Two new arbitration laws have recently been enacted in Italy, concerning corporate and general arbitration proceedings, aimed at promoting arbitration to settle disputes in civil and commercial matters, namely:

- Legislative Decree No. 5 dated 17 January 2003 (Legislative Decree 5/2003), which took effect on 1 January 2004, containing at article 34ff special provisions designed for arbitration in corporate matters, as well as rules concerning mediation in corporate matters; and
- Legislative Decree No. 40 dated 2 February 2006 (Legislative Decree 40/2006), which took effect on 2 March 2006, amending and restating the provisions on arbitration in general that are contained in article 806ff. of the Italian Code of Civil Procedure.

The new laws left unaltered the provisions governing the recognition and enforcement of foreign awards in Italy, which are based on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This article provides a brief overview of the most significant aspects of the new Italian laws on arbitration which may be of interest to foreign investors in an Italian vehicle and to foreign parties when negotiating arbitration clauses with their Italian counterparts or when arbitrating their disputes in Italy.

### The new Corporate Arbitration Law of 2003

The new Corporate Arbitration Law (Legislative Decree 5/2003) governs arbitration clauses inserted in the by-laws of unlisted companies and lays down certain mandatory provisions applicable to corporate arbitration proceedings commenced pursuant to said clauses, and to the awards rendered in relation thereto. The new law does not apply to listed or public companies. As for unlisted companies, the prevailing view is that this new law applies only when both the company's registered offices and the place of the arbitration are located in Italy.

A different arbitration clause may be inserted by the parties in a shareholders' agreement, in a joint venture agreement, in a sale and purchase agreement related to the company's shares, or in any other agreement, in which case the new General Arbitration Law (Legislative Decree 40/2006) will govern the clause and the proceedings.

### Arbitration clauses in companies' by-laws

Arbitration clauses contained in the deed of incorporation or, more commonly, in the by-laws of a company may provide that any dispute arising among the company's members, or between the company and any of its members, may be settled by arbitration, with certain minor exceptions. Resolutions concerning arbitration clauses do not have to be passed by the totality of members, but only by a qualified majority (two-thirds of the corporate capital).

An arbitration clause will be binding on the company and all of its members, including those whose capacity as member is in dispute. Hence, new members are also bound by the clause, even without a specific approval. The by-laws may extend the arbitration clause to disputes commenced by or against the company's directors, liquidators and internal auditors, in which case the clause will be binding upon them following their formal acceptance of appointment, hence without a specific approval of the clause. The arbitration clause may also be extended to disputes regarding the validity of the members' resolutions.

It is important to note that arbitration clauses of this type must require that all members of the arbitral tribunal be appointed by a third party who is unrelated to the company (including an arbitral institution), otherwise the clause is null and void (the scope of such nullity, however, is currently a matter of debate). If the third party called to act as the appointing authority fails to do so, then the arbitrators will be appointed, at a party's request, by the president of the court in the place of the company's registered offices.

### Arbitration proceedings in corporate matters

Special mandatory rules apply to arbitration proceedings which are commenced pursuant to an arbitration clause contained in a company's by-laws of the kind mentioned above, and to the award rendered under such proceedings.

The request for arbitration brought by or against the company under such a clause must be filed at the Registry of Enterprises and be available for inspection to all members. This filing is not required when the dispute involves only the members. The law allows third parties' intervention in the corporate arbitral proceedings, up to the first hearing, either by way of voluntary intervention, including in support of a party's claim, or following a party's request or an arbitral tribunal's order, but only as regards the company's members.

Although in principle arbitrators in Italy may not grant interim measures (as this is excluded by article 818 of the Code of Civil Procedure), a different rule applies for arbitration in corporate matters when the dispute involves the validity of company's members' resolution. In such a case, the new law allows the arbitrators to issue an order suspending the effectiveness of the disputed resolution. For all other matters, the parties may go to state courts to obtain interim relief.

The arbitrators must decide in accordance with the law, and not by applying equity principles, and the award is binding on the company even when the company itself was not a party to the arbitration proceedings.

### The new General Arbitration Law of 2006

Like other European countries (eg, England, France, Switzerland), Italy has adopted an independent drafting approach, in that Legislative Decree 40/2006 (amending article 806ff of the Code of Civil Procedure) is not based on the UNCITRAL Model Law. Following a trend in other countries, Italy has now also adopted a unitary system, in that it no longer makes a distinction (as the previous arbitration law of 1994 did) between purely domestic and international arbitrations, even though certain differences still exist when at least one of the parties resides or has its head office abroad.

The most salient provisions introduced by the new law are summarised below.
Arbitration agreement

It is a well established principle that the parties may provide for arbitration as a means of settling disputes arising under the terms of their contract, either (i) by inserting an arbitration clause (clausola compromissoria) in the contract, or in a separate document, at the time of its execution or at any time prior to the emergence of the dispute, or (ii) in the absence of such a clause, by executing a specific arbitration agreement (compromesso) in which the nature and subject matter of the dispute are outlined and submitted to arbitrators.

The new law now provides that the parties may also enter into an arbitration agreement for the settlement of disputes that may arise in respect of a non-contractual legal relationships. Awards rendered in this respect are enforceable in other jurisdictions pursuant to article II of the 1958 New York Convention. However, certain disputes may not be submitted to arbitration, such as disputes over rights that may not be disposed of by the parties (diritti indiscussibili).

Individual labour disputes may be submitted to arbitration on condition that collective labour contracts or agreements so provide, or if so allowed by law.

Formal and informal arbitration

The parties have a choice of formal (rituale) arbitration, most commonly used in practice and leading to a traditional award having the effectiveness of a judgment, or informal (intitule) arbitration, referred to by the new law as a means of contractual determination and leading to a contractual award (ordo contrattuale). The contractual award should not be confused with the consent award contemplated by certain arbitration rules (eg, article 26 of the International Chamber of Commerce Rules).

Formal requirements

An agreement to arbitrate disputes is void unless it is in writing. This requirement is satisfied even when the arbitration agreement is stipulated by exchange of telegraph, teletype or facsimile exchange and, pursuant to the new law, even by electronic means, in keeping with the new legislation on the transmission and receipt of digital documents. However, Italian law still takes a rather formalistic approach regarding arbitration clauses contained in certain types of standard conditions, which must be specifically and separately approved in writing. This requirement, which is no longer expressly excluded for international arbitration, can be considered to be inoperative when the 1961 Geneva Convention (European Convention on International Commercial Arbitration) applies.

Administered arbitration

The parties may opt for ad hoc arbitration or administered arbitration. Under the new law, in case of conflict between the rules of arbitration referred to by the parties and the specific provisions contained in the arbitration agreement, the latter prevail.

The most prominent Italian arbitration institutions include the Italian Arbitration Association (AIA), founded in 1958 and located in Rome, which administers arbitrations under its own rules (separate for international and national arbitrations), in force as of 1994, and under the UNCITRAL Rules; and the Chamber of National and International Arbitration of Milan, whose Arbitration Rules have been in force since 2004 and are designed for both domestic and international arbitrations.

Appointment, disclosure and challenging arbitrators

The arbitral tribunal may be composed of one or more arbitrators, but under Italian law its compulsory for their number to be uneven. The parties are generally free to determine the method for appointing the arbitrators and may well require that the arbitrators possess certain qualifications (including as to their nationality or country of residence).

When accepting their appointment, arbitrators are not required by law to disclose any possible reasons that might potentially affect their impartiality or independence. However, this kind of disclosure is mandated by the rules of arbitration of the major Italian arbitral institutions, including the Italian Arbitration Association and the Milan Chamber of Arbitration. A similar duty of disclosure is required of lawyers serving as arbitrators by the Italian Bar Code of Ethics.

The new law clarifies that a party may challenge even its own appointed arbitrator, but only on grounds that the party becomes aware of after the appointment. In any event, if the challenge of an arbitrator is found to be manifestly ill-grounded or inadmissible, the challenging party may be ordered to pay a fine in favour of the other party. The challenge of an arbitrator will not suspend the proceedings, unless otherwise decided by the arbitral tribunal; but, if the challenge is successful, the activity performed by that arbitrator, or with his or her contribution, will be considered as ineffective.

As for the grounds of challenge, whereas under the old regime an arbitrator was equated to a judge in this respect, the new law introduces a list of specific grounds for challenging arbitrators, namely when:

• the arbitrator does not possess the agreed qualifications;
• the arbitrator, or a company, association or entity of which the arbitrator is a director, has an interest in the dispute;
• the arbitrator or his or her spouse is a relative to the fourth degree or is a cohabitant or "table-companion" of any of the parties, their legal representatives or defence lawyers;
• the arbitrator or his or her spouse has a pending suit or serious enmity with any of the parties, their legal representatives or defence lawyers;
• the arbitrator is an employee or a regularly paid consultant or adviser of any of the parties, of any company controlled by them, of any person or company controlling any of them, or of any other company in the same group, or if the arbitrator has any other relationship, of a patrimonial or associative nature, with any of the foregoing that may affect the arbitrators’ independence, or if the arbitrator is a guardian or administrator of any of the parties; and
• the arbitrator has given advice or provided assistance or legal services to one of the parties in a preceding stage of the dispute or has testified in relation thereto.

These grounds may be supplemented by the rules of arbitration referred to by the parties.

The statutory time limit for challenging arbitrators before the competent court in Italy remains 10 days from the date of their appointment or of a party’s becoming aware of the ground for challenge.

Multi-party arbitration

The method for appointing the arbitrators becomes of crucial importance when there are more than two parties in dispute. The solution provided by the new law is that, where multiple parties are bound by the same arbitration agreement, one or more parties may commence arbitration proceedings against any or all of the other parties and the matter will be decided in the same arbitration, provided that: (i) pursuant to the arbitration agreement all the arbitrators are appointed by a third party (eg, by a court of arbitration of a chosen institution whose rules the parties have referred to); or (ii) all the arbitrators are appointed by consent of all the parties in dispute; or (iii) when, following the claimant’s appointment of one or more
arbitrators, all the respondents agree to appoint their arbitrator or arbitrators, or ask a third party to do so on their behalf.

The importance of establishing the appropriate method of appointment in a multi-party situation is self-evident considering that, pursuant to the new law, if all the arbitrators cannot be appointed in one of the aforementioned ways, then the arbitration commenced against multiple respondents is split into separate proceedings, one for each respondent, which can hardly be considered a satisfactory solution. However, when certain parties must necessarily be joined in the same proceeding (titusconsorzio necessario) the arbitration may not proceed and the state courts gain jurisdiction.

Third-party intervention
The new law allows third party’s wilful intervention when in support of a party’s claim and when the third party must necessarily be joined in the proceeding. Any other kind of intervention must be accepted by the parties and the arbitrators.

Conduct of the proceedings
The new law contains a number of provisions to facilitate the conduct of arbitration proceedings, including with respect to foreign parties.

For example, unless the parties have agreed otherwise, the time-limit for rendering the award is now 240 (instead of 180) days, which may be extended by agreement of the parties or by decree of the competent state court upon a reasoned request by one of the parties or by the arbitrators. However, the time limit is extended by 180 days (unless the parties have agreed differently) when evidence must be acquired, an expert is appointed by the arbitrators, the arbitrators issue a partial or non-final award, or if a member of the arbitral tribunal is replaced.

Moreover, the arbitrators can now obtain the state courts’ assistance as regards the appearance of witnesses before them, and may also request information and documents from the public administration.

Other new provisions are meant to take account of the presence of foreign parties or arbitrators. For example, unless the parties have agreed otherwise, the arbitrators may conduct hearings abroad, including evidentiary hearings, and other stages of the procedure, and may deliberate and sign the award abroad. A personal meeting of the arbitrators to deliberate the award is no longer required, unless one of the arbitrators so demands.

The parties can agree on the rules that the arbitrators must observe in the proceedings and the language of the arbitration, failing which the arbitrators will make such determination as they deem appropriate, provided that the rule of due process is respected. Therefore, the parties or the arbitrators may well decide to conduct the proceedings in a language other than Italian, even when all the parties involved are Italian.

A quirk in the new law is that, if one of the parties fail to pay advances on certain foreseeable costs required by the arbitrators, and the other party does not pay all such costs, then the arbitration clause becomes inoperative as regards that specific dispute. However, this rule (which has been highly criticised) applies only to advances on costs, not to advances on arbitrators’ fees.

Setting aside of the award
The new law unifies the rules on the setting aside of awards which were previously different for domestic and international arbitrations. As a result, the means of recourse against all awards are now nullity, revocation and third-party opposition.

The grounds for nullity, which are exhaustive, have also been amended and restated. In particular, an award may be annulled if:

- the arbitration agreement is invalid, but a party may avail itself of this ground only if the invalidity issue was timely raised during the arbitration proceedings;
- the arbitrators were not duly appointed, provided that this objection was raised during the arbitration;
- the award was rendered by a person who, having no legal capacity, should not have been appointed as arbitrator;
- the award exceeds the limits of the agreement to arbitrate, provided that this objection was raised during the arbitration;
- the award does not contain the reasons for the decision, or the decision, or the arbitrators’ signatures (but a majority of the arbitrators’ signatures will suffice if the award acknowledges that it was deliberated with the participation of all arbitrators and

Ughi e Nunziante, whose origins go back to the 1960s, is one of the oldest law firms in Italy. The firm has about 80 lawyers. The firm has a decidedly international vocation and is used to providing its legal services in English, French, German and Spanish. Some of its attorneys are foreign nationals, and are licensed both in Italy and in other jurisdictions.

The firm has close contacts with many law firms throughout the world which can provide its clients with the legal services required even outside Italy.

Its clients range from medium-sized corporations in their early stages of international expansion, to large multinational, financial institutions, governments and (other) public organisations. Many of the firm’s clients are non-Italian entities who turn to the firm for advice on legal issues connected with their existing Italian operations, on the establishment of new operations in Italy, or for assistance in international transactions or disputes which have an Italian element. Various partners of the firm have acted as experts of Italian law in proceedings pending abroad.

An important part of the firm’s practice consists of representing clients in litigation proceedings before the Italian courts or in matters submitted to arbitration.

Practice areas
Administrative law, antitrust, aviation, banking and finance, bankruptcy, contracts, commercial litigation and arbitration, corporate law, energy, environmental, EU law, intellectual property, labour, M&A and private equity, media and entertainment, privatisations, real estate, tax law and international tax planning, telecommunications.
Arbitral awards may not be challenged on the ground of violation of the applicable substantive law, unless otherwise agreed by the parties, or so mandated by law (eg, in labour disputes or when the violation relates to a preliminary question that could not be arbitrated). The violation of rules of public policy may always be invoked.

Although the means of recourse cannot be waived in advance, the new law clarifies that a party may not rely on a ground for nullity if it was directly responsible for its occurrence, or if it failed to timely raise an objection as regards the failure to comply with a procedural rule, or if it waived its right to object thereto.

An important difference between national and international arbitration still exists as regards the annulment of the award, which should be considered when drafting an arbitration agreement. When one of the parties at the time of entering into the arbitration agreement was a resident or had its head offices abroad, following the annulment of the award by the Court of Appeal the merits of the case are not decided by such court, and the parties may still settle the dispute by arbitration unless they have agreed otherwise. This rule is reversed with respect to domestic arbitrations, where, following the annulment of the award, the Court of Appeal decides the merits (if the annulment is based on certain grounds) unless the parties agree otherwise.

Revocation is available in exceptional circumstances, namely when the award is the result of fraud by one party or by the arbitrator, when the award is based on evidence later recognised as forged, or decisive documents are discovered after the award. Third-party opposition is limited to cases when the award prejudices a third party’s rights, or is the result of fraud or collusion to the detriment of the successors in title or creditors of one of the parties.

The time limit for filing an action before the Court of Appeal to annul the award is 90 days from its notification (or one year after its signature). Revocation and third-party oppositions have a time limit of 30 days.