Investor-State Arbitration 2020

A practical cross-border insight into investor-State arbitration

Second Edition

Featuring contributions from:

3D Legal – DANDRIA Law Firm
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Arbitration Institute of the Stockholm Chamber of Commerce
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Blake, Cassels & Graydon LLP
Boies Schiller Flexner LLP
Busse Disputes Rechtsanwaltsgesellschaft mbH
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Expert Chapters

1. Third-Party Funding and Investor-State Arbitration
   Dominic Roughton & Nathalie Allen Prince, Boies Schiller Flexner LLP

9. Issues in Cross-Border Valuation and the Implications for Damages Assessments in Investor-State Disputes
   Ronnie Barnes, Cornerstone Research

14. Investor-State Arbitration Before the SCC
    James Hope, Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

19. The Impact of EU Law on ISDS
    Prof. Dr. Nikos Lavranos, European Federation for Investment Law and Arbitration (EFILA)

Q&A Chapters

23. Australia
    Corrs Chambers Westgarth: Lee Carroll & Frances Williams

29. Austria
    Obkin Rechtsanwälte GmbH: Miloš Ivković

35. Belarus
    Sorainen: Alexey Anischenko & Valeria Dubeshka

39. Brazil
    Huck, Otranto, Camargo: Fábio Peixinho Gomes Corrêa & Mônica Naomi Murayama

44. Canada
    Blake, Cassels & Graydon LLP: Iris Antonios & Paul Blyschak

50. China
    Zhong Lun Law Firm: Huawei Sun

57. Estonia
    Sorainen: Maria Pihlak & Dr. Carri Ginter

62. France
    Eversheds Sutherland: Julien Fouret

68. Germany
    Busse Disputes Rechtsanwaltsgesellschaft mbH: Dr. Daniel Busse & Dr. Sven Lange

74. Hong Kong
    Fangda Partners: Olga Boltenko & John Zhou

80. Hungary
    DLA Piper Posztl, Nemecssoi, Györfi-Tóth and Partners Law Firm: András Nemecssoi & David Kohegyi

85. India
    AZB & Partners: Rajendra Barot & Sonali Mathur

91. Italy
    3D Legal – DANDRIA Law Firm: Roberto Pirozzi & Rocco Ioa

97. Japan
    Mori Hamada & Matsumoto: Yuko Kanamaru & Daniel Allen

102. Malaysia
    Cecil Abraham & Partners: Sunil Abraham & Syukran Syafiq

106. Netherlands
    Conway & Partners N.V.: Thabiso van den Bosch & Lilian Meinen

111. Panama
    Morgan & Morgan: José D. Carrizo D.

115. Singapore
    Allen & Gledhill LLP: Chua Kee Loon & Nicholas Tan

121. Sweden
    Hannes Snellman Attorneys Ltd.: Pontus Ewerlöf & Andreas Johard

126. Switzerland
    Homburger AG: Mariella Orelli & Dilber Devitre

131. United Arab Emirates
    Hamdan Al Shamsi Lawyers and Legal Consultants: Hamdan Al Shamsi, Omar Kamel & Nandini Tiwari

138. United Kingdom
    Boies Schiller Flexner LLP: Dominic Roughton & Rosalind Axbey

144. USA
    Foley Hoag LLP: Tafadzwa Pasipanodya & Darío Maestro
Italy

1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your jurisdiction ratified?

As of now, Italy has signed 102 Bilateral Investment Treaties (BITs), 59 of which are in force, 28 are terminated and 13 have not been ratified yet.

In addition, Italy is party to another 55 multilateral treaties including investment provisions, such as the China – EC Trade and Cooperation Agreement, the EU – Japan Economic Partnership Agreement and the EC – Mercosur Cooperation Agreement.

Moreover, as a member of the World Bank Group, Italy is also party to the Multilateral Investment Guarantee Agency (MIGA), which promotes cross-border investments in developing countries by providing guarantees (political risks insurance and credit enhancement) to investors and lenders.

Italy has been a WTO member since 1995 and became a member of GATT in 1950.

1.2 What bilateral and multilateral treaties and trade agreements has your jurisdiction signed and not yet ratified? Why have they not yet been ratified?

According to the United Nations Commission on International Trade Law, Italy has signed 13 BITs that have not been ratified yet, i.e.: Turkmenistan; Democratic Republic of the Congo; Belize; Sudan; Malta; Bolivarian Republic of Venezuela (2001); Serbia; Democratic People’s Republic of Korea; Zambia; Ghana; Cabo Verde; Brazil; Bolivarian Republic of Venezuela (1990); and Côte d’Ivoire.

There is no official information about the above, but it is believed that the reasons behind the non-ratification of these treaties are to be found in the complex geo-political situations of those countries.

There are 14 treaties, including certain investment agreements, which have not been ratified yet, such as the EU – Singapore Investment Protection Agreement and the Comprehensive Trade and Economic Agreement between Canada and the European Union (CETA).

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Italian BITs are highly standardised because they are based on the 2003 Italian Model BIT drafted by the Legal Department of the Italian Ministry of Foreign Affairs.

The Italian BIT model includes as key provisions:

- a pretty narrow definition of “investment”, which is described as “every kind of asset” which may be subject to economic exploitation;
- the “fair and equitable treatment” (FET) which must regulate the entire contractual relationship and the prohibition of “unjustified or discriminatory measures”;
- the principle of “National Treatment” and “Most Favoured Nation Treatment” to be accorded to investments effected by, and income accruing from investors of the other Contracting Party. Art. III(2) provides that the most favourable treatment referred to in Art. III(1) may come from either a piece of domestic legislation or an international obligation “in force or that may come into force in the future for one of the Contracting Parties”;
- with regard to expropriation, the Italian BIT model provides that investments and the activities connected with an investment may be expropriated only under four conditions, which are: a) a public purpose or national interest; b) on a non-discriminatory basis; c) in conformity with all legal provisions and procedures; and d) upon immediate, full, and effective compensation;
- a multi-tier clause either for the settlement of disputes between the Contracting Parties and between Investors and Contracting Parties. With regard to the former type of disputes, Art. IX of the Italian BIT model provides that the Parties should attempt to settle the controversy first through negotiations or consultations. In the event that the dispute cannot be solved within six months from the date on which one of the Contracting Parties notifies in writing the other Contracting Party, the dispute shall, at the request of one of the Contracting Parties, be laid before an ad hoc Arbitral Tribunal.

With regard to disputes between Investors and Contracting Parties, disputing parties are firstly invited to resort to negotiations and consultations in order to settle their differences within six months. In the event such dispute cannot be solved, the investor then may resort to: a) the competent Court of the Contracting Party which is the host State of the investment; b) an ad hoc Arbitral Tribunal which will apply the UNCITRAL rules; or c) ICSID, as long as both the Contracting Parties have acceded to it.

1.4 Does your jurisdiction publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Diplomatic notes exchanged with other States concerning signed treaties are published in the Italian Official Law Journal alongside with the law which ratifies the treaty. However, thanks to the Freedom of Information Act (FOIA), introduced with the Legislative Decree n. 97/2016, individuals, institutions or ONGs have now the right to access documents held by public bodies even before those are published in the Official Journal (see TAR Lazio, ruling n. 11125/2018).
No, there are no governmental commentaries concerning the meaning and the interpretation of treaties or trade agreement clauses.

2 Legal Frameworks

2.1 Is your jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?


Italy also signed the United Nation Convention on Transparency in Treaty-based Investor-State Arbitration on 19th May 2015, but it has not been ratified yet.

2.2 Does your jurisdiction also have an investment law? If so, what are its key substantive and dispute resolution provisions?

Foreign investments in Italy are not regulated by a specific law: the legislative and regulatory framework is mostly based on: a) the rules set out in the Italian Civil Code; b) the EU and Italian Antitrust Law; c) the Consolidated Text on Financial Intermediation; d) the law on personal information treatment and protection, i.e. the Legislative Decree n. 196/2003 and the EU Regulation n. 679/2016; e) the Law on corporate persons’ liability, i.e. the Legislative Decree n. 231/2001; f) the environmental legislation, i.e. the Legislative Decree n. 152/2006; and g) the Law on workplace safety and hygiene, i.e. the Legislative Decree n. 81/2008.

However, foreign investments in the fields of defence, national security, energy, transport, communications and high-tech are specifically regulated by Legislative Decree n. 21/2012.

Further, as a member of the European Union, Italy is subject to all provisions under EU law designed to create a European common market, which includes the free movement of goods, capital, services and persons.

With regard to dispute resolution provisions, Italy is a signatory of both the 1958 New York Convention and the 1965 ICSID Convention (see question 2.1). Thus, disputing parties may submit their controversies either to ICSID arbitration and to any foreign Arbitral Tribunal.

Further, Italy, with Law n. 9/2014 introduced a Tribunal specialised in dealing with business and corporate law matters. These specialised Tribunals have also the jurisdiction over any civil proceedings to which a foreign company is a party (whether as defendant or plaintiff).

2.3 Does your jurisdiction require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

With specific reference to foreign investments in the fields of defence, national security, energy, transport, communications and high-tech, Legislative Decree n. 21/2012 provides that these activities are subject to a review procedure the government may exercise its powers, which may result even in vetoing or imposing conditions.

All things considered, foreign investments in any other economic fields are not subject to any other limitation or prior review apart from the general reciprocity rules and applicable antitrust rules. However, in certain economic areas, such as banking and investment services (Directive 2013/36/EU, Directive 2014/65/EU and Directive 2009/138/EC as enacted in Italy by, respectively, Legislative Decree n. 385/1993, the Italian Securities Act, and Legislative Decree No. 209/2005), telecommunications (Code of Electronic Communications), broadcasting (Law n. 249/1997), gas networks (EU Directive 2009/73/EC as enacted in Italy by Legislative Decree n. 93/2011) and electricity networks (EU Directive 2009/72 as enacted in Italy also by Legislative Decree n. 93/2011), regulatory authorisations may be required.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

There have been no recent cases in which national courts have decided on the interpretation of treaties in Italy.

However, there are some arbitral proceedings Italy was a party of, where the issue related to the interpretation of the BIT at stake was addressed. First and foremost, the paramount case in this regard is the ad hoc arbitration initiated in 2003 by Italy against Cuba.

3.2 Has your jurisdiction indicated its policy with regard to investor-state arbitration?

According to the most recent studies, there are no governmental documents which indicate the Italian policy with regard to investor-State arbitration. In spite of that, it is very clear that Italy has a strong general favour towards arbitration; indeed, Italy has recognised arbitration as an effective tool to settle investment disputes also due to the fact that all of the 55 BITs in force provide for arbitration clauses.

Nonetheless, we must mention the recent “anti-investment arbitration movement” joined by the European Union. This new trend can be spotted first in the fact that while negotiating the terms of the TTIP (Transatlantic Trade and Investment Partnership), the EU excluded investor-State dispute settlement mechanisms and proposed the creation of a standing investment tribunal that would have been established after the treaty came into force.

Moreover, arts. 8.18–8.45 of the Comprehensive Economic and Trade Agreement (an agreement signed by the European Union and Canada) govern the resolution of investment disputes between investors and States by creating a settlement mechanism based on a permanent tribunal which has more differences than similarities with an arbitration proceeding.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your jurisdiction’s treaties?

The Italian BIT model does not cover any such issues, with the exception of the Most Favoured Nation treatment clause, which is included in all the BITs Italy is and was part of.

However, with regard to corruption, transparency and climate change, Italy is a member respectively of the United Nations Convention against Corruption, the Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention), the Kyoto Protocol and the Paris Agreement.
According to the United Nations Commission on International Trade Law, the BITs that were in force with: the Syrian Arab Republic; Armenia; India; Republic of Moldova; Indonesia; Azerbaijan; Jordan; Uzbekistan; Uganda; Plurinational State of Bolivia; Kazakhstan; and Gabon, have been terminated without renewal.

Moreover, in 2013, Italy terminated all the intra-EU BITs. The reason behind this decision is the fact that many of these intra-EU BITs were signed before the EU enlargements of 2004, 2007 and 2013; therefore, they had the purpose to protect potential investors who wanted to invest in the future “unnamed EU 13” from the risks which might have occurred by investing in those not yet EU countries. And since, after the final enlargement, all the Member States are bound to the very same EU rules, there are no grounds for the old intra-EU BITs to exist any longer.

Lastly, as of the 1st January 2016, Italy has withdrawn from the Energy Charter Treaty because of its retroactive measures, which were causing the rise of a huge amount of arbitration proceedings in the renewable energy sector.

### 4 Case Trends

#### 4.1 What investor-state cases, if any, has your jurisdiction been involved in?

As of today, Italy has been involved in 11 investor-State cases as a respondent, eight of which are still pending, and three of which have been defined with an award.

- **Pending cases:**
  - Vedda Proprêté S.A.S. v. Italian Republic (ICSID Case No. ARB/18/20);
  - Rockhopper Exploration Plc, Rockhopper Italia S.p.A., and Rockhopper Mediterranean Ltd v. Italian Republic (ICSID Case No. ARB/17/14);
  - CIC Renewable Energies Italy GmbH, Enerunum Asset 1 GmbH & Co. KG, Enerunum GmbH & Co. KG and others v. Italian Republic (ICSID Case No. ARB/16/39);
  - ESPF Beteiligung GmbH, ESPF No. 2 Austria Beteiligung GmbH, and InfraClass Energia 5 GmbH & Co. KG v. Italian Republic (ICSID Case No. ARB/16/5);
  - San Reserve Leacor Holdings SRL v. Italy (SCC Case No. 132/2016);
  - CEF Energia BV v. Italian Republic (SCC Case No. 158/2015);
  - Eskoal S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50);
  - Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37).

- **Defined cases:**
  - Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCC Case No. 2015/095);
  - Greentech Energy Systems A/S, NovEnergia II Italian Portfolio S.A v. Italian Republic (SCC Case No. 2015/095);
  - Belenergia S.A. v. Italian Republic (ICSID Case No. ARB/15/40); and
  - Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3).

#### 4.2 What attitude has your jurisdiction taken towards enforcement of awards made against it?

With reference to the three investor-State cases defined with an award, namely: Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCC Case No. 2015/095); Greentech Energy Systems A/S, NovEnergia II Italian Portfolio S.A v. Italian Republic; Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic; and Belenergia S.A. v. Italian Republic, only the first one was appealed by the Italian Ministry of Foreign Affairs and International Cooperation before the Svea Court of Appeal, requesting the Court to set aside or, alternatively, declare the award invalid in its parts or in its entirety.

The second award was issued in favour of the State and the third one was rendered on the 6th August 2019, therefore there is no notice of appeal yet.

#### 4.3 In relation to ICSID cases, has your jurisdiction sought annulment proceedings? If so, on what grounds?

As of today, Italy has not sought annulment proceedings in relation to ICSID cases.

With regard to the abovementioned case, namely Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCC Case No. 2015/095) and Greentech Energy Systems A/S, NovEnergia II Italian Portfolio S.A v. Italian Republic, the arbitral award was issued by the Stockholm Chamber of Commerce (SCC).

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

To date, there has not been any satellite litigation in relation to arbitration proceedings initiated against Italy.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

The majority of the cases that have been brought against Italy may be grouped into a set, where the main element can be spotted in the government measures they relate to.

Out of the 11 cases Italy has been involved in, 10 of them have been initiated by foreign investors due to the adoption of a series of governmental decrees, which aimed at cut tariff incentives in the field of renewable energy sector, specifically with regard to solar power.

Lastly, with reference to the case Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic, the claim arose out of the decision adopted by the Ministry of Economic Development not to award the claimants a production concession covering the Ombrina Mare field located within 12 miles of the coast of Italy, following the government’s re-introduction of a general ban on oil and gas exploration and production activity within the 12-mile limit of the coastline.

### 5 Funding

#### 5.1 Does your jurisdiction allow for the funding of investor-state claims?

Italy does not forbid litigation funding even though the Italian legal system still lacks any specific procedural and substantive rules governing such practice.

Therefore, the funding of investor-State claims is in principle consistent with the Italian legal system and, more precisely, with Article 1322 of the Italian Civil Code.

Indeed, the aforementioned article states in the first paragraph that parties are allowed to create their own contractual framework, within the limits imposed by the law and, in the second one, that parties are free to enter into other kinds of agreement that differ from those provided by the Italian law, provided that such agreements are aimed at interests worthy of protection under Italian law (“typical contract”).
5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

As of today, the Italian Courts have not handed down a judicial decision specifically addressing the funding of investor-State claims. Such a statement does not mean that there are no cases pending on the subject.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

Proceedings supported by a funder in Italy are still not very common. The reasons of such a situation may be found in the origin of the third-party funding practice, which lies in the common law system. Moreover, Italian court proceedings have traditionally been considered time-consuming, and therefore inconsistent with the goals sought by investors.

However, the Italian legal system has recently undergone a relevant change with regard to the possibility of obtaining compensation for damages caused by infringements of EU or national competition. Indeed, a terrific element which may cause a substantial transformation in the use of third-party litigation/arbitration funding may be found in the Italian Legislative Decree No. 3/2017. The aforementioned Decree implements EU Directive 2014/104/EU and introduces a series of new procedural rules that considerably simplify the possibility of obtaining compensation for damages caused by infringements of EU or national competition laws, by addressing both private claims and class actions. As a result, the funders have been looking at it with an increasing interest.

Moreover, another element which has been accepted by the funders very gladly is art. 43 of the Arbitration Rules, published by the Milan Chamber of Arbitration (the most important Italian arbitration institution) in March 2019. Art. 43 addresses, for the first time, the third party funding stating in its first paragraph that “[t]he party that is funded by a third party in relation to the proceedings and its outcome shall disclose the existence of the funding and the identity of the funder.”

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

In Italy, criminal law matters fall within the concept of public order and therefore they cannot be referred to arbitrators. Moreover, pursuant to art. 819 bis of the Italian Code of Civil Procedure (“CCP”), arbitral tribunals must suspend the proceeding if the matter at stake depends on, and will be determined by, the outcome of the related criminal proceeding.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

According to the “rule of chronological priority” (Kompetenz-Kompetenz), only arbitrators, and not national courts, can rule on their jurisdiction and competence. Therefore, only arbitral tribunals are competent to deal with procedural issues arising out of an arbitration proceeding.

6.3 What legislation governs the enforcement of arbitration proceedings?

The procedure for the enforcement of both domestic and foreign arbitral awards is set out respectively by art. 825 and arts. 839–840 of the Italian Code of Civil Procedure.

6.4 To what extent are there laws providing for arbitrator immunity?

Arbitrators’ immunity is not regulated in Italy, although their liability is. Indeed, pursuant to art. 813 bis CCP, arbitrators are liable for damages resulting from: 1) their intentional or gross negligence in delaying their duties; 2) unjustified withdrawal; and 3) intentional or gross negligence that caused delay in issuing the award within the scheduled deadline.

6.5 Are there any limits to the parties’ autonomy to select arbitrators?

Pursuant to art. 809 CCP, the arbitration agreement must indicate the appointment of the arbitrators or, alternatively, it must regulate how many they will be and how they will be appointed.

Regarding the limits to the parties’ autonomy, the disputants cannot appoint as arbitrators’ persons who lack legal capacity, in compliance with art. 812 CCP.

6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

Pursuant to art. 809 and 810 CCP, if the parties have indicated an even number of arbitrators, another arbitrator is appointed by the President of the court where the arbitration is seated, upon a motion filed by the claimant.

If the parties have not agreed upon the number and the appointment procedure of the arbitrators, they will be three and will be named by the President of the court where the arbitration is seated.

If the claimant has served a request for arbitration, and has appointed his arbitrator, demanding the respondent act accordingly, in case the respondent fails to do so within 20 days, the claimant may ask the President of the court where the arbitration is seated to make the appointment.

6.7 Can a domestic court intervene in the selection of arbitrators?

See question 6.6.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Pursuant to art. 839 CCP, in order for a foreign award to be enforced, an application must be filed before the Court of Appeal of the place where the other party is domiciled or, if the other party is not domiciled in Italy, before the Court of Appeal of Rome (the capital of Italy). The applicants must file the original award alongside with the arbitration agreement. If those documents were drafted in a foreign language, a certificated translation is required.
Once the President of the Court of Appeal has verified the regularity of the filing, he issues an order by which he declares the award enforceable.

However, an arbitral award cannot be enforced: 1) if the dispute could not have been referred to arbitrators according to Italian law; or 2) if the award is in contrast with the Italian public order.

### 7.2 On what bases may a party resist recognition and enforcement of an award?

Pursuant to art. 827 CCP, a party may resist recognition and enforcement of an award in the following ways: 1) action for a declaration of invalidity; 2) revocation; and 3) third-party opposition.

As far as the bases on which a party may file one of the aforementioned remedies are concerned, arts. 829 and 831 CCP provide a comprehensive list of those cases, ranging from the invalidity of the arbitration agreement to the violation of the due process or to the introduction of forged evidence.

Recognition or enforcement is also refused ex officio if the Court of Appeal finds that: 1) the dispute could not have been referred to arbitrators according to Italian law; or 2) if the award is in contrast with the Italian public order.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Italy follows the general principles of international law on the subject and customary international law, which is directly applicable in Italy through art. 10 of the Constitution. Therefore, Italy provides sovereign immunity from enforcement of a judicial decision or arbitral award for state-owned assets when such assets are used in fostering a public act or function (*iure imperi*). On the other hand, State assets used in a private entrepreneurial or commercial activity (*iure gestionis*) do not enjoy the same immunity (see, *ex multis*, Italian Supreme Court, ruling n. 3468 of 1992, *United States of America v. Enzo D’Avola*).

Although previously mandatory, a creditor is no longer required to ask prior governmental authorisation for the enforcement of an award against assets belonging to a foreign state (the Italian Constitutional Court abrogated a law that required a prior authorisation from the Ministry of Justice, ruling 23rd July 1992, n. 360).

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

As of today, there are no decisions by Italian courts considering the corporate veil in the context of sovereign assets.
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Founded in 2011, 3DLegal – Dandria Law Firm counts nine lawyers, including two partners, and five trainees. Offices are located in Rome and Milan and the key areas of practice are Antitrust & Regulation, Contracts & Litigation and Alternative Dispute Resolution, with a strong expertise in Commercial Arbitration. We work closely with our clients, primarily consisting of international corporations, to ensure that their agreements and conduct is not only legally sound, but also in line with their business objectives. We advise organisations in a wide range of commercial, contentious and regulatory matters, strengthened by our knowledge of the Italian economic fabric and our recognised expertise in international issues.

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