

NEWSLETTER

November 2022

# The new civil trial

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Legance

## 01. Background

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On 17 October 2022 Legislative Decree No. 149/2022 carrying the reform of civil procedural rules (the "**Legislative Decree**") was published on the Official Journal. The Legislative Decree finally implements the previous Delegation Law No. 206 of 26 November 2021 ("*Delegation to the Government for increasing the efficiency of civil trials, reviewing alternative dispute resolution mechanisms and taking urgent measures for rationalising the procedures regarding rights of individuals and families as well as enforcement procedures*") (the "**Delegation Law**").

The Legislative Decree aims to achieve the three objectives of **simplification, speed** and **streamlining** of civil trials as envisioned by the Delegation Law, while still respecting the principles of an adversarial process and the effectiveness of the right of defence, which remain the guiding light of the reform.

In this context, it is worth reminding that the reform of justice was one of the objectives agreed with the European Union in order to access the financial resources of the National Recovery and Resilience Plan ("**NRRP**"). The Legislative Decree seems to have now satisfied those measures, which had been required at the European level. Indeed the Legislative Decree aims at a better and more efficient management of civil proceedings, also in light of the need to adapt the Italian justice timeframe to the dynamism of the European and global market. It is no coincidence that on 13 July 2022, within the third Rule of Law Report - published against the backdrop of the Russian invasion of Ukraine and therefore highlighting the importance of defending democratic values, human rights and the rule of law - the European Commission welcomed the measures adopted by Italy, highlighting how many of the commitments made in the NRRP had been integrated in the reform of civil and criminal justice.

Below, we analyse those measures that will have the greatest impact on the **length of civil proceedings** and the **simplification of the justice system**, since those are the issues historically most valued to market players and foreign investors.

First, the Legislative Decree significantly intervenes on the rules governing the **first instance proceedings**. To this end, the Legislative Decree has operated on a twofold basis: on the one hand, it has enhanced the simplified trial procedure ("*procedimento semplificato di cognizione*"), which is now mandatory when evidence is based solely on documents and the dispute is not particularly complex (see para. 2.4 below); on the other hand, it has introduced a speeding-up process which allows, in the presence of certain conditions, to reach the adjudication of the dispute in a very short time, avoiding useless and costly preliminary investigations (see para. 2.5 below).

In this regard, significant measures have been adopted with the aim of **digitalising the proceedings**, in respect of which Italy was already an excellent example on the European scene. Thus, the possibility of certain hearings to be conducted electronically has now become law and, in general, the tools for a fully digitalised civil trial were strengthened (see para. 2.6 below).

Within the review proceedings, the Legislative Decree has strengthened the rules on "filters" (see para. 3.1 below) and by **speeding up the conclusion of appeal proceedings**, when the appeals are inadmissible or clearly groundless (see para. 3.2 below).

Lastly, the Legislative Decree has introduced **important innovations in the area of alternative dispute resolution mechanisms**, intervening on the rules of mediation and assisted negotiation (see paras. 4.1 and 4.2 below) and, above all, by **strengthening the rules on arbitration**. In particular, arbitrators have been granted the authority to issue precautionary measures (see para. 4.3 below).

The rules introduced by the Legislative Decree - with certain exceptions - will apply to proceedings commenced after 30 June 2023.

## 02. First instance proceedings

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The **reduction by 40%**, of the length of civil trials within June 2026, compared to the 2019 results, was one of the main goals of the reform and it has been pursued through multiple measures relating to the structure of the first instance proceedings.

### 2.1 The pre-trial phase

The introductory phase of the proceedings has been reformed, in order to strive for greater focus and to have all the "**cards already on the table**" when the first hearing begins. This will mean that the definition of the *thema decidendum* and of the *thema probandum* will be already clear at the time the first hearing is held, so consenting the effective commencement of the proceedings and of the parties' positions.

At present, it is not so. The first hearing is indeed focused on certain preliminary assessments and usually a new postponed hearing is scheduled by the Court, before which the parties may file supplementary briefs pursuant to Article 183, para. 6 of the Italian Code of Civil Procedure, with the result of delaying the proceedings.

On the opposite, the reform now provides that the filing of defence briefs will take place **before** the first hearing (and not after that) – setting deadlines for their deposit (shorter than the current timeframes): one for each party (first for the plaintiff and then for the defendant) and a third one for the respective rebuttals and contrary evidence.

### 2.2 The participation of the parties at the first hearing

The reform aims at streamlining hearings and, in this regard, the first hearing will play a central role. In particular, it is established that **at the first hearing, the parties will have to appear in person** for the purpose of attempting to settle the dispute, and failure to appear, without a reasonable justification, will be evaluated by the judge as a possible item of evidence pursuant to Article 116(2) of the Italian Code of Civil Procedure.

### 2.3 Enhancement of judicial settlement proposals

Also with a view to reducing the number of civil litigations, the new provisions set forth that, **also in the decisional phase of the proceedings**, the judge can try and offer a settlement **proposal**, *i.e.* until the time when the hearing is set for the case to be remitted for decision.

### 2.4 The new simplified trial procedure ("**procedimento semplificato di cognizione**")

The simplified trial procedure, currently governed by Articles 702-*bis* to 702-*quater* of the Italian Code of Civil Procedure, will be applied both before the court in monocratic composition (single judge) and in collegial composition, when the facts are only partially disputed and the investigation is based on documentary evidence or does not require particularly complex actions.

### 2.5 Interim decisions

The Legislative Decree introduces the possibility for the proceedings to be concluded very quickly: disputes, where the debated point appears of easy solution, may be settled by the Court through an order (also provisionally enforceable), at the request of a party, provided that only disposable rights are concerned (rights that parties are allowed to waive, limit or sell).

### 2.6 Digitalisation

The Legislative Decree provides for expanded opportunities to conduct hearings **electronically** or in any case by means of **written briefs**, inline with the solutions introduced during the Covid emergency. Written

briefs will thus be able to replace, if the parties jointly request or do not object, civil hearings that do not require the presence of subject other than lawyers, the parties, the public prosecutor or the judge's assistants.

## 03. Review proceedings

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In line with the idea of achieving simplification, speed and streamlining the civil trial, the Legislative Decree aims to **discourage specious and unnecessary review proceedings**.

### 3.1 The appeal filter

For appeal proceedings, the reform provides for the possibility, for the judge in charge of the file ("*Consigliere istruttore*") to dismiss an appeal **as clearly ungrounded**, when it has no chance of being upheld. Following an oral discussion, the decision on whether the appeal is clearly ungrounded is rendered in a concise judgment, also by referring to settled case law.

### 3.2 The filter of the Supreme Court

In relation to proceedings before the Supreme Court, the Legislative Decree provides for an accelerated procedure for declaring an appeal inadmissible or clearly ungrounded.

## 04. Alternative dispute resolution mechanisms

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At the European level, again with a view to achieve the goals to reduce litigations and reduce the times of proceedings, Italy has committed to **enhance alternative dispute resolution mechanisms**. This has been done following three main principles: extending the applicability of mediation, extending the scope of assisted negotiation and strengthening the guarantees of impartiality in arbitration.

### 4.1 Mediation

Mediation has seen a rather slow but steady growth, together with a progressive improvement of its results in terms of effectiveness. From the few thousand proceedings filed each year (although with a very high success rate in reaching an agreement of around 80%) as recorded in the years prior to 2010, the number has risen to around 300,000 proceedings filed in 2014 and around the same number in 2015, and, after a period of adjustment, the number has settled at around 260,000 per year between 2016 and 2021<sup>(1)</sup>. It is particularly interesting to note that the percentage of mediation procedures in which the summoned party actually appeared before the mediator rose from 40.5% in 2014 to 50% in 2021 and, among those, the percentage of proceedings that actually ended with an agreement increased from 24.2% in 2014 to 27.3% in 2021. In light of these results, the reform has strengthened the procedure by enlarging, firstly, the **matters in which the mediation procedure is mandatory** (matters that will now include many other types of contracts).

In an attempt to promote the mediation as a truly effective tool, alternative to ordinary litigation, **tax exemptions** and **tax credits** have been introduced. For instance, the choice of mediation instead of ordinary litigation results in the exemption from payment of stamp duty on deeds and orders and of registration tax on the mediation minutes and the final settlement agreement (up to € 100,000). In the

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<sup>1</sup> After a peak in the number of proceedings filed immediately after the reintroduction of compulsory mediation in the final months of 2013 - reintroduced after it was ruled unconstitutional in 2012 on the grounds of excess of delegated power - there has been a gradual adjustment of the number of proceedings in the following years (between 270.000 and 230,000 per year) [source Ministry of Justice, Department of Judicial Organisation, Personnel and Services, General Directorate for Statistics and Organisational Analysis, "*Civil mediation ex D.L. 28/2010 statistics of 2021, entire period 1 January - 31 December*"].

event of successful mediation, it will also be possible to benefit from a tax credit equal to the mediation fee (up to € 600).

In order then to increase the effectiveness and opportunities of the mediation procedure, the reform proposes *(i)* to encourage the **participation** of the parties in person in the relevant meetings - a factor which has already proven its effectiveness - *(ii)* to encourage, simultaneously, also **mediation ordered by the judge**, which promotes cooperation between judicial offices, lawyers and mediation bodies, which would permanently train practitioners, monitor experience and track court orders requesting the parties to enter into the mediation procedure, and *(iii)* to improve the **training of mediators**, so that they also have conciliatory skills, while providing training courses on the issue to **judges**.

## 4.2 Assisted Negotiation

With specific reference to assisted negotiation, regulated by Law Decree No. 132 of 2014, in addition to **expanding the number of cases** within which it will be possible to resort to assisted negotiations – including, for the first time, also labour law matters – the reform has introduced important innovations, making it possible to conduct negotiations by **electronic means** and introducing the **out-of-court evidence gathering**. If so provided for in the negotiation agreement, in fact, each lawyer will be able to invite the other party to acknowledge/confess specific facts. This will make it possible to definitively ascertain certain circumstances of the dispute that can be used in court in the event that out-of-court settlement is unsuccessful. In addition, the lawyer may also gather **statements from third parties** on circumstances relevant to the dispute<sup>(2)</sup>. Also of great importance, again with a view to encouraging the use of assisted negotiation, is the implementation of **legal financial aids** in cases in which it constitutes a condition for the admissibility of legal proceedings.

## 4.3 Arbitration

Finally, by way of the reform, arbitration has also been substantially strengthened: on the one hand, the **guarantees of impartiality and independence of arbitrators** are reinforced, as they are progressively treated more and more the same as judges, and on the other hand, their powers are increased, allowing them to **issue precautionary measures**, a prerogative up till now granted exclusively to the judiciary.

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<sup>2</sup> This is - especially with reference to the admissions that a party may be invited to make - a particularly significant introduction, the development of which appears to be unpredictable, having been grafted onto a procedure that (at least until now) has seen little use in practice. It will be necessary in all cases to pay particular attention to the consequences that such revisions might imply for the party already at the time of drafting the assisted negotiation agreement, taking into account the fact that the documents incorporating the aforementioned admissions (both when they come from the opposing party and when they are issued by third parties) will be full evidence in the proceedings that may be filed if the assisted negotiation fails.

## Dispute Resolution Department

The Dispute Resolution Department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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