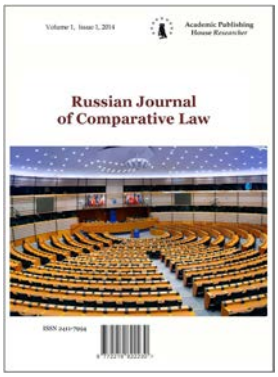
Published in the Russian Federation
Russian Journal of Comparative Law
Has been issued since 2014.
ISSN 2411-7994
E-ISSN 2413-7618
Vol. 8, Is. 2, pp. 102-106, 2016

DOI: 10.13187/rjcl.2016.8.102
http://ejournal41.com



UDC 347.469.1

Recent Reforms of Italian Civil Procedure (or 'The Road to Hell is Paved with Good Intentions')

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Abstract

This essay describes some among the most recent reforms that have affected Italian civil procedure. These reforms rely heavily on the use of ADR, and particularly on mediation, arbitration and assisted negotiation, in an attempt to reduce the heavy backlog of civil cases and to speed up the resolution of disputes. In Italy, an attempt at out-of-court mediation is mandatory in a wide variety of civil and commercial cases: mediation had some ups and down, since it was made mandatory in 2010, repealed by the Constitutional Court at the end of 2012, and eventually reinstated in 2013. In 2014 two new ADR procedures were established, that is, assisted negotiation and the 'transfer' of cases already pending before courts of first instance or appellate courts to a panel of arbitrators. While assisted negotiation is mandatory for cases whose value is above a certain threshold (provided that the claim is for payment of sums of money), the 'transfer' of cases to arbitration is strictly voluntary and, as a matter of fact, it is possible only when both parties agree on diverting their case from the court system to arbitration. This essay expands on the many controversial issues raised by the 'transfer' of cases to arbitrators and, more generally, on the dangers of the 'outsourcing' of dispute resolution.

Keywords: Italy, civil cases, mediation, assisted negotiation, arbitration.

Introduction

The administration of justice, and in particular of civil justice, is one of the most critical areas of the Italian legal system. It is not necessary to expand any further on that point, since it is well known in the Member states of the EU and beyond. A variety of official and unofficial documents have demostrated that the performance of the Italian judicial system is significantly worse than the performance of other comparable countries as far as the length of proceedings and the backlogs of courts are concerned. Among the documents that shed light on this issue, it is worth mentioning a relatively recent one issued in September 2014 by the International Monetary Fund. In this document, a chapter is devoted to 'Judicial Reforms for Growth'. The conclusion of this chapter reads as follows:

'There is scope for significant improvements in the efficiency of the Italian judicial system, with potentially important macroeconomic effects. The reform should be structural, comprehensive and should have the necessary institutional support. It should also have the buy-in of all relevant

stakeholders, notably judges and lawyers. The strategy should follow a four-pronged approach: (i) reducing the backlog; (ii) promoting wider use of alternative disputes resolution proceedings, such as mediation; (iii) rationalizing the appeal system, including review by the Supreme Court of Cassation and the role of lawyers in this context; and (iv) focusing on courts' management and accountability. Such a comprehensive reform package, if taken together and effectively implemented, could help reduce unemployment and lift potential growth by increasing investment'[1].

The report emphasizes the need for structural and comprehensive reforms, but, actually, if there is anything that Italy has not been lacking since the beginning of the third Millennium it is reforms affecting the administration of justice, and in particular the treatment of civil cases. Just to give the reader an idea of the speed at which the legislators have been turning tables in the field of civil procedure, consider that the Code of civil procedure was amended in 2003, 2005, 2006, 2009, 2011 (three times), 2012 (four times), 2013 and 2014 (two times). Needless to say, it would be useless to look for a unitary and specific vision of civil justice as the inspiration of these reforms: the reality is that they have been dictated only by the need to face the emergency, meaning the tremendous caseload overburdening Italian courts. According to the most recent survey conducted by the Ministry of Justice, a total of 4,800,000 civil proceedings were pending as of November 2015: a dreadful number of cases, even though, according to the Ministry, it shows a positive trend towards the decrease of pending civil cases, which were 5,155,000 at the end of 2013 [2].

Materials and methods

The main sources of this essay are both official documents of Italy (the Constitution, the Code of civil procedure, and a few statutes amending the Code), and scholarly essays. As far as the method followed by the author is concerned, the approach is descriptive of the law in force, with personal annotations and comments aimed at emphasizing the problems brought about by the interpretation of a set of new rules, many of which have not yet produced any case law.

Discussion

Many of the reforms mentioned above have gone in the direction of increasing the use of ADR and, in general, of fostering a creeping privatization of dispute resolution. The case of out-of-court mediation, at first made mandatory, then repealed by the Constitutional Court and eventually reinstated as a compulsory step to be taken before acquiring the right to approach the court system is probably the best example of this trend [3].

While at the beginning the promotion of ADR was presented as the choice necessary to embrace more civilized and therefore better ways to resolve civil disputes, with one of the latest reforms – the one enacted in the Fall of 2014 – the legislators have whipped off their masks, passing a statute whose official title is 'Urgent measures for the privatization (of dispute resolution) and for the disposition of pending civil cases' [4]. Privatization is this author's free translation of a neologism invented by the legislators for this occasion: in fact, the Italian word 'degiurisdizionalizzazione' has no specific translation (and cannot even be found in a good Italian dictionary), but it implies the removal of civil cases from the court system, and their diversion toward private methods of dispute resolution.

The measures contemplated by the statute are many; two seem worth mentioning, meaning the new 'assisted negotiation' and the 'transfer' of pending civil cases to arbitrators. The former will be described briefly, while more attention will be paid to the latter.

The 'assisted negotiation' is an out-of-court procedure, whose aim is to resolve a dispute by an agreement that the parties are supposed to reach with the assistance of their attorneys, based upon a contract in which the parties have committed themselves to cooperate in good faith so as to put an end to their dispute amicably. The interesting aspect of the 'assisted negotiation' is that it is mandatory for any claims for damages arising out of road traffic accidents, as well as for any claims for payment of sums in excess of 50,000 Euros, whether the payment is claimed as the consequence of a contractual obligation or as the result of a tort.

And now let us examine the most curious reform, the 'tranfer' of cases pending before both a court of first instance and a court of appeals to a panel of arbitrators. The relevant rules will be described as they are, in their sheer madness, with some comments here and there and an emphasis placed on the problems they bring about.

The 'transfer' is available in any civil cases, provided that the matter at stake is arbitrable, meaning it does not entail any rights the parties cannot freely dispose of (for instance, rights concerning personal status, such as marriage, parenthood, and the like). Labor cases can be tranferred to arbitrators only if arbitration is specifically allowed by collective agreements. The 'tranfer' is available also for the cases in which the defendant is a public administration and the value at stake is below 50,000 Euros.

The 'transfer' is possible only insofar as it is requested jointly by both parties at any stage of the proceeding, but before the case has been remitted to the judge for the decision, meaning before the moment when the parties have lodged their final briefs with the court.

If the requirements of the 'tranfer' are met, the judge will transmit the case to the Chairman of the local Bar Association. Either the parties or, if they disagree, the Chairman himself will choose the arbitrators among the attorneys who have been enrolled in the local Bar for at least five years. Once the arbitrators have been appointed, the case will continue before them 'as it is', meaning that time bars, estoppel, and in general any legal limitations that in the judicial proceeding have prevented the parties from changing their strategy, producing new evidence and so on can neither be revisited nor modified: in other words, the arbitrators pick up the case where the judge left off. That said, the arbitration proceeding shall follow the general rules laid down by the Code of civil procedure for domestic arbitration (Articles 806-838), and the arbitral award shall have the same effects as a court judgment.

If the 'trasfer' is requested on appeal, the award must be rendered within 120 days from the appointment of the arbitrators. If this deadline is not complied with, the parties must resume the case before the court of appeals. If they fail to resume the case, the proceeding shall be discontinued. If the arbitrators render the award, the award is challenged, and eventually declared null and void, the case must be resumed before the court of appeal within 60 days from the date when the judgment declaring the arbitral award null and void has become final (meaning, it has become *res iudicata*).

Does the reader feel at a loss like this author does, faced with such a mess? Which kind of arbitration is this? Certainly, it is not a form of court-annexed arbitration, because once the 'transfer' takes place, any court's supervision over the arbitration procedure stops; it is not a 'regular' arbitration that the parties could choose, at least in theory, even after the beginning of litigation, since – should they opt for arbitration – the litigation would have to be discontinued and the arbitration proceeding would start from scratch. On the contrary, according to the new statute the 'transfer' implies that the case continues before the arbitrators, who – as mentioned above – pick up the case where the judge left off. Therefore, in spite of the fact that the new rules provide that the 'transfer' to arbitrators shall follow the Code's rules governing domestic arbitration, this author believes that the legislators have delivered a new legal 'monster' that is difficult to qualify, and whose purpose is unclear.

The interpretation of the new rules raises a variety of problems. Just to mention some, consider, for instance that the parties may request the 'transfer' of the case to arbitration logding with the court a joint application: nothing is said about the form (written or verbal) that the application is supposed to have. That is unexplicable, in light of the fact that, according to the Code of civil procedure, the arbitration agreement must meet specific requirements, namely it must be made in writing; it must describe the object of the dispute; and it must include the appointment of the abitrators or the indication of the manner in which they will be appointed. But, most of all, what is difficult to understand is why the parties should agree, perhaps at a late stage of litigation, to divest the court of the dispute so that it will be decided by a panel of arbitrators. There are no incentives at all: no financial incentives, because on top what the parties have already invested in term of court fees, attorney fees, costs of experts witnesses and the like, they will have to pay for the arbitrators' services. Neither can the parties count on time incentives, since the rules fail to provide for a time limit within which the arbitrators are expected to render their award, considering that the time limit of 120 days refers only to the 'transfer' of a case pending on appeal. Besides, even supposing that the arbitration procedure will proceed faster than adjudication, the legislators seem to have moved from the assumption that both parties have the same interest in a quick resolution of the dispute, while in practice it is quite common that one party (in general, the defendant) has a strong interest in dragging things out as long as possible. And what about multiparty litigation or,

even worse, the cases in which the joinder of parties is mandatory? These are just some of the many questions that are left unsolved.

Neither does the procedural flexibility that could make the transfer of the dispute to arbitration appealing work as an incentive for the parties, since the case lands before the arbitrators 'as it is'. The consequence is that the parties will not have any possibilities to change their defensive strategies, nor will they be able to reverse – so to speak – what they have done in the judicial proceeding or to take any initiatives that would be barred in the adjudication.

Another critical point is the following: according to the new rules, the award has the same effects as a judgment. The problem is that, according to Article 825 of the Code of civil procedure, the party seeking enforcement of the award must file certied copies of both the award and the arbitration agreement with the court of first instance at the seat of arbitration. If this rule is considered applicable, then we will be faced with a sort of legal 'vaudeville', with a case that goes madly from the court to the arbitrators and then back to the court.

Another aspect of the new rules that seems worth investigating concerns the arbitrators: the choice of the parties is limited, since the arbitrators can be selected only among the attorneys who are members of the local bar. It is superfluous to emphasize, on the one hand, how this limitation runs against the traditional freedom of the parties in the choice of arbitrators and, on the other hand, how high is the risk of conflicts of interest, because of the vicinity of the attorneys for the parties and the prospective arbitrators. Very little attention is paid to the problem of independency and impartiality of arbitrators, but that is a fault of the whole Italian arbitration law: in this regard, it is worth mentioning that the Code of civil procedure does not impose on arbitrators any duties of disclosure, even though it lists a variety of grounds for challenging and disqualifying arbitrators. As far as attorneys are concerned, the Code of conduct for Italian Lawyers seems to address the problem in a more serious way, requiring that attorneys appointed as arbitrators must disclose to the parties every relationships, facts and events that are likely to affect their independence [5].

A few final words on the 'transfer' to arbitrators of a case pending on appeal. In this author's opinion, this is the apotheosis of madness: leaving aside the technical issued raised by the new rules, the idea that a judgment issued by a member of the judiciary can be reviewed and possibly quashed by a private judge is simply repugnant. It is true that the courts of appeals are the courts in worste shape from the point of view of backlog, but a State that believes that the problem can be solved devolving the appellate review to arbitrators is a State that disowns willfully one of its fundamental powers: and this is unacceptable, even under extreme circumstances.

Results

As mentioned above, the 'transfer' of cases to arbitrators has not taken off, in part because the rules governing it are poorly written and difficult to enforce, but essentially because the legislators did not provide for any incentives persuading the parties to remove their case from the court so as to have it decided by aritrators. As far as the assisted negotiation is concerned, so far its success is modest.

Conclusion

The reforms described above fall within the concept of outsourcing judicial functions. In this author's opinion, this is a form of outsourcing that cannot be regarded as a blessing, but, on the contrary, as a pure betrayal. The rethorics of ADR or, even worse, the self-celebrating hymns by which attorneys have saluted the new rules as the long-awaited recognition of their fundamental contribution to the process of improving the administration of justice are simply out of place: the Italian government has openly aknowledged that it is unable to do its job, that is, to grant its citizens the right to access to courts, a right enshrined in the Constitution.

In 2012, a distinguished British Professor Dame Hazel Genn, delivered a very inspirational lecture on the state of civil justice in England. The title of the lecture is 'Why the privatization of civil justice is a rule of law issue'. In light of the situation of public justice in Italy, this author cannot help subscribing to Professor Genn's point of view, and finds it appropriate to close this essay quoting a passage from the lecture: '[the removal of most civil diputes from the public justice system] has the potential to undermine the rule of law and that, together with the barriers that are being erected to access to justice for citizen, will have have a corrosive influence on public respect

for and compliance with obligations and responsabilities under the law, and provide encouragement to those who would flout their legal responsabilities' [6].

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4. Reference is made to statute no. 162 of November 10, 2014.

5. A new version of the Code of Conduct for Italian Lawyers entered in force at the end of 2014. An official translation into English of the Code, prepared by the National Bar Council is available, // www.canestrinilex.com/resources/ethical-code-italy/

6. Hazel Genn, 'Why the privatization of civil justice is a rule of law issue'. 36th F.A. Mann Lecture, Lincoln's Inn, 19 November 2012 // https://www.ucl.ac.uk/laws/judicial-institute/layout-components/36th_F_A_Mann_Lecture_19.11.12_Professor_Hazel_Genn.pdf.

УДК 347.469.1

Последние реформы итальянского гражданского процесса (или "Путь в ад выстлан благими намерениями")

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Аннотация. Статья описывает некоторые из самых недавних реформ итальянского гражданского процесса. Эти реформы в значительной степени полагаются на расширение использования посредничества, и особенно арбитража и помощи в переговорах. Они нацелены на упрощение рассмотрения сложных гражданских дел и ускорение разрешения споров. Основное внимание уделяется описанию роли суда в договорном посредничестве, различиям в формах разрешения споров, условиям использовании. Кроме того, анализируется процедура, установленная для судебной медиации. Затрагивается вопрос о критериях, которые применяются для отличия посредничества и примирения.

Ключевые слова: Италия, гражданские дела, медиация, посредничество, помощь при переговорах, арбитражный процесс.