Legance

What's up in the Italian courts?

Legance Dispute Resolution Bulletin

01

October 2023

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The Editorial

Litigation, arbitration and bankruptcy proceedings have always been a major focus of attention, not only for legal practitioners, but also for those – investors and companies – who, on a daily basis, are called upon to adjust their business choices to increasingly complex regulatory frameworks, taking into account the risks of disputes.

Tools to enforce legal rights are constantly evolving and have been following the political and economic developments in recent years.

Just recently, two landmark reforms have been enacted:

- the **new Business Crisis Code** (L.D. No. 14 of January 12, 2019 as amended), applicable to bankruptcy procedures starting on or after July 15, 2022, and
- the **"Cartabia" Justice Reform** (L.D. No. 149 of October 10, 2022), applicable to civil law proceedings starting on or after February 28, 2023, except for certain provisions that had already come into force from January 1, 2023.

A third corner stone of the Italian legal system development, *i.e.*, the strengthening of **collective redress instruments** (e.g., the class action) (pursuant to Law No. 31 of April 12, 2019 and the transposition of Directive (EU) No. 2020/1828 by the Legislative Decree no. 28/2023) needs also to be considered.

The issue of this newsletter, in a new format and with new content, is the first pace of Legance Litigation, Arbitration and ADR Department's new project, which aims at addressing to the attention of clients relevant substantive civil law issues, with the goal to gather legislative and case-law updates.

Hoping that this first issue of the Legance Dispute Resolution Bulletin, will also be an opportunity for both you and us to compare notes, we remain at your disposal at disputeresolutionbulletin@legance.it

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Chapter 1

Civil justice reform: focus on the entitlement of arbitrators to issue urgent and interim measures

Within the context of the civil justice reform, arbitration proceedings have been amended, with provisions that came into effect as of February 28, 2023.

Attribution of precautionary powers to arbitrators is one of the most worth-noting innovations.

The previous – anachronistic – prohibition on arbitrators to grant interim measures, which somehow isolated Italy from other arbitration-friendly systems, has now been removed. In fact, Article 818 of the Italian Code of Civil Procedure now provides that arbitrators have the power to grant interim measures, upon agreement between the parties and on an exclusive basis.

Two initial remarks on this.

First, the innovative reach of the provision is mitigated by the fact that the arbitrators have the power to grant interim measures only to the extent that the parties have expressly agreed on attributing that power. Therefore, an arbitration clause that makes no mention of this power would not allow for an interim measure request to the appointed arbitrator/arbitration panel. In the renewed system, therefore, the arbitrators' power to grant interim measures has not become the general rule yet; conversely, it is the result of the parties' consensus on the arbitrators' scope of powers. The parties must make clear either in the arbitration agreement, or in a deed prior to the start of the proceedings, their common intention to provide the arbitrators with the power to grant interim measures.

However, the provision allows that the parties' choice may be expressed "*also by reference to arbitration regulations*". According to some authors, even if such a reference is contained in arbitration clauses that were already effective at the date the reform came into force, that can be construed as an explicit agreement on the arbitrators' power to grant interim measures. Since the most widely-used arbitration regulations provide for the possibility for arbitrators to grant interim measures, should the above interpretation be accepted, the innovative reach of the reform would be maximised.

Secondly, the reform has opted for a regime of exclusive rather than concurrent competence. Therefore, once the parties attribute interim powers to the arbitrators, that power belongs only to the arbitrators and the power of ordinary courts to grant interim measures could be exercised only before the establishment of the arbitration panel.

The reform then deals with the modalities to challenge and enforce the interim measure granted by the arbitrators.

The arbitrators' interim measure can be challenged by lodging an appeal before the Court of Appeal in whose district the arbitration panel sits (*i.e.*, the same court competent to decide on the appeal of the final arbitration award). However:

- interim measures granted by the arbitrator may be challenged only (a) on the same grounds that would allow the appeal of the final arbitral award (Article 829, para. 1, of the Italian Code of Civil Procedure) in so far as they are compatible, or (b) on if the arbitrator's interim measure is contrary to *public order*. Except for cases in which the compatibility test is straightforward – for example, in cases where the interim measure was granted in violation of the *audi alteram partem* principle (*principio del contraddittorio*) – the compatibility test will likely be highly debated in Courts and among scholars;
- the same procedural rules for challenging interim measures granted by ordinary courts shall apply to interim measures granted by arbitrators: some authors consider therefore applicable, *inter alia*, (a) the fifteen-day deadline for filing the appeal and (b) the possibility to suspend the enforcement of the measure. There are some doubts, however, about the possibility of admitting complaints in the appeal phase, which are based on circumstances not previously discussed before the arbitrators.

The reform also deals with the execution of the interim measure: the court in whose district the arbitration panel sits – or, if the seat is abroad, the court of the place where the precautionary measure is to be enforced – is the competent venue for the enforcement proceedings.

Chapter 2

Appealing an arbitral award in international arbitration for the violation of law provisions

In order to ascertain whether an arbitration award is appealable on the grounds of violation of law provisions, the procedural law in force at the time the arbitration clause was executed shall be considered, rather than the law in force at the time that arbitration proceedings were started.

This principle was recently confirmed by the Italian Supreme Court in an international case concerning a sale and purchase agreement (Italian Supreme Court, First Civil Division, November 7, 2022, No. 32752) and is previously stated in multiple decisions concerning domestic law cases.

The case in point concerned the following:

- after completing an international purchase and sale agreement, the buyer complained about some faults and defects affecting the sold assets, and thus started arbitration proceedings against the seller
- the arbitrator rejected the seller's objection on the violation of the statute of limitations (by means of a non-final award) and upheld the purchaser's claims (by means of a final award)
- however, the competent Court of Appeal annulled the arbitration awards because the Court found that the arbitrator had wrongly identified the correct law provisions on statute of limitations
- the appeal decision was then challenged before the Italian Supreme Court, also claiming that the Court of Appeal had exceeded its powers; in fact, it was contested that the law then in force admitted the invalidation of the arbitration decision only for violation of procedural rules and did not allow the Court of Appeal to scrutinize instead whether the arbitral awards were based on violation of law provisions on statute of limitations.

The Italian Supreme Court upheld that the Court of Appeal had wrongly identified the transitional rules to be applied to an international award rendered after 2006 under an arbitration convention entered into at an earlier date. In particular, to understand whether an arbitral award can be challenged for the violation of law provisions (other than procedural rules), the law applicable at the moment the convention of arbitration was entered into shall be considered. Consequently, the Court of Appeal should have applied the former version of Article 838 of the Italian Code of Civil Procedure, since that was the applicable provision at the time of execution of the arbitration clause and, therefore, it should have declared that the current Article 829 of the Italian Code of Civil Procedure was not applicable.

Chapter 3

Guarantees and commercial lease agreements

In Judgment No. 33968 of November 17, 2022, the Third Civil Division of the Italian Supreme Court ruled again on the duration of a third party guarantee to secure the performance of the tenant's obligations in a commercial lease agreement.

The case submitted to the Court concerned a third-party guarantor who, after receiving Court injunctions to pay overdue rent instalments unpaid by the tenant, challenged the decision before the Italian Supreme Court claiming that the guarantee was to be considered valid only for the first six-year period between the execution of the commercial lease agreement and its first expiration, and not for the six years following tacit renewal of the commercial lease.

The Italian Supreme Court, however, confirmed the existing case law and found that the guarantee was still valid. In particular, the Court noted that, by virtue of the necessary coordination of the general rules on leases (Articles 1597, 1598 and 1938 of the Italian Civil Code) and the specific rules on commercial leases (Articles 28 and 29 of Law No. 392/1978), the guarantee to secure the obligations of the tenant of a commercial building necessarily continues (unless mutually otherwise agreed upon by the parties) until the expiration of the second six-year term. It is in fact only from that time onwards that the lease can be terminated without restrictions (according to the *ratio* of Article 1597 of the Italian Civil Code). Conversely, at the end of the first six-year period, termination can be sought by landlord only in specific legal cases.

Chapter 4

Settlement agreement reached after the issuance of an injunction order

In a very recent ruling, adopted on January 10, 2023, No. 372, the Italian Supreme Court established a principle of relevant practical significance in the matter of injunction procedure.

The Italian Supreme Court was requested to decide on an appeal judgment that had rejected the opposition to a payment injunction. In the case at issue the opponent had entered into a settlement agreement with the other party in relation to sums due under the payment injunction - which had been fully paid. The point to be decided was whether there was a lack of interest by the opponent in pursuing his opposition against the payment injunction.

The Italian Supreme Court, having determined that the settlement agreement had been concluded after the issuance of the injunction decree and before the deadline for opposition had expired, clarified that challenges in the merit to extinguish or modify the payment injunction have to be discussed within the opposition proceeding (and not within the enforcement proceedings, where only claims can be raised, which are based on facts occurred after the judgment becomes *res judicata*).

In the case under consideration, the parties had concluded the settlement before the deadline for opposition expired - and therefore before the payment injunction can become *res judicata*. Consequently, because the settlement agreement was concluded before the formation of *res judicata* it could not have been enforced in any enforcement proceeding.

Chapter 5

The representative action to protect consumers' collective interests

On April 7, 2023, the legislative decree no. 28/2023 – transposing in Italy EU Directive 2020/1828 – was approved. The aim of the directive is to provide consumers in Member States with an effective and uniform instrument of collective protection, both at a national and European level, thanks also to the possibility of establishing cross-border class actions.

The discipline contained in the legislative decree - which is entered into force on June 25, 2023 – will complement the provisions already in force in Italy, recently reformed by Law No. 31 of 2019, and will establish the so-called "*azione rappresentativa*" ("representative action").

The scope of application of the new framework is set out in Annex I of the directive and includes cases of breach of European legislation concerning: unfair commercial practices; misleading advertising; transportation contracts; electricity and gas; mobile phone; personal data protection; food safety; insurance and investment funds.

Associations of consumers and users listed in special registers kept by the Italian Ministry (*Ministero delle imprese e del made in Italy*), which will indicate the associations authorised to carry out cross-border class actions, will have *locus standi* to bring legal actions.

Within such new framework, authorised associations will directly and personally hold the rights they might claim in courts and, therefore, the prior adherence of consumers will not be necessary. Furthermore, national independent public authorities, as referred to in Article 3(6), Reg. (EU) 2017/2394, *i.e.* "*any public authority established either at national, regional or local level and designated by a Member State as responsible for enforcing the Union laws that protect consumers' interests*", shall have standing to sue if so requested by them.

On July 26, 2023, a decree of the Italian Ministry (*Ministero delle imprese e del made in Italy*) was published in the Official Gazette (*Gazzetta Ufficiale*), outlining the procedures by which associations, as well as national independent public authorities, are required to submit applications – along with the documentation specified in the decree – to legitimize themselves for cross-border representative actions and/or communicate their intention to qualify for promoting national actions by sending a communication to the Ministry's designated certified e-mail adress. The process is simplified for associations already listed in accordance with Article 137 of the Consumer Code.

The list of associations and authorized bodies for representative actions shall be communicated to the EU Commission and published on the Italian Ministry's website. The Ministry verifies the continued compliance with the requirements stipulated for associations under the

Consumer Code, including those raised by the EU Commission or a member state, has a duty to remove associations or organizations from the special section when necessary and collects information on actions initiated by authorized entities.

On the other hand, professionals, defined as "*any person or legal entity that, regardless of whether it is a public or private entity, acts, including through another entity acting in its name or on its behalf, for purposes relating to its commercial, entrepreneurial, craft or professional activity*", will have the standing to be sued.

As for the remedies that might be sought, the new framework allows both **injunctions**, which may also be accompanied by financial penalties in case of delays in complying with them, as well as **orders for compensation**. Those remedies can also be combined.

With reference to injunctions, it is worth noting that the applicant will not have the burden of proving the fault and wilful misconduct of the trader and the suffered loss and damage, as they are presumed.

Besides the possibility for the parties to file settlement proposals after the commencement of the proceedings, the new framework also provides for the power of the Court to invite the parties to reach an amicable settlement of the dispute.

Finally, the legislative decree specifically mentions the funding of representative actions. Although it does not appear to regulate the matter (it merely sets out rules on conflict of interest), this reference could be interpreted as opening the system to third party funding.

Chapter 6

Statute of limitation of claims for payment and composition with creditors

Judgment No. 35960, issued by the Third Division of the Italian Supreme Court on December 7, 2022, offers some interesting considerations regarding the relationship between the composition with creditors procedure and the statute of limitation period of a creditor's claim.

In particular, in the case that we discuss here (a) the company's agreement for a composition with creditors had been terminated, (b) one of the creditors submitted an application for admission of his receivable in the then insolvent company's list of payables, but (c) the judge in charge of the composition rejected that request arguing that the statute of limitation of the receivable had already expired.

In the subsequent judicial proceedings, the judge confirmed the decision of the judge in charge of the composition, rejecting the argument that the statute of limitation was suspended during the composition procedure pursuant to Article 2941, no. 6 of the Italian Civil Code.

The creditor therefore lodged an appeal before the Italian Supreme Court noting, *(i)* that the statute of limitation period runs only from the judgment declaring the company's bankruptcy (*i.e.*, after termination of the composition agreement); *(ii)* that the suspension of the statute of limitation is further confirmed by the fact that, pending the composition, the company cannot freely manage its asses (Article 2941, no. 6 of the Italian Civil Code), and *(iii)* that, because of the company's failure to challenge the credit in dispute, the creditor had no interest in taking actions until the composition agreement is in force, and that again determines the suspension of the statute of limitation period.

The Italian Supreme Court based its reasoning on the provision under Article 184 of the Italian Bankruptcy Law, which – for the sake of the *par condicio creditorum* principle – provides that the composition with creditors, once authorized by the Court, shall be mandatory for all creditors who have credits existing before the publication of the petition for the composition with creditor's procedure (Article 161 of the Italian Bankruptcy Law). As that is a mandatory agreement and it is forbidden that company's debts be paid by other means, the Court ruled for the applicability of Article 2953 of the Italian Civil Code (10 years statute of limitation from the time the judicial decision is issued). That rule, as confirmed multiple times by the Italian Supreme Court itself, applies whenever there is a legal obstacle to pursue a claim.

The Italian Supreme Court therefore concluded that the limitation period of the credit existing before the publication of the petition under Article 161 of the Italian Bankruptcy Law shall not run until the claim is subject to the composition with creditors agreement.

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