Briefing

24 December 2021

Italy: Parliament passes civil justice reform bill

On 26 November 2021, the Italian Parliament passed a new bill (Law No. 206/2021) delegating the Government to adopt one or more decrees to reform the civil justice system. The bill sets out the guiding principles and criteria that the Government will have to follow. The implementing decrees will be adopted within one year from the entry into force of the bill.

The bill was published in the Official Journal on 9 December 2021 and therefore it will enter into force on 24 December 2021.

The overarching goal of the reform is to ”simplify, expedite and rationalize civil proceedings” (art. 1, para. 1). This is in line with the commitments undertook by the Italian Government under the National Recovery and Resilience Plan (NRRP), as part of the Next Generation EU (NGEU) programme, "to reduce the average length of civil proceedings by more than 40 per cent" (p. 99) and the "backlog of cases in the ordinary courts of first instance", reducing by 65 per cent the number of pending cases compared to 2019 (by mid-2024).

The most important changes concern proceedings of first instance, of appeal and before the Court of Cassation. To reduce the number of pending cases, the reform also strengthens the main alternative dispute resolution mechanisms (ADR), arbitration, mediation, and assisted negotiation. It also aims at reforming enforcement proceedings and the Trial Office (“Ufficio per il Processo”).

First Instance Proceedings

The first hearing and the activities preceding it will become more important during first instance proceedings. The goal is to encourage an immediate discussion between the parties and to avoid that at the hearing the judge merely sets the time limits for written pleadings, as it frequently happens at present. To this end, according to the new bill:

- the plaintiff will be entitled - before the first hearing - to put forward new claims and objections and to summon third parties if this is a consequence of the defendant's counterclaims or objections. Analogous powers will be granted to the defendant;

- the parties will appear in person at the hearing with a view to try and settle the dispute before the judge and the failure to appear in person might be taken into account by the judge against the absent party;

- the judge will decide on the requests for evidence at the first hearing, and then schedule the hearing for the taking of evidence within the following 90 days.

In addition, the bill directs the Government to:

- reform the final phase of the proceedings by replacing the current hearing devoted to the mere restatement of the pleas of the parties ("udienza di precisazione delle conclusioni") with a new final hearing coming after the final written pleadings of the parties (subject to shorter and peremptory deadlines);

- ensure that the judge can make a settlement proposal up to the final stage of the proceedings - an option now limited to the initial phase of the litigation;

- reduce the number of cases in which the Court of First Instance sits as a panel as opposed to as a single judge;

- generalize the application of the summary proceedings, i.e. an expedited and simplified procedure currently applicable only for specific matters. This procedure should become available for all cases that do not require an evidentiary phase (or in which documents are the only evidence);

- provide that the judge may, by way of appealable order, either grant the application with a provisionally enforceable order or reject it, if it is manifestly ill-founded.

Appeal

Appeal proceedings are reformed with the aim of simplifying the procedure and discouraging groundless appeals. To this end:

- regarding the so-called "appeal filter", appeals that do not have a reasonable chance of being upheld are declared manifestly ill-founded (and no longer

inadmissible) at the end of an oral hearing (and no longer beforehand) with a briefly reasoned judgment (and no longer with an order);

- the first instance judgment remains immediately enforceable, but the appellant may, even more than once, request the appellate court to stay the enforceability or execution of the judgment. The stay will be granted if the appeal appears to be manifestly founded or, alternatively, if there is a risk of serious and irreparable harm for the appellant. Currently, the two requirements are not alternative, but shall both be met to grant the stay;

- the reform reintroduces the "consigliere istruttore", a judge appointed by the president of the panel who oversees all activities leading to the final decision, including the admission or taking of evidence.

Court of Cassation

The main changes that the reform will bring about regarding the proceedings before the Court of Cassation are:

- a new preliminary reference procedure to the Court of Cassation. Through this procedure, lower courts submit in advance to the Supreme Court a question of law, both important for the specific case at hand and in general. The referral determines the suspension of the proceedings before the lower court and the Court of Cassation directly resolves the question with a binding decision for all the subsequent stages of the case;

- final civil judgments subsequently found in conflict with the European Convention on Human Rights or with one of its Protocols can be revoked (whereas before the reform the only remedy available was monetary compensation);

- the filter panel of the Supreme Court is eliminated. An expedited procedure for defining inadmissible, frivolous, or manifestly ill-founded cases is introduced. Under this new procedure, upon notice by the judge, the parties have the possibility to opt for a simplified hearing in chamber or to abandon the appeal altogether. The latter possibility is encouraged by excluding for the unsuccessful party the payment of the court fee otherwise due as a penalty.

Mediation and Assisted Negotiation

Another goal of the reform is to encourage the use of mediation and assisted negotiation as alternative dispute resolution mechanisms. The new rules will be collected in a new organic act on ADR. The most important changes envisaged include the following:

- new tax incentives and the possibility, introduced for the first time by the COVID-19 emergency legislation, to participate remotely in mediation meetings upon agreement of the parties;
- new cases of mandatory mediation, i.e. cases where the parties must first try to settle their dispute through mediation before commencing judicial proceedings. Mediation will be mandatory also for disputes concerning joint ventures ("associazione in partecipazione"), consortiums, service and network agreements, subcontracting, supply agreements, and partnerships ("società di persone"). In 2020, according to data from the Ministry of Justice, mandatory mediation was successful in 28% of cases;
- simplification of the assisted negotiation procedure with the possibility for the parties to agree on an evidentiary phase. This new phase will make it possible to take statements from third parties or to question the parties to obtain statements with the value of a confession. The aim is to enable the parties to better assess the risk of the case, thus encouraging settlements.

Arbitration

Arbitration is strengthened with the aim of reducing litigation. The main changes concern the rules on impartiality and independence of arbitrators of and their power to grant interim measures:

- the reform introduces a general duty of disclosure for arbitrators, as existing in many other jurisdictions. When accepting the appointment, arbitrators will be required to disclose all the facts that may affect their impartiality and independence (e.g. links with the parties or their counsel) and any omission may result in the disqualification of the arbitrator;
- the parties will have the right to challenge arbitrators "for serious reasons" that may give rise to doubts as to their impartiality or independence;
- the arbitral tribunal will have the power to order interim measures, if expressly agreed by the parties. This will exclude the jurisdiction of State courts, except for the phase prior to the acceptance of the arbitral tribunal. The interim measures

adopted by the arbitral tribunal will be subject to appeal before State courts, which will also oversee the enforcement of such measures.

Enforcement Procedure

To rationalise and expedite enforcement proceedings, one of the crucial pillars of the civil justice system, the reform will:

- eliminate the requirement to obtain the order for enforcement ("formula esecutiva") before enforcing judgments and court orders (a requirement generally considered formalistic and outdated). A certified copy of the authority to execute, extracted and certified by lawyers, will suffice;
- speed up the procedure for vacating illegally occupied properties;
- speed up real estate enforcement proceedings by providing that the debtor may be authorised by the judge to directly sell the attached property, for no less than its market value;
- set out the criteria to determine the amount and duration of indirect coercive measure ("astreinte") in order to foster its usage.

Measures Directly Applicable

The reform bill, in addition to setting out the guiding criteria for the Government, directly introduces certain measures applicable to new proceedings started after 22 June 2022. In particular, for enforcement proceedings regarding sums and assets held by third parties ("esecuzione forzata presso terzi"):

- when the debtor is a public administration, the competent judge is where the State Attorney has its office within the district of residency of the creditor (thus abandoning the criterion of the residency of the third party who has a debt vis-à-vis the public administration);
- the creditor must inform both the debtor and the third party that the case has been registered with the Court, to ensure that they are aware of the pending proceedings.

Trial Office and Service

The Trial Office was introduced in 2014 to support judicial activities. According to government data, currently, 106 ordinary courts and 22 courts of appeal in Italy have established a Trial Office. The National Plan for Recovery and Resilience aims at fully implementing the Trial Office by investing in it (more than € 2 billion) as a tool capable of reducing the duration of proceedings and the backlog of courts. To this end, the reform envisages the establishment of the Trial Office also at the Supreme Court and at the General Prosecutor's Office and delegates the Government to review the applicable regulations.

The reform also concerns the service of process. For persons with a certified e-mail address (PEC), service will be exclusively by PEC. For the others, service by bailiff will remain possible, but new legislation will be introduced to increase the use of computerised and telematic tools.

The Reform: Good News?

The goals of the reform – "to simplify, expedite and rationalize civil proceedings" – are certainly to be welcomed. But the proof of the pudding is in the eating so we need to wait (at least) for the Government delegated decrees to find out to what extent the reform will achieve them.

Generally speaking, it seems that the reform will mostly affect the parties and their activities (increasingly subject to peremptory and tight deadlines), without intervening (at least not with peremptory deadlines) on the activity of judges. Yet, the study commission inspiring the reform, the so-called Luiso Commission, had pointed out that "the bottleneck of the declaratory proceedings is the judgment" (p. 4). This suggested that measures intervening on the organizational and structural level (as it has been partially done with the Trial Office) ought to be the priority. Without these measures, the risk is to impose limitation on the parties' rights without speeding up the proceedings.