Ufficio studi

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In the course of 2022 the Italian Parliament, with the instrument of the Legislative Decree, implemented the general provisions of the reforms in the area of civil and criminal justice, outlined in 2021. In the regulation process, the Italian National Bar has punctually interacted with the Government and the Parliamentary Bodies, often listened to and at other times disregarded.

1. REFORMS IN THE AREA OF CIVIL PROCEDURE AND ALTERNATIVE DISPUTE RESOLUTION

Legislative Decree n. 149 of 10 October **2022** («*Implementation of Law 26 November 2021, n. 206, Delegation to the Government for the efficiency of the civil process and for the revision of the discipline of alternative dispute resolution instruments and urgent measures for the rationalization of proceedings concerning personal and family rights as well as enforcement*») implemented with specific provisions the principles set out in the delegated law on the reform of civil procedure (law n. 206/2021).

As pointed out last year, the Italian National Bar has repeatedly emphasized that to pursue the goal of making trials faster, thereby guaranteeing the effectiveness of judicial protection, a serious investment in the recruitment of new judges and an equally serious reflection on the organization of justice was necessary. On the contrary, action was taken almost exclusively and massively on procedural rules.

The legislative decree:

a) provides for **alternatives to in-person judicial hearings** (remote hearings through video conference; replacement of the hearing with an exchange of short written defenses), as already experimented during the Covid-19 pandemic, cutting out though any consultation between the judge and the parties on the choice of the model (the latter can only object to the judge's choice;
b) **extends** the **competence** of the **Justice of the Peace** (up to fifteen thousand euros for chattel and to thirty thousand euros for injury compensation due to transportation), **reducing** the **competence** of **collegial Tribunal** cases;
c) provides for **judicial notification** and **communications exclusively** through **telematic** means (PEC, the electronic certified e-mail);
d) **simplifies executive protection**, erasing the need of the enforcement order (and administrative unnecessary formalities, for the administrative staff of the judicial offices, for notaries and for lawyers), providing new procedures, such as the direct sale (authorizing the debtor to directly sell his foreclosed property), establishing a data base of judicial auctions;
e) **unifies rules of proceedings** before the Italian Supreme Court (**Court of Cassation**) and **eliminates** the **filter Section**;
f) provides a **new remedy** to national definitive decisions contrary to the European Convention of Human Rights (or one of its Protocols) – **revocation** of **decisions contrary to ECHR** – whereas the recognized fair compensation did not erase the consequences of the human right violation.

On the contrary, positive judgment cannot be expressed as to the further provisions, neither in terms of the individual solutions adopted nor and especially with reference to the objective of simplifying the judgment and reducing the time of judicial assessment:

a) **rules** on **aggravated liability** (art. 96 c.p.c.), repeatedly criticized by the Italian National Bar, have become **harsher** (condemning the defeated party to pay a sum between 500 and 5.000 euros;
b) a new **principle** of **clarity** and **conciseness** of **judicial acts** is introduced, providing that its violation (as well as the lack of respect for technical rules) may be considered by the judge when deciding on trial expenses;
c) the same principle must be respected in **appeal procedures**, otherwise **reasons of appeal** are considered **inadmissible**;
d) the structure of **first instance trial** is profoundly revised, and **three different rites coexist** – full cognition; simplified cognition; proceedings before the Justice of Peace – **in addition** to the special rites already provided for labor proceedings and for persons, children and families cases. The new rules introduce a complex mechanism and a high risk of irregularities for complex cases (e.g. where there are multiple parties) which can stretch the timing for handling the cases even further than today, frustrating the main purpose of the reform – accelerating civil proceedings – due to a delay of the first contact between the parties and the judge: for the introductory phase the new discipline recovers old on corporate proceedings which did not result effective, anticipating before the first hearing the exchange of the pleadings currently envisaged as a written appendix to the proceedings before the court;
e) the overall delay is aggravated by the **complex** innovations regarding the **decisional phase**: a simpler model (sentence after an oral discussion, with the faculty – currently not contemplated – for the judge to postpone the judgement for thirty days) coexists with a **more complex** model (exchange of three pleadings prior to the hearing for the remittance of the case for decision, whereas the current rules provide for one hearing for closing arguments and a maximum of two pleadings). The new provisions are more complex and intricated compared to the current ones, and thus are not able to guarantee faster proceedings but, on the contrary, they appear as a burden;
f) **further risks of delay** may result from the **interim summary measures** the judge can adopt (of acceptance or rejection), with temporary executive efficacy, that can define the case if not opposed, difficult to interpret;
g) the introduction of a «**reference for a preliminary ruling**», to refer to the Supreme Court (Court of Cassation) during the trial questions of interpretation may also **delay** the length of the proceedings, **limiting the grounds of appeal** for the parties and bringing the trial temporarily to a halt;
h) new proceedings disciplined in the **simplified cognition rite** (before the Justice of Peace or the monocratic Tribunal, if chosen by the plaintiff or the judge for simpler cases), do not offer any specific nor relevant innovation as compared to the current summary proceedings rules;
i) solutions proposed for the **appeal process** – apart from the **elimination** of the **appeal filter** (inadmissible appeals according to a non-reasonable probability standard) – essentially **reproduce past** and subsequently outdated **disciplines** (strengthening the figure of the examining judge; reserving the collegial exam and intervention to the decisional phase) and provide further requirements for reasons of appeal [clarity and simplicity] – which appear too elastic and difficult to reasonably verify – reducing moreover hypothesis of remittance to first instance courts, limiting as such the exercise of the right of appeal.

The reform also affects the discipline of alternative dispute resolution (ADR) and, in particular, rules on mediation and assistive negotiation. A positive stand must be taken for the **extension** of **legal aid** to **compulsory mediation** and **assistive negotiation** when it's a requirement for the legal claim,

the natural implementation of the basic right of defense, as stressed by the Italian National Bar on multiple occasions; positive, as well, the involvement of the local Bars in the proceedings regarding the legal aid application, the confirmation of the indispensable assistance of a lawyer in the proceedings, the extension of non-compulsory negotiation to other controversies, provisions dedicated to a more efficient proceedings and incentivizing the resort to ADR.

Nonetheless, as it has already been pointed out, it seems that the Legislator has retraced again paths already crossed in the past 15 years, without any obvious benefit. Despite the fact that the issue of the excessive length of civil proceedings suggested the adoption of different strategies and measures, the reform of civil proceedings functional for accessing EU funds is based on the extension of ADR procedures, conditional for the jurisdictional claims, the tightening of provisions of financial penalties, the provisions of massive changes of proceedings, almost always in the scope of a summarization of the judicial assessment.

2. REFORMS IN THE AREAS OF CRIMINAL PROCEDURE

Legislative Decree n. 150 of 10 October **2022** («*Implementation of Law 27 September 2021, n. 134, Delegation to the Government for the efficiency of the criminal process, on restorative justice and provisions for a swift close of judicial*») implemented with specific provisions the principles set out in the delegated law on the reform of criminal procedure (law n. 134/2021), redefining the proceedings, introducing new provisions on restorative justice and regulating the office for criminal proceedings, in consistency with the aims set out in the *Italian National Recovery Plan* of acceleration of criminal proceedings and the high standard level of protection of constitutional rights of victims, defendants, reasonable time of proceedings.

As pointed out last year, the Italian National Bar played a crucial role in the process, advancing proposals and putting forward requests for corrective measures in the relevant parliamentary and ministerial forums. The implementation carried out by the reform seems satisfactory, with some due exceptions.

In particular, the evaluation is positive for the provisions:

a) for the **digitalization** of **criminal proceedings**, which allow a party to participate to the hearing through video conference or to an act through video recording;
b) on the regime of **notifications to the defendant** and the rules regarding the **trial in absence** of the latter (only the first notification is addressed personally to the defendant, while the following may be addressed to the trusted lawyer);
c) relating to **preliminary investigation** and **preliminary hearing**, which allow to establish (or continue) the **trial only in cases where it is reasonable to expect a conviction**, as well as the **remodulation** of the duration of **preliminary investigation** (six months for infractions and misdemeanors [contraventions]; one year for felonies [offences]; one and a half years for the most serious felonies, with a possible one-time six months extension for complex investigations);
d) on the **extension** of the scope of application of **special procedures**, alternative to the criminal trial (plea bargaining, shortened judgement, decree procedure);
e) regarding the **exclusion** of **punishable offences** of the grounds of the **faintness** (tenuity) of the offence, avoiding trials for petty and not serious crimes;
f) which **extend** the **suspension** of **proceedings** with **probation** of the defendant for crimes punishable by a restrained penalty (custody not exceeding six years) in which the perpetrator takes part in re-socializing or restorative paths;
g) which regulates the **office for criminal proceedings** (set out in the legislative decree n. 151/2022), aimed at ensuring more efficiency to the criminal process.

The **National Forensic Council has evaluated, and <u>still evaluatesnegatively</u>** some provisions, and in particular:

a) those regulating the **appeal process**,
   a. that allow the lawyer to propose an appeal only if a specific power of attorney is given after the sentence to be appealed, (which in some cases is not possible and may also collide with deontological duties of the legal counsel, and in particular loyalty, trust, and carrying out representation);
   b. that do not allow anymore the submission of an appeal in the registry of a judicial office other than the one that issued the acted to be challenged (and to proceed by telegram or registered letter); the mitigation to the stern provision (telematic submission) does not reassure, since it's not regulated in the reform but demanded to secondary norms according to vague and undefined criteria, and therefore impossible at present;
   c. the **inadmissibility** of the **reason of appeal** for **lack of specificity**, hypothesis which seems utterly identical to the manifest lack of grounds, and ascribes the current rules of appeal the reasons of malfunction of the system, such as the excessive length of proceedings, almost forgetting that just the last year new rules were set regarding the inadmissibility of appeals due to exceeding appeal time-limit;

b) the **provisions** regulating **restorative justice**, concerning access, execution, and conclusion of restorative paths: proceedings should have been more versatile, and not provide exhaustive requirements that could hinder its operativity and reduce its effectivity and effectiveness, according to a logic of settlement of the dispute, also involving the local Bars in mediators training and providing for the necessary assistance of a lawyer, since restoration must be in the interest of the victim but also of the defendant;

c) the **new felony** of **ground or building invasion** for **gatherings**, **hazardous** for the public order, safety, or health (art. 434-bis c.p.), disciplined in law decree n. 162/2022, product of an incomplete drafting by the legislator, which initially attributed criminal relevance to actions without any connection to the concrete danger for the protected value; the Legislator, subsequently, reviewed the norms erasing reference to the public order and tying the danger trial to the «*non-compliance to norms on narcotic substances, or in matter of security, hygiene of performances or public entertainment manifestations, also due to the number of participants or the state of the venues*». There's still a doubt, though, of the real political-criminal necessity of such a provision, since the felony of abusive occupation was already punished, allowing the adoption of interim measures, with aggravating penalties if the crime was committed by more than five individuals.

Lastly, the Italian National Bar would like, and has proposed, that further and different measures be taken with the aim of:

a) make the no-fault principle effective, to exclude proceedings for faint offences;
b) enhancing the code-reservation principle, to rationalize offence hypotheses provided in complimentary law, avoid useless overlaps and complex systematic reconstructions;
c) provide a clear and precise discipline for administrative corporate liability arising from offences, reducing the application of preventive measures, and assessing the applicability of administrative and/or pecuniary measures;
d) increasing the judiciary staff (judges and administrative officers) and provide for an appropriate allocation of resources and a proper "restructuring of judicial buildings";
e) reduce organizational measures of heads of offices or the identification of priority criteria in criminal process to figures outside the legislative framework of primary source.