

The Italian Parliament extends emergency measures to arbitration

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On 24 April 2020, with Law No. 27 (the “Conversion Law”) the Italian Parliament converted into law the Law Decree No. 18 of 17 March 2020 (“Cura Italia Decree”) adopted by the Italian Government in the aftermath of the COVID-19 outbreak.

The Conversion Law, among other things, extended the emergency measures introduced for judicial proceedings with the Cura Italia Decree to arbitrations governed by the Italian Code of Civil Procedure, “to the extent compatible”.

These emergency measures notably include the suspension of all procedural deadlines until 11 May 2020 and affect the conduct of arbitration hearings until 30 June 2020, including with respect to the possibility to hold virtual hearings.

The choice to retroactively extend the emergency measures to arbitration “to the extent compatible” at this late point in time raises several questions, particularly with respect to (i) the practical implications of such extension, (ii) its interplay with the principle of party autonomy and (iii) the impact that such extension may have on the enforceability and the validity of awards issued in Italy under the new legal framework.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

MILAN

Carlo Santoro

+39 02 7260 8280

csantoro@cgsh.com

Francesca Gesualdi

+39 02 7260 8276

fgesualdi@cgsh.com

Larisa Babiy

+39 02 7260 8660

lbabiy@cgsh.com

ROME

Roberto Argeri

+39 06 6952 2614

rargeri@cgsh.com



Introduction

With the Conversion Law, the Italian Parliament retroactively extended to arbitration, “to the extent compatible” (“*in quanto compatibile*”), the emergency measures introduced for judicial proceedings with the Cura Italia Decree since March 2020 (Art. 83, paragraph 21 of the Conversion Law).¹

The Conversion Law fills the gap concerning the applicability of such emergency measures to arbitration proceedings seated in Italy, which had generated uncertainties, particularly in the context of *ad hoc* arbitrations. The silence as to the applicability of the emergency measures to arbitration was particularly problematic in light of the 240-day deadline for issuing the award set forth in Article 820 of the Italian Code of Civil Procedure.²

Nonetheless, the impact of the Conversion Law on pending arbitrations raises new questions and concerns. Set forth below is a brief assessment thereof, particularly with respect to: (i) the suspension of procedural deadlines; (ii) the postponement of hearings and the recourse to virtual hearings; (iii) the impact that the Conversion Law may have on the enforceability and validity of awards issued under the

¹ The wording of this provision as a result of the Conversion Law may leave room for a narrow interpretation, pursuant to which the emergency measures set forth in the Cura Italia Decree would only be extended to “judicial proceedings relating to [...] arbitration”, *i.e.*, to those cases in which Italian courts act in support of arbitrations (*e.g.*, to appoint an arbitrator absent agreement by the parties), rather than to arbitral proceedings *tout-court*. This reading is problematic, considering that such judicial proceedings were presumably already covered by the general provisions of the Cura Italia Decree applying to all judicial proceedings before civil courts.

² Under Article 820 of the Italian Code of Civil Procedure, unless otherwise agreed by the parties, the award shall be issued within 240 days from the arbitrators’ acceptance of their appointment. The deadline may be extended under certain circumstances set forth in the same provision. Failure to comply with this deadline constitutes a ground for setting aside the award under Article 829, paragraph 1, No. 6, of the Italian Code of Civil Procedure. However, these provisions are rarely of relevance in practice, as deadlines for issuing the award are routinely

new emergency legal framework; and (iv) the applicability of other provisions of the Cura Italia Decree to arbitration “to the extent compatible”.

Suspension of procedural deadlines

Article 83, paragraph 2, of the Cura Italia Decree suspended all procedural deadlines, with very limited exceptions, for proceedings pending before Italian courts from 9 March 2020 until 15 April 2020.³ As a result of an amendment introduced by Law Decree No. 23 of 8 April 2020, the suspension was extended until 11 May 2020.

With the Conversion Law, the suspension until 11 May 2020 is now retroactively extended to arbitral proceedings, which until the present day have continued unaltered, with limited exceptions.

Indeed, in response to the COVID-19 emergency, the general trend among arbitral institutions has been to ensure continuity of pending cases from their inception to the issuance of the award, including by promoting case management techniques and the virtual conduct of arbitral proceedings.⁴ In this context, the Milan Chamber of Arbitration (Italy’s main arbitral institution) adopted a prudential approach, consistent

extended by the parties, and the possibility to obtain an annulment of the award for failure to respect such deadlines is limited, including because pursuant to Article 821 of the Italian Code of Civil Procedure, a party may only invoke this ground for annulment if it expressly notified to the other party and the tribunal its intention to do so prior to the tribunal’s deliberations.

³ The Cura Italia Decree extended to 15 April 2020 the suspension of procedural deadlines from 9 March to 22 March 2020 previously introduced by the Law Decree No. 11 of 8 March 2020.

⁴ *See, e.g.*, the joint statement by major arbitral institutions respecting the conduct of international arbitration in times of COVID-19 dated 16 April 2020: <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>. *See also* ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic dated 9 April 2020: <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>.

with the measures introduced by the Cura Italia Decree and with the severe situation affecting the Milan area in particular: it suspended all procedural deadlines, including deadlines for issuing awards, until 11 May 2020, subject to an agreement to the contrary by the parties and the arbitral tribunal.⁵

The Conversion Law raises several questions as to the validity of the procedural activity carried out until its effective date (30 April 2020) and the impact that the Conversion Law may have on the procedural activity scheduled to occur between its effective date and 11 May 2020.

Reasons of procedural economy and efficient administration of justice suggest that all procedural activity carried out between 9 March 2020 and 29 April 2020 remains valid.

However, the retroactive extension to arbitration of the suspension of procedural deadlines may affect those cases in which, for example, between 9 March 2020 and 29 April 2020 one of the parties failed to meet a given deadline, or the respondent failed to appear and was declared in default of appearance. One may reasonably take the position that the Conversion Law relieved the defaulting party from the expiry of time limits occurred during the suspension period and that the arbitral tribunal is required to set new deadlines allowing the defaulting party to cure its failure once the suspension period is over.

As to the procedural activity to be carried out between 30 April 2020 and 11 May 2020, Article 83, paragraph 2, of the Cura Italia Decree suspends all deadlines *ex officio*, regardless of the existing calendar of the proceedings.

However, one may speculate whether the automatic suspension of all deadlines until 11 May 2020 has a mandatory nature which may not be derogated by the parties. While of apparent limited practical application at this stage (considering the few remaining days before 11 May 2020), the issue may continue to be

relevant in case of further extensions of the emergency measures beyond 11 May 2020.

The question is likely to be answered in the negative, including for the following reasons:

First, the Conversion Law (applicable to arbitration “to the extent compatible”) does not appear to derogate to the principle of party autonomy, which lies at the foundation of arbitration. According to such principle, the parties may derogate from non-mandatory provisions of the *lex arbitri* and structure their proceedings as best fits their needs. Establishing procedural deadlines is a typical example of the exercise of party autonomy in arbitration.

Second, considerations of procedural efficiency suggest that if the parties agree, or are in a position to agree, to proceed with the arbitration despite the difficulties raised by the COVID-19 pandemic, there is no reason why such an agreement should be invalid.

Conversely, absent an agreement by the parties, it is unlikely that an arbitral tribunal may derogate from the suspension of procedural deadlines *ex officio*.

In any event, should a pending proceeding contemplate a deadline falling before 11 May 2020, it is advisable that the parties and the arbitral tribunal liaise to address the impact of the Conversion Law on such deadline. When discussing the procedural calendar, parties and tribunals should bear in mind that the 240-day deadline for issuing the award set forth in Article 820 of the Italian Code of Civil Procedure (where applicable) is presumably suspended pursuant to the Conversion Law. However, it is advisable that the parties confer and discuss an express postponement of such deadline, taking into account that failure to comply with it constitutes a ground for setting aside the award under the Italian *lex arbitri*.⁶

⁵ See CAM communication dated 14 April 2020: <https://www.camera-arbitrale.it/it/news/arbitrato-sospensioni-dei-termini.php?id=930>.

⁶ See Article 829, paragraph 1, No. 6, of the Italian Code of Civil Procedure.

Virtual hearings and other alternatives to in-person hearings

Article 83, paragraph 1, of the Cura Italia Decree postponed *ex officio* all hearings to a date following 11 May 2020. As a result of the Conversion Law, this postponement now applies also to hearings of arbitrations seated in Italy.

The Cura Italia Decree introduced limited possibilities to derogate to the rule, and the only exception that arguably applies to arbitration is when the delay may cause “serious prejudice to the parties” (Article 83, paragraph 3, letter a).

The considerations made above with respect to procedural economy and efficient administration of justice suggest that all hearings conducted prior to the enactment of the Conversion Law should remain unaffected.

Similarly, party autonomy and procedural efficiency suggest that the parties may validly derogate from the automatic postponement of arbitration hearings and agree to hold (or maintain) a hearing scheduled to take place before 11 May 2020. One practical way to do this in compliance with the express provisions of Article 83 may be to reach an express agreement that a postponement may cause “serious prejudice to the parties”.

The Cura Italia Decree also introduced a number of restrictions for hearings to be held during or after the current suspension period.

Article 83, paragraphs 5 to 7, of the Cura Italia Decree provides that, in order to mitigate the disruption caused by the public health emergency to the judicial activity, the heads of the local judicial offices (“*capi degli uffici giudiziari*”) may implement alternative means for conducting hearings before 11 May 2020 (to the limited extent they can be held) and between 12 May 2020 and 30 June 2020,⁷ including particularly the following:

- Hearings not requiring the attendance of individuals other than the parties, their legal counsel and the tribunal’s auxiliaries may be conducted virtually, provided that the parties’ right to be heard is respected (Art. 83, paragraph 7, letter f).
- Hearings not requiring the attendance of individuals other than the parties’ counsel may be replaced by an exchange of written notes containing solely the parties’ respective requests (Art. 83, paragraph 7, letter h).⁸

Absent a role equivalent to that of the head of the local judicial office in arbitration, one may question whether Article 83, paragraphs 5 to 7, is “compatible” with, and thus applicable to, arbitration as a result of the Conversion Law. The question could be answered in the positive if one were to intend the reference to the heads of the local judicial office, in the case of arbitrations, as a reference to the arbitral tribunals themselves.

A further key question relates to the mandatory nature of the restrictions set forth in this provision, particularly insofar as they introduce an implicit prohibition to hold virtual hearings when the attendance of individuals other than the parties and their legal counsel (*i.e.*, typically, fact and expert witnesses) is required. One may speculate whether the nature of this prohibition is such that it should be deemed to apply—on a mandatory basis—to all arbitrations seated in Italy.

Construing this prohibition as mandatory would be particularly problematic, as it would *de facto* inhibit the conduct of most evidentiary hearings in arbitration, which typically involve the presence and examination of fact and expert witnesses. Should restrictions to travel and movement extend beyond 30 June 2020, continuing to prevent in-person hearings, such prohibition would result in an effective stall of arbitration proceedings seated in Italy, frustrating the

⁷ A new Law Decree is currently under discussion by the Italian Government, which may extend the 30 June 2020 deadline until 31 July 2020.

⁸ Hearings scheduled between 12 May 2020 and 30 June 2020 may otherwise be postponed further beyond 30 June 2020 (Art. 83, paragraph 7, letter g).

parties' right and expectation to have their proceeding conducted efficiently and in a reasonable time.

The Italian legislator's distrust towards virtual evidentiary hearings also appears in contrast with the current international arbitration practice, which is rapidly shifting towards virtual hearings, including in the context of complex evidentiary hearings. The major arbitral institutions also sided in favor of virtual hearings.⁹ Among others, the Milan Chamber of Arbitration invited arbitral tribunals to make "all possible efforts" to hold virtual hearings through audio or video conference.¹⁰ Several service providers offer cutting-edge solutions to ensure the effective conduct of virtual hearings and the quality of the audio and visual interaction among the participants.

Considerations of party autonomy and procedural efficiency suggest that, provided that the parties' right to be heard is respected, evidentiary hearings involving fact and expert witnesses may be held virtually, if the parties (and the arbitral tribunal) so agree, until 30 June 2020 (and even beyond that date).

Conversely, absent the agreement by the parties, the room for the arbitral tribunal to order the conduct of a hearing beyond the restrictions set by Article 83, paragraphs 5 to 7, of the Cura Italia Decree appears very narrow, if at all existent. Measures taken beyond these restrictions and not supported by the parties' agreement may negatively affect the future enforceability or the validity of the award (*see* below).

Possible effects on the enforceability and validity of arbitral awards

The COVID-19 pandemic caused many parties and arbitral tribunals to revisit their procedural calendars, including with respect to the hearing dates and to the possibility of holding virtual hearings, in an attempt to strike a difficult balance between due process and procedural efficiency. Absent an agreement by the parties, arbitral tribunals are put in a delicate spot, as their decisions may have a significant impact on the future validity and enforceability of their awards.¹¹

For example, one may consider a scenario in which the arbitral tribunal, without party agreement or over party objection, decided to schedule a hearing before 11 May 2020 or to conduct a virtual hearing beyond the restrictions set forth in Article 83, paragraphs 5 to 7.

In this scenario, an unsatisfied party may raise an objection, reserve its rights and later resist the enforcement of an unfavorable award, for example, on the ground that it was "unable to present his case" (New York Convention, Art. V.1.b) or that "the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place" (New York Convention, Art. V.1.d).

The losing party may also attempt to challenge the validity of the award, for example, on the ground that the arbitral tribunal's decision violated its right to be

⁹ See, e.g., the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic dated 9 April 2020, encouraging parties and tribunals to hold virtual hearings and addressing a number of related technical, organizational and confidentiality issues: <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>. See also the joint statement by major arbitral institutions respecting the conduct of international arbitration in times of COVID-19 dated 16 April 2020: <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>.

¹⁰ See CAM communication dated 14 April 2020: <https://www.camera-arbitrale.it/it/news/arbitrato-sospensioni-dei-termini.php?id=930>.

¹¹ For example, para. 22 of the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic expressly provides that "[i]f a tribunal determines to proceed with a virtual hearing without party agreement, or over party objection, it should carefully consider the relevant circumstances [...], assess whether the award will be enforceable at law [...], and provide reasons for that determination" (emphasis added).

heard under Article 829, paragraph 1, No. 9, of the Italian Code of Civil Procedure.¹²

Other applicable provisions

Other provisions that are now extended to arbitration as a result of the Conversion Law (insofar as they are “compatible”) arguably include the following:

1. Deliberations

Article 83, paragraph 12-*quinquies*, allows virtual (as opposed to in person) deliberations of judicial bodies in connections with civil proceedings that are not suspended pursuant to the Cura Italia Decree. This provision is now arguably extended to arbitral tribunals, which could otherwise be required to take deliberations in person if at least one arbitrator so requests, pursuant to Article 823 of the Italian Code of Civil Procedure.

2. Signature of the Power of Attorney

Pursuant to Article 83, paragraph 20-*ter*, powers of attorney can be granted and signed electronically. The parties may provide their counsel with a scanned copy of the signed Power of Attorney (as opposed to the original document), and their counsel will then validate the party’s signature by adding an electronic signature to the scanned document.

3. Electronic filings

Pursuant to Article 83, paragraph 11, memorials and documents shall be submitted exclusively through electronic means to the extent possible. While judicial proceedings are subject to specific rules for electronic submission, the preference for electronic submissions reflected in this provision now arguably applies to arbitration.

Conclusions

The choice of the Italian Parliament to extend retroactively the emergency measures set forth in the Cura Italia Decree to arbitration at this late point in time resolved a situation of uncertainty regarding

arbitration, but at the same time generated doubts as to its practical implications.

Arbitral tribunals are confronted with difficult questions regarding the conduct of their proceedings, particularly in the absence of party agreement, and may be left with limited tools to resist dilatory tactics.

In this rather unclear scenario, caution, careful strategic thinking and the parties’ good faith collaboration will be key for navigating uncertainties and ensuring a smooth conduct of the proceedings.

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¹² According to Article 829, paragraph 2, of the Italian Code of Civil Procedure, a party may be precluded

from challenging the award if it failed to promptly raise the violation of its right to be heard during the arbitration.