



Ordine degli Avvocati di Lucca

FBE INTERMEDIATE MEETING

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**Procedural systems in comparison.
Combine efficiency, justice, and equality of the
parties.
Current solutions and projects under the sign of
European unity. Directive ADR?**

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WHAT HAS BEEN DONE

Some recent, and many less recent Italian Acts have significantly modified the original structure of Italian civil procedure code.

The target of the interventions is – almost always – the acceleration of procedure, since a pathological length has always been a mark of Italian civil procedure. So far the result is not remarkable. In some cases we have achieved little, and sometimes less than nothing.

1. First comes, in my opinion, the transformation of the court of first stage (the *Tribunale*) into a monocratic judge: one person instead of a panel made of three members (this is the general rule; of course there are some significant exceptions but the so called *collegialità* must be explicitly provided by the law).

Traditionally the procedure before the Italian *Tribunale* was split into a first phase ruled by the *giudice istruttore* (a sort of investigating judge, charged of preparing the case through a set of hearings) and into a second phase where the case was decided by a three judges panel. The system allowed the possibility of lodging a claim to the panel against the measures taken by the *giudice istruttore* (a sort of *juge de la mise en état*) during the preparatory stage as to the admissibility and the taking of proofs. Such a possibility is now over, for the lack of a panel. One man for all tasks, because the *giudice istruttore* rules the proceeding and decides the case.

We shall take this point into consideration in the afternoon, speaking of what to do.

2. The second attempt made by the Italian law to reduce the length of the procedure is the organisation of the first stage into a sequence of phases

marked by rigid **time limits** for allegations and productions; the proceeding has been transformed into a structure (quite stiff indeed) that obliges both parties to tell all (to hold nothing back) at the beginning, included the exhibition of the pieces of evidence in their possession and the application to gather evidences. The law provides for fixed time limits for the exchange of pleadings and for supporting evidence.

This is now the stable frame of the ordinary proceedings, and although it can be certainly considered a good conceptual model, in practise it has not accelerated in a significant way the length of the procedure. Moreover it has filled the courts of review with plenty of appeals against the (too numerous) dismissals of claims (*fins de non-recevoir*). These dismissals are fed by the chance for the judge of dismissing complicated cases by declaring the inadmissibility of the claim: this often occurs for the difficulty of identifying and easily recognizing deadlines which sometimes are true traps. This situation actually has increased the number of cases that transmigrate from the first to the appeal stage with the result of engulfing the Courts of review and slowing down their times.

3. Third comes the introduction of a special procedure aimed at dealing the proceeding in an informal way (summary proceeding). The plaintiff may ask for a special and fast hearing of his claim and the case will be handled in a speedy and informal way, but always in full application of the *audi alteram partem* rule. However, such a course of process can take place provided the judge does not ascertain that the line of defence of the defendant is worth a formal procedure; that is when the plaintiff's right is not evident at the beginning, or when he cannot show his reason for lack of a straightforward evidence, or when the defendant produces pieces of evidence that require a complex investigation. In such cases the judge has the power to transform the summary proceeding into an ordinary civil proceeding and the case will be heard in the usual, formal way.

An appeal can be filed against the judgement that closes the summary proceeding, and it is noteworthy that such a judgement is not a provisional one:

indeed, if not appealed it becomes definitive and can no longer be challenged. This is a fundamental difference from the French *référé provision* that is characterized by its lack of aptitude to become definitive and *res judicata*.

4. Another attempt to shorten the time of the proceeding is the restriction progressively imposed on the remedy of appeal against the adjudication that ends the first stage of the proceeding. Whereas the Italian system (differently from other European jurisdictions) still does not require any permission or “leave” for taking an appeal against the judgement, the appeal has become, step by step, a simple review of the first decision. In the past it gave rise to a second hearing of the case; with time the possibility has vanished either of introducing new pleas and new facts or producing new pieces of evidence. Besides, the Court of appeal has been given the power of dismissing the case immediately – and by a simple order *in limine litis* – just by declaring that the appeal appears *prima facie* not well grounded and is not likely to be granted.

5. A not negligible improvement of the Italian system of justice is the possibility of a judge order for the payment of a penalty (*astreinte*) due to a non-compliance with an injunction. A novelty for the Italian system, this measure was introduced only in 2009.

The real problem is that this kind of order cannot be issued for non-compliance with orders of paying a sum of money, but only with orders related to not fungible obligations, that is performances not capable of being substituted in place of one another.

6. However, the main route followed by the Italian legislator in recent years is the attempt to divert a significant part of the disputes away from the courts for addressing them towards an alternative resolution: the recourse to the courts should be the *ultima ratio* (last resort) since the judiciary system is deemed less and less adequate to resolve all kinds of disputes and the abstract right to submit every claim to the response of the judiciary has to be balanced with the actual resources of the system. The problem is far from being resolved

since a forced induction to mediation is bound to conflict with the provisions (Article 24 of Italian constitution, Article 6 of European Convention of Human Rights) of the right of every citizen to the “due process of law”, but the intent of the lawmaker will not be questioned.

In 2010 has been passed a law that – following the European Mediation Directive (2008) – expressly contemplates the so-called *compulsory* mediation (of course, what is compulsory is the attendance to the mediation proceeding, not the settlement that should be reached through mediation). The result is searched with the help of an unbiased third party, a registered mediator, and the settlement gives rise to an agreement which takes the place of the judicial adjudication. After an abrupt stop put to the compulsory mediation coming from the Italian *Corte costituzionale* in 2012 (and due to the faultiness of the process of law making), in 2013 the legislator has amended the law and now the mediation system is fully operating.

The fields where mediation is compulsory are various and considerable: condominium law; rights in rem; division; inheritance succession; patti di famiglia¹; lease contracts and rentals; business (branch) lease; medical malpractice; libel; bank, insurance and finance contracts.

Moreover a latest legislative measure (*decreto legge* n. 132 of Sept 12) has extended the necessity of seeking an agreement before starting a lawsuit. The provision concerns any claim for damages coming from circulation accidents and every claim for a money sum under € 50.000 regardless its cause of action. The technique of this mandatory kind of ADR is slightly different from the general mediation proceeding, since the dispute is not submitted to an unbiased third party, but is directly negotiated by the parties with the assistance of their lawyers. So far, however, it is impossible to be sure that this is a definitive outline of the situation, for we are dealing with a *decreto legge* that is an “executive order”, an intrinsically interim measure coming from the Government, something that has to be converted into an Legislative Act (by the Parliament) in the next future, so that the scenery offers four possibilities:

¹ Agreement where the entrepreneur donates his firm to a son, or a grandson, while the other sons and the consort – the uninheritable relatives – receive some money or other goods according to the value of the firm and following the provisions about their rights.

- a) the plain confirmation of the provisions;
- b) the confirmation of the core of provisions mixed with changes in some details;
- c) the modification of the essence of the provisions;
- c) the vanishing of the provisions for lack of conversion of the *decreto legge* in time.

WHAT TO DO

1. Speaking of the subject of court litigation, my opinion is that the main thing to do is introducing a dispute resolution method based on the model of the French *référé provision*. A basic fault of the Italian summary proceeding is the character of its output, that is the stability of the judgement, its aptitude to become *res judicata*. My experience of the Italian Courts tells me that this quality has the power of conditioning the attitude of mind of Italian judges, in the sense that very often (too often indeed) they prefer to transform the summary proceeding into an ordinary civil proceeding so that the case can be heard in the usual, formal way. Very seldom an Italian judge takes the risk of issuing a summary decision when such a decision is bound to become definitive. The satisfying experience of the provisional remedies based on the *periculum in mora* (urgent reliefs – *référé en cas d'urgence* – attachments and seizures) shows that the average judge could easily issue an order for payment of sum of money or specific performance, if and only if his order is immediately enforceable but not definitive. The conditions for issuing such an order could correspond to the conditions the French *Code de procédure civile* requires – out of situations of urgency – for the *référé provision* and for the *référé injonction*. The most important of these conditions is the existence of the obligation that the applicant seeks to enforce is not seriously contested, so that the judge can order the respondent to pay to the applicant a sum of money or perform the relevant obligation (even if it consists of an obligation to do something).

2. With reference to the fact that and a monocratic decision of a single judge has taken – in most cases – the place of the decision by panel before the *Tribunale*, a serious problem has arisen in the recent years. Indeed this problem has little to do with the length of procedure: it is rather related to the justice of the decision. If a judge has refused the admission of a piece of evidence, the party relying on it has no means of safeguarding his right, for there is neither possibility of control in the first stage nor any chance of taking the evidence during the course of the appeal stage. Since the dismissal of the claim often depends upon the denial of the taking of the evidence, in my view allowing the control by the panel of the decisions regarding the admissibility and the taking of proofs will be a fair balance of a power now out of control. A single justice certainly is an advantage in terms of simplification but ... in pitching a tent, it is hazardous to lengthen one's ropes without strengthen one's stakes.

3. An important factor for a positive managing of the dispute solution depends, in my view, on the spread of the culture of mediation in our legal studies. Mediation cannot and should not be compulsory in every field; nevertheless, its use should gain momentum for the sake of both efficiency of the system and satisfaction of parties. At that end, law is not enough (we know why). But in order to achieve that aim, we need a full revision to our traditional understanding of the proper roles judges and mediators. Our discussions continue to ignore the need for a fundamental revision of the roles of the critical actors in the system. Moreover our literature describes mediation per se, mediation approaches, and outcomes but in a way that is more descriptive than theoretical. It does not provide an ample base for theory development so in our Universities nobody is taught to think in terms of safeguarding one's rights by means of an agreement achieved by a mediation rather than by the administration of justice by the jurisdiction. The right of action is sacred and there are no university chairs in the field of Mediation. The only ADR that has attained a scientific status is arbitration, but it is quite unrealistic to imagine that arbitration can really become a common solution. A new spirit is requested in our studies,

new routes have to be taken, new instruments to be employed. Simplification is required but this implies a shift in our culture that is far from be reached.

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