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ITALY: NO COUNTRY FOR ARBITRATORS?*

The title of my presentation, besides being a play on the title of the Coen brothers film[1], makes it clear that Italy is not exactly the most hospitable environment when it comes to the popularity of arbitration. It is true that statistical data, when available, concern essentially institutional arbitration[2] [1; 7, p. 39] (the empirical data are not really updated. The only comprehensive survey of ADR in Italy concerns 2016; in that year the total number of arbitration procedures carried out by private and public institutions was 708 (784 in 2015) and can be considered misleading, at least to a certain degree, since nothing is officially known of the phenomenon of ad hoc arbitration, which, apparently, is very popular but escapes survey. In any event, my purpose here is to sketch out some of the reasons why arbitration is still an elitist method for resolving disputes, in general – as we will see – commercial disputes.

Keywords: civil procedure, arbitration, disputes resolution, civil and commercial disputes.

Introduction. The fact that arbitration is not popular in Italy may sound surprising in light of the fact that, notoriously, the Italian wheels of justice grind slowly. I can give you some data: according to the latest statistics released by the Department of Justice, the average length of a civil case before the courts of first instance is 981 days (approximately two years and eight months); the average length of an arbitral procedure (before the Milan Chamber of Arbitration, which is the largest Italian arbitral institution) is thirteen months [2] thus only a little more than one year. Still, in spite of the obvious advantage in terms of a speedy disposition of cases, Italian litigants prefer to turn to the court system. Are we then a country of masochistic individuals? Not exactly. I would say that litigants stay away from arbitration for a variety of reasons. Let me identify two of them.

Presenting main material. One reason has to do with the legislation on ADR that is in force in my country.The landscape of ADR methods other than arbitration includes mediation, assisted negotiation, special forms of conciliation, hybrid out-of-court procedures for particular matters (such as banking, investment and insurancedisputes), consumer ADR established to implementEuropean Directive 2013/11/EU on alternative dispute resolution for consumer disputes and – last but not least – online dispute resolution mechanisms. Some of these multifaceted ADR procedures are mandatory, and that fact already reduces the number of cases that could benefit from ending up before an arbitral tribunal. As I have written elsewhere, in Italy the conventional wisdom according to which toolarge an amount of a positive orusefulthingcan be harmful or excessive has gained new meaning with reference to the overabundance of ADR methods, none of which seems to be completely satisfactory or suitable as offering individuals a true and effective alternative to slow and cumbersome judicial procedures [3, p. 29].

A second and, one may say, powerful reason preventing arbitration from becoming more popular is sociological.Many people feel intimidated not only by the high costs of arbitration procedures, but also and most of all by the aura surrounding arbitral tribunals, which are commonly perceived as venues unwelcoming to ordinary people, the people who cannot afford to hire glamorous lawyers in double-breasted suits and pay their fees according to a billable hours system. Is this fearfulnessthat arbitration instills in so many justified and, if so, is it possible to change litigants' attitudes? Honestly, I have no definite answers. I can only tell you that, at present, arbitration concerns essentially disputes arising out of commercial contracts, and therefore not the typical garden-variety cases that crowd the courts' dockets. A caveat is in order, though. The fact that the caseload of arbitral tribunals is made up of a majority of commercial cases does not necessarily mean that the average value at stake is high: to the contrary (and again based on the statistics of the Milan Chamber of Arbitration), the average value of (domestic) arbitration procedures handled in 2017 was less than €5,000 [2].

Let us now consider the attitude of the Italian legal system as a whole towards arbitration (The literature on Italian arbitration law written in English is not extensive) [5, 6, 7, 8]. Arbitration is governed by a detailed set of rules in the fourth book of the Code of Civil Procedure. Keeping in mind that the Code was enacted in 1942, the rules on arbitration have been updated several times, in 1983, 1994 and 2006. A statute enacted in 2014 for the establishment of assisted negotiation tangentially concerned arbitration, too, but – as we will see – up to the present time the statute has remained a dead letter. Every reform of the rules on arbitration has pursued the goal of modernizing the arbitral procedure with a view to increasing its appeal. Yet, one may truly say to no avail. All the same, examining the rules laid down by the Code, one is inclined to conclude that if the legislators wanted to update the arbitral procedure, probably they have taken the wrong road. The terms ofreference for the amendments have been the steps through which judicial procedures develop. In other words, the arbitral procedure has lost some of its most remarkable features, namely its informality and flexibility. In several aspects there is an extraordinary resemblance between the arbitral procedure and the judicial procedure. This is clear,

*This essay reproduces the text of a presentation given in Skopje, Republic of North Macedonia, at the International Arbitration Conference 28–29 March 2019 organized by the Economic Chamber of Macedonia, on the subject 'From Arbitration Legislation Reform to Enhancing the Business Climate'.

[1] This essay reproduces the text of a presentation given in Skopje, Republic of North Macedonia, at the International Arbitration Conference 28–29 March 2019 organized by the Economic Chamber of Macedonia, on the subject 'From Arbitration Legislation Reform to Enhancing the Business Climate'; The film referred to in the text is *No Country for Old Men* (Miramax Films, 2007).

[2] Bonsignore V. La ricercalsdacisulla diffusione della giustizia alternativa in Italia nel 2016 in ISDACI-Istituto per l'arbitrato, la mediazione e il diritto commerciale. *Decimo rapporto sulla diffusione della giustizia alternativa in Italia*. ISDACI 2018, 7, 39.

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for instance, if one looks at the many grounds for which the arbitral award can be challenged, not to mention the fact that arbitral awards (exactly like court judgments) can be subject to extraordinary appeals known as revocation and third-party opposition.

The same 2014 statute I mentioned that established assisted negotiation also provided for the so-called transfer of cases already pending before a court to an arbitral tribunal (The statute in question is statute no. 162 of 10 November 2014). The convoluted procedure and the lack of any foreseeable advantages resulting from such a transfer have been received in a very negative way by the legal community, to the point that almost five years have gone by since the entering into force of the statute and we are still waiting for the first recourse to the transfer procedure.

It is worth mentioning, though, that in the 2014 statute one can see an attempt at fostering arbitration, which signals that Italian institutions today are not against arbitration as they have been in the past, when the state was not inclined to relinquish its monopoly in the resolution of disputes. Along the same lines, the Italian Constitutional Court has repeatedly stated that arbitral justice is the functional equivalent of state justice, so that an arbitral award is totally comparable to a court judgment as far as the type of relief granted and the effects of the holding that is the essence of the decision.

Be that as it may, I would now like to advance some modest proposals on how the appeal of arbitration could be reinforced. The first issue that comes to mind is the issue of arbitrability. According to the Code of Civil Procedure (Article 806, section 1), the only disputes that can be submitted to arbitration are the ones concerning rights that the parties can freely dispose of (in Italian, *diritti disponibili*). Many European legal systems recognize the distinction between disposable rights and non-disposable rights, the latter concerning, for instance, the status and capacity of individuals, and therefore I imagine that you understand what I mean. There are also disputes that cannot be arbitrated even though the rights involved are, in principle, rights that the bearer can dispose of. This is the case, for instance, with disputes in the field of labor relations for which special rules provide for particular forms of arbitration before specialized bodies. One may advance the theory that, in order to foster the development of arbitration, the concept of 'arbitrability' as it emerges from the Code should be softened, so as to include a wider array of cases. Areas that would benefit from a less stringent requirement of arbitrability would be intra-corporate disputes, consumer law and, most of all, family law. In recent years, Italy has embraced the idea that separation of spouses and divorce can be handled as private matters, at least when no minor children are involved. Nowadays, separation and divorce can be obtained via either private procedures in the form of negotiation assisted by attorneys or statements collected by public registrars. One may argue that if the dissolution of a marriage is not a judicial matter any longer, then there should be no obstacles to admitting that the economic aspects related to a separation or divorce fall within the category of 'disposable rights', so that disputes concerning, for instance, alimony or the division of assets between the spouses when community property is dissolved can be resolved through arbitration, without any necessity to resort to judicial procedures.

From a different angle, arbitration could benefit from some improvements in the way the arbitral procedure is regulated by the Code. I mentioned already the fact that a number of steps in the procedure are too similar to the corresponding steps in a judicial proceeding. Another aspect that seems almost at odds with what I just mentioned is that the freedom from strict forms that is supposed to be a particular trait of arbitration is more theoretical than practical. This is clear most of all in the evidence-taking stage of the arbitral proceeding, the stage at which it is quite unclear to what extent arbitrators can take evidence *ex officio*. Against the background of the rules governing arbitration there is an ambivalent attitude on the part of the legislators: arbitration can substitute for adjudication, but certain powers pertaining to the courts cannot be delegated to arbitrators. This is the case with regard to the power of issuing interim protective measures that can be obtained only by petitioning the appropriate court, even though the application for an interim measure does not imply any stay of the arbitral proceeding.

Conclusions. In light of the problems affecting Italian civil justice, one may wonder which strategies could be put to work to increase the appeal of arbitration. First of all, I believe the time has come to get rid of a distinction that is only known in Italy and that causes a great deal of confusion, at least in the eyes of foreigners. I am making reference to the distinction between true arbitration (*arbitrato rituale*), the one that is governed by the Code of Civil Procedure and at the end of which the sole arbitrator (or the arbitral tribunal) issues an award producing the same *res judicata* effects as a court judgment, and so-called 'free arbitration' (*arbitrato irrituale*). Dispensing withthe complex details, suffice it to say that free arbitration is not real arbitration, since it results not in an enforceable award but in a contract that is binding on the parties just as any other contract is. If a party does not comply with the award arrived at through free arbitration, the other party can bring to court an ordinary action for breach of contract.

Finally, I suggest that a good way to promote arbitration would be to devise a fast-track arbitration available most of all for the resolution of disputes in which the value at stake is modest and the legal issues in controversy are not highly complex. As we have learned from the experiences of several renowned arbitral institutions operating at the international level, fast-track arbitration is characterized by strict time limits that apply to the parties and the arbitrators equally, as well as by a significant limitation of procedural steps (meaning, for instance, restrictions on the number of written submissions, but also on the number of hearings). Fast-track arbitration also relies on the new communication tools made available by modern technology. What I envision is an expedited, flexible, truly informal and possibly inexpensive procedure that could realistically compete with ordinary adjudication.

At present, though, the Italian Government is at work on the umpteenth reform of the procedure before the courts of first instance, and there are no hints that the rules governing arbitration will change in the near future. Therefore, I am reasonably sure that at least for the time being Italy will remain no country for arbitrators.

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ІТАЛІЯ: АРБІТРАМ ТУТ НЕ МІСЦЕ?

Назва роботи, окрім того, що пов'язана назвою з фільмом братів Коен, дає чітко зрозуміти: Італія не є гостинним середовищем, якщо йдеться про популяризацію арбітражу. Статистичні дані свідчать, якщо вони є доступними, то стосуються, головним чином, інституціонального арбітражу (емпіричні дані насправді не оновлюються, єдине всебічне узагальнення АДР в Італії було проведено у 2016 р.; у цьому році загальна кількість арбітражних процедур, виконаних приватними та державними установами, досягла 708 (784 у 2015 р.) і можна вважати оманливим, принаймні певною мірою, оскільки офіційно нічого невідомо про феномен adhoc-арбітражу, який, мабуть, є дуже популярним, але не враховується під час проведення узагальнення. У будь-якому випадку метою статті є окреслити причини, чому арбітраж все ще залишається елітарним методом урегулювання спорів, загалом – як ми бачимо – для комерційних спорів.

Ключові слова: цивільний процес, арбітраж, урегулювання спорів, цивільні та господарські спори.

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И. ДАНИЛОВИЧ – ПЕРВЫЙ ДЕКАН ЮРИДИЧЕСКОГО ФАКУЛЬТЕТА КИЕВСКОГО УНИВЕРСИТЕТА

Посвящено известнейшему ученому-юристу первой половины XIX ст., первому декану юридического факультета Киевского университета Святого Владимира профессору Игнату Николаевичу Даниловичу (1788–1843). Автор из разрозненных сведений постарался комплексно раскрыть его научно-педагогическую деятельность. Несмотря на недоверие к нему со стороны имперской власти, он стал родоначальником научного исследования права Великого Княжества Литовского, продолженного позже украинскими, русскими и белорусскими учеными.

Ключевые слова: И. Данилович, Вильно, Харьков, Петербург, Киев, Москва, наука, университет, юриспруденция.

Вступление. Чтобы лучше осмыслить настоящее и спрогнозировать будущее, необходимо хорошо знать прошлое. Такое утверждение не новое. Однако история свидетельствует о том, что многое из прошлого мы не знаем, или знаем недостаточно по разным причинам. В гуманитарных науках это происходило, бывает и сейчас, во многом из-за советского классового подхода, идеологических и политических взглядов руководства СССР. Ныне в гуманитарных науках нет однозначного отношения к нашему прошлому. Или мы все отрицаем, что было в советский период истории, или все поддерживаем. Имеется и взвешенный подход. Автор придерживается последнего. Ученый должен стремиться объективно исследовать избранную тему, несмотря на свое мировоззрение и свои предпочтения. Это не так просто осуществить, так как мы вольно или невольно придерживаемся определенных идеолого-политических взглядов.

Не случайно наш знаменитый земляк, известнейший отечественный юрист, тонкий ценитель источников права профессор Игнат Николаевич Данилович (по польски – Ignacy Daniłowicz) писал, что "в Истории стократно более заслуживает благодарность тот, кто издает в мир старые акты и Летописи, нежели тот, кто составляет Историю по готовым книгам. Скольких избежали бы ошибок, если бы все рукописные Летописи и акты народов были напечатаны; сколько заменили бы они собою лучшая ненужных, обременяющих письменные столы Ученых" [1, с. 114]. И это естественно, так как познание права, как и других сфер жизнедеятельности людей, невозможно без знания источников права. Вот почему Игнатий Николаевич практически всю свою жизнь посвятил выявлению, сбору, обработке, печатанию и объяснению письменных источников права. Прежде всего, именно за это мы и должны быть ему глубоко благодарны.

Актуальность темы. Исследование о жизнедеятельности профессора И. Даниловича в целом и о первом декане юридического факультета Киевского Императорского университета в частности не нашло должного рассмотрения в историко-правовой науке. Имеются отдельные эпизодические материалы в Интернете, в работах некоторых авторов. Ссылки на отдельных из них будут в этом материале, но они не дают комплексного представления об этом удивительном ученом и гражданине. Поэтому автор будет ссылаться в своем большинстве на работы непосредственно И. Даниловича. Исследование темы позволит лучше осмыслить развитие юридической науки в первой половине XIX в.

Изложение основного материала. Чтобы лучше понять, за какие достижения и почему именно он стал первым деканом юрфака Киевского университета, следует познакомиться с его жизнедеятельностью. Родился И. Данилович 30 июля (10 августа) 1788 г. в

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