The first blow is half the battle; the ‘torpedo’ in (international) legal proceedings

Procedural law provides the rules of play for litigation. As lawyers in (international) litigation practice, we increasingly see, however, that procedural law can be of service when making strategic choices before commencing and/or during proceedings. One good example in this context is “forum shopping”, where one party from several objectively competent forums unilaterally selects the forum where a favourable decision is anticipated. The (strategic) choice of where an action is brought is not reserved solely to potential claimants.

The (potential) defendant can also exert influence on this. A defendant or potential defendant can do this by claiming what is termed a negative declaration (also described as filing a negative action). This is understood to mean a claim of a defensive nature. The final objective of a negative action is to obtain a declaratory decision to the effect that a subjective right on which a potential claimant is or might be relying does not exist, or at least that its substance is more restricted than the claimant or potential claimant suggests. Bringing a negative action therefore means that a party has control (to some extent) over the jurisdiction where the proceedings are commenced. In the past, potential defendants often opted for a jurisdiction that was known for protracted proceedings (for instance, due to backlogs in the courts), so as to cause delays (which might be advantageous). Italy used to be well-known as a jurisdiction with protracted proceedings, therefore reference was made to “launching an Italian torpedo” when a potential defendant initiated a negative lawsuit (before an Italian court).

Protracted proceedings now appear to be much less of an issue with Italian courts and (as we shall explain below) factors other than protracted proceedings can be of relevance in determining which court in which country should be approached pre-emptively by a potential defendant. Against this background, it is no longer customary to talk about “Italian torpedoes”, though practitioners nowadays ordinarily talk about torpedoes (and launching them).

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