*relevant factual circumstances*" that may affect their "*impartiality and independence*." If arbitrators do not do so, their appointment will be invalid. Moreover, if the arbitrator fails to disclose circumstances that are grounds for disqualification under Article 815 the Italian Code of Civil Procedure ("ICCP"), the arbitrator will be removed from office.

This change aligns Italy to the standards expected from a modern and efficient international arbitration seat. The early disclosure of circumstances that may affect a potential arbitrator's impartiality or independence is indeed a well-established practice in international arbitration as well as a requirement in virtually all institutional arbitration rules and in the national arbitration statutes of arbitration-friendly jurisdictions (e.g. Article 1456(2) of the French Code of Civil Procedure; Article 12(1) of the UNCITRAL Model Law).

Regarding the content of disclosure, Law 206 does not provide any particular details. The ensuing governmental decrees (or, if they are silent on this point, the courts and arbitral tribunals dealing with this issue) will, therefore, set out what an arbitrator must disclose in practice. While no

predictions can be made, it is reasonable to expect that the Government will look at the well-established international practice and, therefore, consider that the early duty of disclosure should not be limited to the circumstances that would lead to the arbitrator's disqualification under the Italian *lex arbitri*, but should instead also include further circumstances (*e.g.*, those listed in the red and orange lists of the IBA Guidelines on Conflicts of Interest).

B. The Recognition and Enforcement of Foreign Awards in Italy

Pursuant to the current Article 839 of the ICCP, the President of the competent Court of Appeals, if requested to recognize a foreign award in Italy, must in *ex parte* proceedings:

(i) assess whether the dispute that is the subject matter of the relevant award is arbitrable under Italian law and whether the award contains findings that are contrary to public policy; and

(ii) based on the foregoing assessment, issue a decree recognizing or refusing to recognize the "*effectiveness*" of the award in Italy. The Presidential decree can then be opposed in fully-fledged adversarial proceedings ("Opposition Proceedings").

Italian courts and scholars have long debated the practical effects of a Presidential decree recognizing the "*effectiveness*" of a foreign award in Italy ("Recognition Decree"). In particular, they have debated as to whether:

- the award becomes enforceable only if the Recognition Decree is confirmed in the Opposition Proceedings (as many scholars and major Italian courts have indicated).[1)]
- the Recognition Decree renders the award immediately enforceable and, therefore, usable as a basis for attaching the assets of the award debtor (as others believe).[2)]

Article 1(15)(b) of Law 206 puts an end to the debate, requiring the Government to "explicitly" provide in its implementing decrees that the Recognition Decree is enforceable. Although aimed at providing clarity, this change appears to be inconsistent with the practice of many major Italian courts (such as the Milan Court of Appeals).

C. Interim Measures

The most noteworthy change introduced by Law 206 is contained in Article 1(15)(c) (see also detailed discussion here), requiring the Government to provide in its implementing decrees that, if the parties have so agreed in the arbitration agreement, arbitrators can issue interim measures (a power that Article 818 of the ICCP presently excludes).

This is a long overdue reform, which has the potential to finally bring Italy up to the level of the most arbitration-friendly jurisdictions in the world. The impossibility to obtain interim measures from arbitrators has often been indicated as one of the main factors preventing Italy from becoming a truly attractive seat for international arbitrations.

D. The Parties' Choice of the Applicable Law

Article 1(15)(d) of Law 206 requires the Government to provide in its implementing decrees the "*power*" for the parties to Italy-seated arbitrations "*to choose the law applicable to their dispute*."

At first reading this provision may seem of little consequence as it is undeniable that parties to an Italy-based arbitration already enjoy the possibility to choose the law applicable to their dispute. However, the foregoing provision may open the door to the possibility for the parties to an Italy-based arbitration to choose a set of rules other than national laws (*e.g.*, the a-national *lex mercatoria*) to resolve their dispute. This may be the case if the Government in its implementing decrees (or the courts and arbitrators afterwards) interpret the expression "*law applicable*" broadly, thereby empowering the parties to choose any "rules" they wish to apply to their dispute. This was indeed the case under former Article 834 of the ICCP, which was repealed through the 2006 Italian arbitration reform.

Conclusion

The principles set out in Law 206 for reforming the Italian arbitration statute certainly have the potential to improve the attractiveness of Italy as a seat of international arbitrations. In particular, the provision vesting arbitrators with the power to issue interim measures seems to have finally taken Italy out of the back burner on which the jurisdictions hostile to arbitration are usually relegated. For a full assessment of the actual reach of the reform, however, it is necessary to wait for the governmental decrees. Only those decrees will tell if Italy is finally on the right track to become a truly attractive seat for international arbitration.

References

?1 *See e.g.*, Court of Appeals of Milan (Italy), October 7, 2019; M. Rubino-Sammartano, *Il Diritto dell'Arbitrato* (CEDAM 2010).

?2 *See e.g.*, Court of Appeals of Catanzaro (Italy), March 25, 1996; La China, *L'arbitrato. Il sistema e l'esperienza* (Giuffrè 2004).

This entry was posted on Friday, January 21st, 2022 at 8:00 am and is filed under Enforcement, Independence and Impartiality, Interim measures, Italian law, Italy
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