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Court assistance in the taking of evidence in arbitral proceedings: The Italian perspective

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Arbitral tribunals lack coercive powers with respect to the taking of evidence. Accordingly, parties to arbitration would normally have to resort to the assistance of state courts to: compel the appearance of witnesses; secure the preservation of evidence; and, order the production of documents.

The scope of state court assistance in evidentiary matters is laid down in the law of the seat of the arbitration. The rules described below apply to arbitral proceedings with an Italian seat.

Appearance of witnesses

The 2006 reform of Italian arbitration law introduced specific rules designed to compel the appearance of witnesses in arbitral proceedings. Specifically, pursuant to article 816-ter, second and third paragraphs, of the Italian Code of Civil Procedure (CCP), “[t]he arbitral tribunal may hear witnesses [...]. Should a witness refuse to appear, the arbitral tribunal, if it so deems proper appropriate in light of the circumstances, may request the chairman of the court where the seat of the arbitration is established to order the appearance of the witness.”

In Italy, unlike similar rules existing in other countries and the Model Law, only arbitral tribunals (and not the parties) are vested with the power to seek assistance from state courts to compel the appearance of witnesses.

Arbitral tribunals enjoy a certain degree of discretion in deciding whether to resort to the state court for assistance. The factors that it would normally consider include: the reasons given by the witness for his/her refusal to appear before the arbitral tribunal; whether a party has filed a petition with the arbitral tribunal seeking state court assistance; and, the probative value of the witness testimony for the outcome of the case.

Pursuant to Article 816-ter, fourth paragraph, CCP, if the arbitral tribunal seeks state court assistance, the time limit for the rendition of the award is stayed until the hearing date for the appearance of the witness before the arbitral tribunal. If a witness refuses to appear, even after a state court has ordered it, the arbitral tribunal may request the state court to compel such appearance with the assistance of law enforcement pursuant to article 255 CCP.

Preservation of evidence

Prior to the 2006 reform, Italian arbitration law did not contemplate any form of state court assistance in evidentiary matters. To fill this vacuum, a number of scholars had suggested resorting to the rules of the CCP governing the preservation of evidence in anticipation of litigation proceedings. Specifically, a party may seek urgency measures from the court aimed at: securing pre-trial witness depositions if there are “strong reasons to believe that one or more witnesses may not be available during the proceedings,” for example, due to health reasons (article 692 CCP); and, ordering pre-trial inspections of objects or premises if there is “urgency to ascertain their status or condition” (article 696 CCP).

The Italian Supreme Court repeatedly dismissed attempts to seek court-ordered urgency measures in aid of arbitral proceedings on the grounds that the parties’ agreement to arbitrate precludes reliance on provisions intended to apply to court proceedings.

