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“Forward, but be Careful”: Italy and Interim Measures Issued by Arbitrators

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“*Pedro, adelante, con juicio*“: this Spanish exhortation comes from a famous Italian novel, “*I Promessi Sposi*” by Alessandro Manzoni. The Spanish governor of Milan gives these ambiguous instructions to his coachman Pedro, who is steering the carriage amidst a rioting mob: “*forward, but be careful*“. It became proverbial for describing an uneasy balance between action and caution. As such, it captures quite well the recent developments of Italian arbitration law.

On November 25, 2021, the Italian Parliament approved a bill delegating the Government to reform the Italian Code of Civil Procedure (the “**Delegation Act**“), including the arbitration chapter. Within one year, pursuant to the guidelines set out in the bill, the Government will implement the reform by enacting a legislative decree. The Delegation Act already heralds significant changes for Italian arbitration law. This post outlines some of the major alterations to be introduced (which will be then presented in more detail by a follow-up post), before focusing on interim measures.

An Overview of the Upcoming Reform

The reform seeks to increase guarantees of impartiality and independence for arbitrators by (i) re-introducing, among the grounds for challenging an arbitrator, the notion of “*serious grounds of appropriateness*” that before 2006 was applicable as consequence of the general reference to the discipline for court judges; and (ii) expanding the arbitrator’s duty of disclosure, by introducing a written declaration disclosing all circumstances relevant for impartiality and independence. On this latter point, the law is giving general application to something already common in arbitral proceedings seated in Italy, also considering the express requirements found in several sets of rules (e.g. Article 11 of the ICC Rules; Article 20 of the Arbitration Rules of the Milan Chamber of Commerce).

The reform will also explicitly provide that: (i) the judicial decrees recognizing foreign awards are immediately enforceable; and (ii) the parties are free to choose the law applicable to the merits. Here the reform is expressly clarifying what is already widely taken for granted in practice.

The reform will also reduce, from one year to six months, the time limit for filing a set-aside petition when the award has not been notified to the challenging party: a reasonable compromise between the different interests at stake.

The Traditional Prohibition of Interim Measures Issued by Arbitrators

In the perspective of international arbitration, the main change concerns interim measures issued by arbitral tribunals. Currently, arbitral tribunals sitting in Italy are not empowered to grant interim measures. Under Article 818 of the Italian Code of Civil Procedure "*arbitrators may not grant attachments, or other protective measures, unless otherwise provided by the law*". There is only one significant exception based on a *lex specialis*, applicable when the dispute is based on arbitration clauses incorporated in companies' by-laws. In this specific scenario, when the validity of a shareholders' resolution is challenged, the arbitral tribunal can provisionally suspend the resolution.

In the international landscape, the Italian prohibition is peculiar. In recent decades, most jurisdictions have granted to arbitral tribunals significant powers with respect to issuing interim measures: we see this not only in common law jurisdictions such as England, Singapore or Hong Kong, but also in civil law jurisdictions. For example, arbitral tribunals can order interim measures in France (Article 1468 of the French Code of Civil Procedure), Switzerland (Article 183 of the Federal Act on Private International Law) and Germany (Article 1041 of the German Code of Civil Procedure).

The Italian approach, still echoing an ancient suspicion towards arbitration, can discourage the choice of Italy as seat of arbitration. Quite understandably, the issue has been subject to many debates within the arbitration community, with most voices asking for a reconsideration.

Arbitrators Empowered to Issue Interim Measures (with Some Requirements)

At first glance, the reform is going in the auspicated direction. Pursuant to Article 1, paragraph 15 of the Delegation Act, the reform of the Italian Code of Civil Procedure will grant to arbitrators "*the power to issue interim measures in the event of express will of the parties, manifested in the arbitration agreement or in a subsequent written act, unless otherwise provided by the law*".

In implementing this guideline, the reform will finally overcome the general prohibition under Article 818 of the Italian Code of Civil Procedure. The arbitrators' power to issue interim measures will no longer be a very limited exception. However, this power will not be as broad as some might hope: the Delegation Act sets specific requirements in relation to the grant of interim measures.

First, it will be limited to "*arbitrato rituale*". We will not discuss here the peculiar differentiation between "*arbitrato rituale*" (leading to an enforceable award) and "*irrituale*" (where the award has merely contractual effects) under Italian law. Practically speaking, in the context of international arbitration, where parties choose arbitration as an alternative to court proceedings, the choice is invariably for "*arbitrato rituale*".

More significantly, the power to issue interim measures will require the "*express will of the parties*". Such an opt-in mechanism is unusual: in many jurisdictions the arbitrators' power to issue interim measures is of general application (e.g. in France, see Article 1468 of the French Code of Civil Procedure) or, at most, it can be "*opted-out*" if the parties so agree (e.g. in Switzerland, see Article 183 of the Federal Act on Private International Law). An opt-in system is not ideal because it works properly only when the parties ponder this issue when negotiating the arbitration clause: arguably, this does not occur often. Conversely, it is unlikely that the parties will agree on this after the dispute has arisen.

Furthermore, the revised regime requires the will of the parties to be "express", which can prove to be a high threshold, especially if we construe express as explicit. Before delving into interpretative gimmicks, we should wait and see how the revision of the Italian Code of Civil Procedure will implement this requirement.

As noted by Carlevaris [1)], a major question revolves around institutional arbitration: can we argue that the parties, merely by choosing arbitration rules which provide for interim relief issued by arbitrators, manifested an "express will" on this specific matter?

If the revised provisions will simply reiterate the notion of "*express will*" without further clarification, it is easy to foresee many real-life situations in which there will be reasonable support for opposite interpretations. Such interpretive dilemmas (fascinating as they might be for lawyers), do not bode well for the overall efficiency and attractiveness of the system. Therefore, we should hope that the implementation will clarify what qualifies as "*express will of the parties*", and possibly address the matter of institutional arbitration.

The Dilemma Between Exclusive and Concurrent Power

Another relevant issue in relation to interim measures involves the coordination between state courts and arbitral tribunals. The Delegation Act provides that state courts will have power to issue interim measures only when the request has been made before the arbitrators' acceptance of the appointment. It means that arbitral tribunals will enjoy an ample sphere of exclusivity in issuing interim measures. This is a bold step forward, especially considering the general prohibition under the current regime.

However, exclusivity is not necessarily the best solution. In many jurisdictions, parties are allowed to choose freely between courts and arbitrators even after the tribunal's constitution, for all or at least some category of interim measures (see, e.g., Article 1033 of the German Code of Civil Procedure, expressly providing that state courts retain a concurrent power to issue interim measures). Moreover, the guidelines provide that it will be possible to appeal the interim measures before state courts, but such appeal will be limited to the grounds of invalid arbitration agreement and violation of public policy.

Logically, state courts will retain a decisive role in enforcing any interim measures issued by arbitral tribunals. On this very point, the Delegation Act is much vaguer, only providing that the legislative decree issued by the Government "*will discipline the manners of enforcement of the interim measure always under the supervision of the court judge*".

An Important Step Forward, But…

Overall, the Italian turnaround on interim measures is a long-awaited step forward. However, for the reasons discussed above, we might expect some criticism targeting the opt-in mechanism based on the parties' consent and, possibly, the exclusive power of arbitral tribunals once they are constituted.

Moreover, even if the reform is still to be implemented by revising the Italian Code of Civil Procedure, in some key areas the guidelines set by the Delegation Act are fairly detailed, and therefore the Government will not have much discretion. For example, the requirement of "*express will of the parties*" is rather specific and cannot be dispensed with. However, as discussed, we

might hope for some additional clarification, especially to address the issue of institutional arbitration and other potential interpretive quandaries.

In conclusion, the opening quote "*forward, but be careful*" is a fair takeaway of this reform. By allowing arbitral tribunals to grant interim measures Italy is truly going "*forward*", arguably even too far in granting them ample exclusive power. However, the requirement of "*express will of the parties*" betrays a residual suspicion: here we see the "*being careful*". Considering the goal of making Italy an attractive forum for arbitration proceedings, excessive caution might turn a good reform into a missed opportunity.

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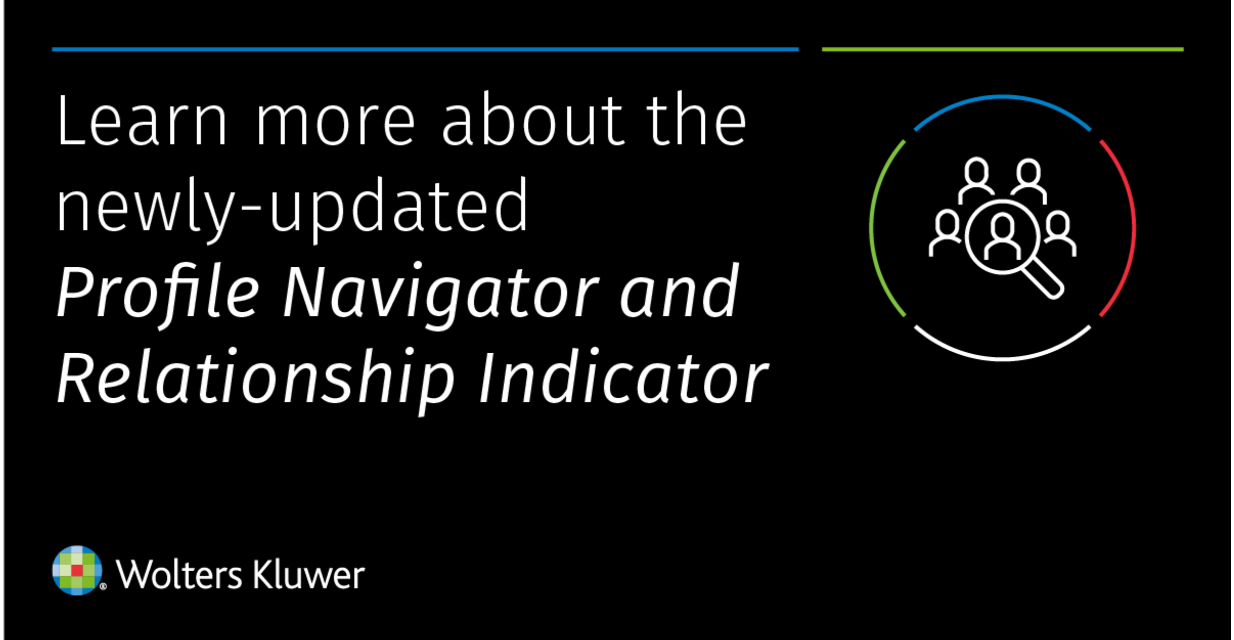

References

?1 Andrea Carlevaris, *La riforma della disciplina dell'arbitrato nella legge delega, un commento* in Newsletter AIA – N. 7/2021, pages 3-4.

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