

GETTING THE
DEAL THROUGH 

Construction 2019

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Peckar & Abramson PC

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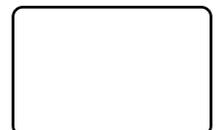


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Preface

Construction 2019

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Construction*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Chile and Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman, of Peckar & Abramson PC, for their continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
July 2018

Italy

Giuseppe Broccoli, Elisabetta Ventrella and Fabio Zanchi

BdaLaw

1 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

Key concerns for a designer or contractor depend on the specific structure selected, but, in particular, it can set up the following:

- local representative office;
- an Italian branch of the foreign entity; or
- an Italian subsidiary.

The local representative office is the cheapest and simplest structure. It does not require the establishment of a local entity and does not imply the payment of taxes in Italy. The representative office cannot carry out commercial or industrial activities but only promotional activities. Its establishment must be notified to the Registry of Enterprises (in the economic administrative index section).

The formalities for setting up a branch in Italy are rather simple, although they involve certain documents to be filed at the Registry of Enterprises. From a legal stand point, a branch is not an independent entity but it remains a part of the foreign entity. This means that the foreign company is fully liable for all debts and obligations undertaken by the branch. From a tax perspective, the branch is instead considered as an autonomous entity and, therefore, is subject in Italy to separate taxation, is required to keep separate books and to prepare annual accounts for payment of local taxation.

Finally, a local subsidiary can be set up in accordance with the Italian Civil Code, mainly in the form of a limited liability company. The two basic forms of a limited liability company are SpAs (where the capital is divided into shares) and Srls (where the capital is divided into quotas). Once set up, the subsidiary must be enrolled at the Registry of Enterprises and at the tax office. The local subsidiary is a separate entity from its shareholders, is required to draw up annual accounts and is subject to local taxation.

2 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

There are no registration or licence requirements for foreign contractors to work locally.

In the private sector, the contractor shall in any event have technical and professional requirements to execute works and must operate in compliance with applicable laws (such as environmental, health and safety and social security regulations).

In the public sector, article 83 et seq of the new Code of Public Contracts (Legislative Decree No. 50/2016) expressly states that the contractor must fulfil certain qualification requirements in order to participate in public contracts and must obtain certain certifications, such as those issued by the certification authority (the SOA), to attest its ability to perform works above a given value.

As to designers, in both the private and public sectors, they must be enrolled in the relevant professional registers. Foreign designers may perform professional services from abroad if they have previously been enrolled in the relevant professional register and their technical and

professional qualifications are recognised in Italy, or directly in Italy if they become registered in the local professional register.

3 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

There is no specific advantage to domestic contractors under Italian law. Foreign and domestic contractors are considered equal pursuant to the fundamental economic principles of the relevant European treaties. In this respect European countries established a competitive internal market aimed at pursuing a balanced economic growth and an effective price stability.

4 Competition protections

What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

The main public procurement legislation in Italy is laid down by the new Code of Public Contracts. The said Code, which entered into force in April 2016, implements the EU principles in contract awarding, aimed at guaranteeing the transparent, equal and non-discriminatory conduct of the contracting public entity.

The selection of the tenderers must be made with the due observance of open, fair and transparent conditions of compliance (to prevent public officers' misconduct and bribery), and the whole contractual action must comply with the principle of good faith and of the protection of legitimate expectations.

In light of the above, the contracting public entity has the legal burden to provide in a proper notice the requirements for presentation of candidatures and tenders, the contract award criteria and the specifications of the subject matter of the contract itself, so that each tenderer can evaluate the project requirements and decide whether to participate or not.

5 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

Italy has signed several international conventions on anti-bribery practices, including the OECD Anti-Bribery Convention. At a domestic level various legislations have been issued on bribery matters, including article 2,635 et seq of the Italian Civil Code, the general provisions of the Italian Criminal Code and of Legislative Decree No. 231/2001 regarding the liability of legal entities in the case of offences committed by individuals holding an apical position in such entities.

Both bribe-givers and bribe-takers are prosecuted. Imprisonment, bar from entering into public contracts, holding public offices and confiscation are the main penalties applied in cases of corruption. As to the administrative liability, penalties may consist of revocation of authorisations and licences, fines, prohibition to work with public administration, contributions or funding denial and the like.

No facilitation payments are permitted under the Italian legal system.

As to the enforcement of contracts awarded as a result of bribery, in the public sector the employer can generally terminate the contract when the contractor has been convicted for a corruption offence. Usually, private contracts also contain specific clauses with the same effect.

Article 32 of Law Decree No. 90/2014, in order to ensure the full and timely performance of public works, also prescribes ad hoc measures and grants relevant powers to the chairman of the Anti-Corruption Authority in the case of anomalous situations or illegal conducts to be ascribed to the awarded contractor. It basically provides the possibility to replace executive bodies of the contractor and, in the event the prescriptions given are not duly followed, to place under temporary receivership the contractor for the completion of public works.

6 Reporting bribery

Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

The Italian anti-corruption laws and the new Code of Conduct for public employees provide that public employees must report suspicions or knowledge of bribery offences of government employees. The same provisions are also extended to employees of third companies and professionals who work and carry out services for the public entity.

Law No. 190/2012, however, provides protection for public employees who report suspicions or knowledge of bribery committed by other employees.

In addition, Law Decree No. 90/2014 has established the Anti-Corruption Authority as the regulatory authority to whom public employees have to report malpractices at the workplace, and the Anti-Corruption Authority's Determination No. 6 of 28 April 2015 contains in particular guidelines on the protection of public employees who decide to report unlawful practices (whistleblowers). Recently, Law No. 179/2017 introduced new provisions for the protection of whistleblowers, both for public employees and for private companies' employees.

The above legislation does not contain a specific provision on penalties for failure to report, as the main purpose of said legislation is, again, to facilitate the reporting of bribery offences. Article 361 of the Italian Criminal Code provides penalties for a public officer in cases of failure to report a crime, but it is insufficiently applied in Italy. The Code of Conduct for public employees provides in any event a disciplinary sanction for employees who fail to report bribery offences.

7 Political contributions

Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

Political contributions cannot be part of doing business even though contractors or design professionals may make contributions to political candidates or parties.

In this regard, article 5 of Law Decree No. 149/2013 expressly provides the obligation for a political party to notify Parliament of any data or information regarding any contribution received in a specific year for a sum higher than €5,000. Pursuant to the transparency principle, said article also states that the name of each contributor has to be published both in the Italian Parliament's official website and in the political party's website.

8 Compliance

Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?

A construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) is subject to the same anti-corruption and compliance rules provided

for the government employees, such as in respect of the prohibition against accepting 'things of value' or abstention in cases of conflicts of interest.

In particular, Law No. 190/2012, the National Anti-Corruption Plan and above all the new Code of Conduct for public employees extend the rules and obligations to be complied with by public employees to professionals and third-party companies that work and carry out services for public entities.

Given this, these companies and professionals shall, inter alia, not accept things of value, shall promptly inform the public entity of any conflicts of interest and shall promptly report suspicions or knowledge of unlawful practices.

9 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

Generally speaking, there are no specific obstacles for a foreign contractor to do business in Italy.

Certain circumstances may obstruct or delay the contractor's plan to invest money and resources in Italy, such as the following:

- the length and complexity of administrative procedures to obtain licences or to acquire the specific recognitions from the competent professional body, if required by law, even if recent government measures are trying to make them easier;
- the rather high tax level pressure over goods, services and business activities;
- labour market regulations and the availability of finance; and
- the phenomenon of bribery (present worldwide), mainly related to the public sector but also in the private construction market.

10 Construction contracts

What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

There are no standard-contract forms in Italy, and it is rather unusual that, for a domestic contract, the parties use forms standard in the international construction industry (such as FIDIC, ICE and ICC forms). Usually, the parties make recourse to ad hoc contracts that reflect the main provisions of the Italian Civil Code (for simpler works) or instead add more complex provisions for works especially for industrial or productive plants.

For public works, the Code of Public Contracts is more specific regarding provisions to be included in contracts although, also in such cases, no standard contract forms are used.

Generally, Italian contractors are not very familiar with the standard forms used in the international markets (such as FIDIC) and they usually accept the conditions imposed by the employer without having a detailed knowledge of the potential risks involved.

11 Payment methods

How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Payments have to be made in a way that allows tracing of the transfer of money (other than below a very low threshold, which allows payment in cash). The bank system is the preferred channel for payments for this reason and also to help fight bribery crimes.

One of the main issues, especially with public entities, is late payment, despite Italy enacting pieces of legislation to fight late payment and which provide for payments to be made within between 30 and 60 days. In the case of delayed payment (without cause) the creditor is entitled to receive interest (the rate of which can be either agreed between the parties or can be the one established by law).

12 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

For major and complex projects, it is usual to use the matrix of an engineering, construction and procurement scheme. One additional frequently used scheme is the one by way of which the employer engages a project management company that will be in charge of the management of the entire project. It is rather unusual for the employer to appoint several contractors for the construction of specific parts of the scope of works (despite the employer having the skills and resources to do that).

13 PPP and PFI

Is there a formal statutory and regulatory framework for PPP and PFI contracts?

Public-private partnerships and private finance initiatives, and in general private sector participation in public infrastructure and projects, are a quite recent phenomenon in Italy. The necessity to look for new efficient private financing partners has significantly increased in recent years due to the difficulties of the public sector in having adequate funds for carrying out infrastructure projects. Most of the Italian PPPs have been used in important sectors, such as transport, infrastructure and healthcare.

According to the 2017 PPP Report (on the 2002-2016 period) prepared by the Italian company Cresme Ricerche SpA with the Italian Monitoring Organisation on PPP, there are approximately 29,000 ongoing PPP projects in Italy, divided between projects already under construction and those just awarded. The number of PPP projects increased from 331 projects in 2002 to 3,187 projects in 2016, with an aggregate amount of over €13 billion.

The regulatory legal framework for PPP and PFI is mainly set out in the Code of Public Contracts. Under said legislation, PPP contracts may concern construction, management and maintenance of a public work or provision of services, including the financing of said activities in whole or in part by the private sector. The main types of contractual PPPs are the work concession, the service concession and the financial lease. The Code of Public Contracts also provides for the requirements, conditions, allocation of risks and procedures to be followed for the award of a public project.

14 Joint ventures

Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

There is no specific Italian regulation on joint ventures but some provisions on consortia are set forth by the Italian Civil Code. Pursuant to article 2,615, for example, when a consortium directly undertakes contractual obligations through its representatives, it is responsible for such obligations with its own specific assets and not with the equity of each member. Differently, when contractual obligations are undertaken by the consortium on behalf of its single members, they are jointly liable together with the consortium.

As to public contracts, Legislative Decree No. 50/2016 contains specific provisions about temporary business associations established with the purpose of jointly performing the awarded project. Such associations can be structured either in a horizontal or a vertical manner.

In horizontal associations (where all members act at the same operative level) companies are jointly liable towards both the public employer and third parties (such as subcontractors and suppliers, if any).

In the case of vertical associations (where the leading company carries out the main contractual obligations and the secondary ones deal with the collateral obligations), a different solution is set out, since each member is deemed as liable for its own part of the whole work. In any case, the leading company is jointly liable with the other members.

15 Tort claims and indemnity

Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

The Italian Civil Code sets out several provisions concerning indemnity. As a general rule, article 1,218 states that a party is entitled to damages in the event the other party fails to comply (or to comply timely and correctly) with its contractual obligations. With particular regard to contractor's liability, there are specific provisions about defective works (articles 1,667 and 1,668) and about total or partial collapse of buildings (article 1,669). If damages arise from a tort, article 2,043 provides that they must be compensated as well. Both in case of breach of contract and of torts, if the damaged party contributed in some way to provoke the damage, the relevant restoration shall be proportionally decreased (article 1,227).

16 Liability to third parties

Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

Article 1,669 of the Italian Civil Code expressly provides that the contractor shall be liable towards the employer and his or her assignees in case of total or partial collapse (or risk of collapse) of the building (and of serious defects in construction). This liability shall last for 10 years after completion. The employer, however, must notify such defects within one year from their discovery and must start the legal action within one year from said notice.

17 Insurance

To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards? Does the local law limit contractors' liability for damages?

There are two main insurance policies: the contractor's all risk (CAR) and the erection all risk (EAR). The former is aimed at protecting the insured against all risks in the execution of works until the completion date, and the latter grants the protection of industrial plants and machines against any damage that may occur during the assembly stages.

Moreover, pursuant to article 4 of Legislative Decree No. 122/2005, the builder, when transferring the property to the buyer, must issue a 10-year insurance guarantee (effective from the date of the work completion) in order to cover damages occurring to his or her property as a consequence of total or partial collapse of the building, serious defects in construction or soil defects. As to public contracts, article 103 of the Code of Public Contracts provides that the awarded contractor must issue an insurance policy against all risks connected to the execution of the project and, in the case of a project of relevant value, a 10-year policy against the risk of total or partial collapse of the erected building.

As to third parties, insurance policies covering injuries to people are commonly available. According to labour legislation, all workers are protected by a compulsory insurance for diseases and accidents, which is provided by the National Institute for Insurance against Accidents at Work (INAIL). In this respect the contractor must pay specific contributions for its workers to such authority. The Code of Public Contracts also provides that the awarded contractor, in the case of a project of relevant value, must issue an insurance policy against damages potentially occurring to third parties.

One insurance policy used in the construction industry is the advanced loss of profit policy (ALOP), which covers the insured against financial losses due to delays in the completion of the project.

There are many different forms of insurance that can be adopted by contractors in regards to damages due to environmental hazards. It is rather common to insert in the construction agreement the contractor's limitation of liability without prejudice in any event to article 1,229 of the Italian Civil Code, which states that such clauses shall have no effect in case of contractors' gross negligence or wilful misconduct.

18 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

Pursuant to Italian law, there is no required minimum number of Italian workers to be employed. With specific reference to the workforce employed by the contractor, however, the amount of labour has to be adequate in relation to the complexity and the size of the project itself.

19 Local labour law

If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

Contractors who directly hire local labour forces for a project in Italy are subject to all the legal obligations referred to ordinary employment relationships. In particular, the collective labour agreement applicable to the specific category the workers belong to must be observed. Basically, the contractor has to pay the workers' wages and related taxes as well as social security and welfare contributions. It must also comply with the rules on compulsory insurance against occupational diseases and accidents. In case of dismissal of labour forces, the contractor has to pay severance indemnities and, pursuant to article 2,948 of the Italian Civil Code, workers are entitled to ask for such payment within five years following the termination of the employment relationship.

20 Labour and human rights

What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

Free movement of persons is one of the basic principles of the EU, expressly stated under article 45 TFEU. Pursuant to such principle, European citizens are entitled to work in any European country without the need for a specific work permit. They are granted with a treatment equal to that of domestic workers for work conditions as well as for any other social and fiscal benefit.

With reference to non-EU workers, the Italian Legislative Decree No. 286/1998 states that they have the same rights and are subject to the same obligations of Italian workers in respect to social security contributions and to the assistance from the national health system. In order to allow foreign workers (lacking of a residency permit) to enter the Italian territory, the contractor must obtain a specific work permit from the Immigration Office. If the contractor fails to fulfil such provisions, he or she may incur in severe legal consequences, since he or she can be prosecuted according to Italian criminal law and sanctioned with high fines and even imprisonment.

21 Close of operations

If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

A contractor can in principle close up the operations and leave the country without having any legal obstacles. It shall in any event be liable for its obligations undertaken under the contract towards its workers and the employer.

As previously mentioned, the contractor is liable to the employer for the performance of works according to applicable laws and contractual provisions. In particular, after the completion of works, it shall remain liable for defects of the works for a period of two years from handover or for 10 years for collapse or serious defects to buildings due to ground conditions or defects in construction.

In addition, the contract normally provides the issue by the contractor in favour of the employer of guarantees – such as a performance and warranty bonds – to be effective until the end of the warranty period. In case of defects or breach, the employer may enforce said bonds.

Other contractual obligations to be considered concern labour and tax matters. The contractor is in fact liable for payment of wages and social security contributions to workers employed on the project and for the payment of taxes in Italy (if any).

Finally, if the contractor sets up a specific Italian entity (such as a subsidiary) for the carrying out of its activities in Italy, it must follow the administrative and corporate procedures set forth by Italian law for the liquidation of said entity and shall therefore close all the contracts with subcontractors or suppliers (such as a rent agreement concerning the registered office of the entity).

22 Payment rights

How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

Contractual clauses concerning the issue of bank guarantees or letters of credit for timely payments are the best way to protect the contractor's position. As for payment rights, in fact, the Italian Civil Code (article 1,666) only provides that the parties can agree for progressive payments (proportioned to each part of the project already completed) and does not provide any further solution for the contractor who wants to secure in advance his or her right to be paid.

The Italian Civil Code does not contain specific provisions allowing the contractor to place liens on the property as a guarantee for the expected fulfilment of the owner's payment obligations despite a contract potentially including some guarantees of this nature.

23 'Pay if paid' and 'pay when paid'

Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

Often used in international construction contracts, pay-when-paid clauses are generally accepted in Italy. However, according to Supreme Court case law and scholars, the aforesaid clauses can delay payment to the subcontractor only for a reasonable period of time. There are no prefixed criteria to ascertain if a reasonable time has passed or not; this is left up to the state judge to decide once the subcontractor, pursuant to article 1,183 of the Italian Civil Code, seeks to set a payment due date.

The validity of pay-if-paid clauses in Italy is instead questioned. In particular, the Tribunal of Milan in 2013, and a couple of arbitral tribunals years before, deemed such clauses invalid under Italian law since it is not possible to subject the payment to a future and uncertain event.

In any event, the pay-if-paid clause would be invalid if non-payment to the subcontractor is due to a breach of the contractor towards the owner as well as if the non-payment is due to a failure of the contractor to enforce its right of payment against the owner.

24 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

A government agency cannot assert its sovereign immunity as a defence to a contractor's claim for payment. In fact, the public agency, involved as employer in a construction project, is regarded as a common business operator and not as a sovereign entity. It is worth mentioning, in this regard, that Italy has signed the 2004 UN Convention on Jurisdictional Immunities of States and their Property (not yet in force), of which article 10 states the following:

If a state engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another state, the state cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

25 Statutory payment protection

Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Italian law does not provide a specific protection for unpaid contractors in case of interruption or cancellation of major projects. Therefore,

they are assisted only by the ordinary legal instruments of debt recovery available in case of breach of contract. If no (different) provisions have been inserted in the contract, unpaid contractors are also entitled under Legislative Decree No. 231/2002 to ask for overdue interest on delayed payments.

Given the above, in order to avoid any possible claim, it is advisable for contractors to negotiate the issue of a payment guarantee with the employer.

26 Force majeure and acts of God

Under local law, are contractors excused from performing contractual obligations owing to events beyond their control?

Although the Italian Civil Code does not offer a definition of 'a force majeure event', it makes important references to this concept.

As to construction contracts, article 1,672 of the Italian Civil Code states that, if the project completion has become impossible due to an unpredictable event (out of the control of both parties), the contract shall be terminated and the parties shall bear the relevant costs.

Article 1,673 of the Italian Civil Code also states that the risk of loss or damage of the project before acceptance of the employer is borne by the contractor (to the extent that he or she has furnished the material for the execution) even if the loss or damage is caused by an unpredictable event out of the control of the parties.

With specific reference to public construction contracts, article 107 of the Code of Public Contracts provides that if the works are partially prevented by an event of force majeure, the contractor is entitled to perform only those contractual obligations still feasible.

27 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

Under article 133 of the Code of Administrative Proceedings (Legislative Decree No. 104/2010), in public contracts, any dispute relating to the tender procedure is subject to the exclusive jurisdiction of the regional administrative courts (on first instance) and the Council of State (on appeal). Rules on the relevant procedure are provided by articles 119 and 120 of the Code.

On the other hand, disputes relating to the contractual relationship are subject to the jurisdiction of the ordinary courts.

The only exception is disputes on public construction contracts with European relevance, which, starting from 21 September 2012, must be filed, pursuant to article 3 of Legislative Decree No. 168/2003, with a specialised section within the ordinary courts.

On the contrary, there are no specialised courts in Italy dedicated to construction disputes in the private sector, and these are settled by ordinary courts.

28 Dispute review boards

Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

DRBs are used in several countries worldwide, due to their high technical expertise and efficiency. Only a small number of disputes are settled by DRBs in Italy, although they are known. However, the attention to this method of dispute resolution is progressively increasing. For instance, the Chamber of Arbitration of Milan enacted in 2016 a specific DRB regulation and introduced a procedure for the appointment of DRB members. DRBs assist the parties in preventing or settling disputes by giving informal opinions or issuing non-binding recommendations. In some cases, such recommendations may become binding for the parties. Pursuant to article 9 of the DRB regulation issued by the Chamber of Arbitration of Milan, for instance, if either or both parties do not expressly reject the recommendation within 30 days, they shall be bound to comply with the recommendation.

29 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where do the mediators come from? If not, why not?

Article 5 of Legislative Decree No. 28/2010 provides that, in specific cases, the claimant is entitled to start legal proceedings before ordinary courts or arbitral tribunals only upon the failure of the mediation procedure. The disputes arising from construction contracts, however, are not included in those matters subject to compulsory mediation. Therefore, the parties may decide to adopt such procedure to settle their disputes only on a voluntary basis.

Currently, the mediation procedure is not largely used for construction contracts in Italy and the relevant disputes are more frequently settled by way of arbitration. According to recent statistics, less than 5 per cent of the overall disputes referred to the Chamber of Arbitration of Milan (acting as a mediation body), between 2013 and 2017, concerned construction issues.

Pursuant to article 16 of the above-mentioned Decree, public or private entities (deemed to be reliable and efficient) are entitled to act as mediation bodies and to adopt their own regulation. They must be enrolled in a special registry upon the approval of the Ministry of Justice. The mediation bodies are usually (but not necessarily) composed of lawyers who attended specific courses to gain proper expertise.

30 Confidentiality in mediation

Are statements made in mediation confidential?

Pursuant to article 10 of Legislative Decree No. 28/2010, statements made and information acquired during the mediation procedure must be kept confidential and cannot be used by parties in any subsequent legal (or arbitral) proceeding concerning the same issue. The specific authorisation of the party who gave the information is the only exception.

31 Arbitration of private disputes

What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

In Italy the majority of construction disputes are settled by means of arbitration due to the fact that civil proceedings before the ordinary courts usually take several years. According to a report issued by the Chamber of Arbitration of Milan, a consistent percentage (around 18 per cent) of the arbitration proceedings administered by such Chamber, between 2016 and 2017, concerned construction disputes. Moreover, under Italian legislation on public contracts, arbitral proceedings are compulsory procedures with reference to specific construction contracts when the successful tenderer does not decline the arbitration clause within 20 days from when he or she becomes aware of being the chosen contractor.

32 Governing law and arbitration providers

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

The contractor's preference for one institution or another depends on many different factors, such as the availability of emergency proceedings, the estimated costs and duration of the whole proceedings.

However, in general, the ICC is the preferred institution compared with the LCIA.

33 Dispute resolution with government entities

May government agencies participate in private arbitration and be bound by the arbitrators' award?

Pursuant to article 209 of the Code of Public Contracts, government agencies are entitled to participate in private arbitration. Although this is possible only if the work contract includes an arbitration clause since paragraph 1-bis of the aforesaid article expressly forbids

government agencies from entering into arbitration by means of a submission agreement.

The arbitration proceedings are subject to article 806 et seq of the Italian Code of Civil Procedure. There are additional, different rules specifically provided in the Code of Public Contracts. The arbitration award shall be binding for both parties and shall become effective upon its filing at the Arbitration Chamber for public contracts.

34 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Italy is a signatory party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and therefore reference to its provisions must be made in order to determine whether the recognition and enforcement of a foreign arbitral award can be rejected by any Italian court of appeal.

As a first step the competent court of appeal checks the formal validity of the award. If the award is declared enforceable, the defendant may file a statement of opposition to the same court. In the subsequent proceedings, the court of appeal is entitled to reject the award in the event it is in violation of Italian public policy rules and if the defendant is able to prove any of the following:

- one or both parties of the arbitral proceedings did not have the necessary capacity under the applicable law or the arbitration agreement was invalid;
- the challenger was not informed of the appointment of an arbitrator or of the beginning of the proceedings, or had no opportunity to submit his or her own defence;
- the dispute does not fall within the scope of the arbitration agreement;
- the composition of the arbitral panel or the relevant proceedings does not comply with the agreement between the parties or with the applicable law; or
- the award is not yet binding between the parties or is cancelled or suspended by the competent authority in the state in which it has been issued.

The decision of the court of appeal can eventually be challenged before the Italian Supreme Court.

35 Limitation periods

Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services, and are there any statutory preconditions for commencing or maintaining such proceedings?

With regard to the matter of statutory limitation periods, specific rules apply to construction works (other than the general one, which states that contractual-based rights shall expire in 10 years).

Article 1,667 of the Italian Civil Code in fact enables the employer to start legal proceedings against the contractor in case of defects of the goods or work within two years from the delivery or handover date. However, as a precondition of action, the employer must notify any defect within 60 days from their actual discovery.

Furthermore, in the event of collapse of the building (or risk of collapse or any other serious defect), the contractor shall be held liable towards the employer (and its assignees) for 10 years from the work completion date (article 1,669 of the Italian Civil Code). In such a case the employer must duly notify the collapse to the contractor within one year from its occurring and the employer's right to begin a legal action shall expire within one year from the above-mentioned notice.

Finally, as to extra-contractual liability, damage compensation in case of tort can be requested within five years from the tort.

36 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Italy is a signatory state of the Stockholm Declaration of 1972. As a part of the European context, Italy pays special attention to environmental issues and, according to European directives, has enacted several rules in respect of wild habitats, water and air protection, waste handling and pollution phenomena in general. The main regulation is contained in the Environmental Code (Legislative Decree No. 152/2006) but significant rules are also provided by Legislative Decree No. 46/2014 on industrial emissions. In addition to the above-mentioned laws, the diligent contractor shall comply with any and all the local provisions coming from the competent territorial entities (at present, regions and municipalities).

37 Local environmental responsibility

What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

The Environmental Code promotes the sustainable exploitation of natural resources and the safeguard of human health.

To this purpose, the Code is based on four main principles regulating the execution of industrial projects potentially affecting environmental health, as follows:

- economic operators should adopt all proper safety measures to avoid contamination and environmental disasters;
- operators who are found liable for pollution shall pay for all related remediation costs or, should remediation not be possible, shall be charged with damages;
- contaminated areas shall be subject to special remediation procedures; and
- failure to comply with the provided rules shall lead to administrative fines and, in the most serious cases, to criminal responsibility.

38 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Italy has signed several bilateral agreements (BITs) concerning the promotion and protection of investments. Among others, it is worth mentioning the investment agreements that Italy signed with China (1985), India (1995 and terminated in 1998), Hong Kong (1995), United Arab Emirates (1995), Saudi Arabia (1996), South Africa (1997), Qatar (2000) and Panama (2009).

In the Italian BIT model the term investment refers to every kind of asset invested by a natural or legal person of a contracting state in the territory of the other contracting state, such as (but not limited to), the following:

- movable and immovable property, any ownership rights in rem including real guarantee rights on a property of a third party, to the extent that it can be invested;
- shares and debentures;
- credits for sums of money connected with an investment as well as reinvested incomes and capital gains;
- copyright, commercial trademarks, patents, industrial designs and other intellectual and industrial property rights, know-how and goodwill; and
- any economic right accruing by law or by contract and any licence and franchise granted in accordance with the provisions in force on economic activities, including the right to prospect for, extract and exploit natural resources.

39 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Italy has entered into a large number of treaties with foreign countries, both within and outside the EU, for the avoidance of double taxation on income and property and for preventing fiscal elusion. The latest double taxation treaties were signed by Italy in 2017 with Panama and Romania.

Each treaty regulates the powers of each state involved in establishing the tax regime to be applied to each category of income (dividends, interest, royalties) and, depending on the specific case, may provide the possibility of taxation by one state only (exclusive taxation) or by both the states (concurrent taxation).

The double taxation conventions are based on the model set forth by the OECD or by the UN.

40 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

In accordance with the European legislation (article 63 et seq TFEU), free movement of capital is granted both within the internal market and between EU and non-EU countries. Therefore, as a general principle, no currency control may affect the execution of commercial activities, even if the member states are entitled to provide for exemptions to the above mentioned general principle with the only specific purpose of preventing the violation of national tax laws.

41 Removal of revenues, profits and investment

Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

There are no particular restrictions to the removal of revenues, profits or investments from Italy to abroad, provided that any tax requirements and obligations as well as any obligations on corporate entities' legal reserves are fulfilled.

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