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**INTERIM MEASURES &
ARBITRATION :
ITALIAN LAW**

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Interim measures and arbitrators: an old conflict

- Italian provisions on arbitration are contained in Book IV, Section VII of the Code of Civil Procedure “the Code” (Arts. 806 to 840)
- Those provisions have been amended in 1983, 1994, and lastly by:
- *Legislative Decree No.40/2006*, amending the provisions on arbitration contained in the Code.

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- 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.
 - Italy is also part of the 1969 Convention on International Commercial Arbitration, and
 - of the 1965 ICSID Convention

Arbitrability

- On the arbitrability of disputes:

Art. 806 of the Code states that “only disputes involving rights which can be disposed of” can be submitted to arbitration

Preliminary relief and interim measures: a weak compromise

- Legislative decree No. 40/2006 and its weak point:
 - “Arbitrators can not dispose freeizing of assets, nor can order other interim measures, **unless otherwise disposed by the law**”
 - Art. 818 Code of Civil Procedure, as amended
- Effects of violation of Art. 818 ?



A minor exception: the 2003 corporate Arbitration Law

- It governs arbitration clauses inserted in the by-laws of unlisted companies and lays down certain compulsory provisions applicable to corporate arbitration proceedings
- This law applies only when both the company's registered seat and the place of the arbitration are located in Italy

Preliminary relief and interim measures: corporate law

- However, a limited exception is provided by *Legislative Decree No.5/2003* (corporate arbitration), as to disputes regarding the validity of shareholders' meetings deliberations: in these cases, arbitrators may suspend the effectiveness of such deliberations

The 2006 General Arbitration Law. 1

- An arbitration clause may also be inserted by the parties in:
 - a shareholders' agreement;
 - a joint venture agreement;
 - a sale and purchase agreement related to the company's shares, or
 - any other agreement
- in these cases the General Arbitration Law of 2006 governs the clause and the proceedings.

The 2006 General Arbitration Law. 2

- Like France, England, Switzerland), Italy has adopted an autonomous drafting approach: as a result the General Arbitration Law of 2006 (amending article 806ff of the Code) is not based on the UNCITRAL Model law
- Since then, Italy has declared to have adopted a unitary system, which makes no longer a distinction between purely domestic and international arbitrations

Preliminary relief and interim measures. 1

- The 2006 reform, however represents a lost chance of harmonization of some aspects of Italian law with the majority of legal systems
- Unlike the free choice scheme contained in the UNCITRAL Model law (*see the 2006 amended version, Art. 17*), Italian Law on Arbitration has not recognized Arbitrators' power to order interim measures

Preliminary relief and interim measures. 2

- Art. 818 of the Code prevents arbitrators from granting interim measures.
- Preliminary relief and interim measures, therefore, must be requested to ordinary courts
- Italian law remains, in spite of wide scholarly request for a reform on this point, close to a small circle of states where arbitrators are prevented from granting interim measures.

Preliminary relief and interim measures. 3

- In those States, interim measures of protection are unavailable through the arbitral tribunal and may only be obtained through recourse to national courts
- This approach
 - denies parties the chance to choose whether arbitrators can grant provisional relief, and
 - it forces parties to resort to courts, while the parties' original intentions were to avoid judicial interference.

Preliminary relief and interim measures. 4

- Case law is severe in recognizing the mandatory nature of Art. 818 of the Code
- According to Supreme Court decisions, reasons are to be found
 - in the recognition of the private nature of the arbitration and
 - in the lacking of coercitive powers with the arbitrators, particularly towards third parties

Preliminary relief and interim measures. 5

- In my view, those arguments are weak, as they do not consider that, quite usually, interim measures consist of orders to the other party to do or not to do something, with no effects on third parties

New rules by the Chambers

- 2010 Rules by the Milano Arbitration Chamber:
 - “The Arbitral Tribunal may issue all urgent and provisional measures of protection, also of anticipatory nature, that are not barred by mandatory provisions applicable to the proceedings” (Art. 22.2.)
 - See also Arts. 22.5, 27, 28.2

Conclusion

- Italian Arbitration Law is still inhibited by limitations on the procedure
- An attempt by some Chambers (Milan, Turin) to expand the arbitrators competence on the procedure, still to be tested by the Courts