



## Italian Government Proposes Civil Justice System Reforms

The Italian government has enacted a Decree containing urgent measures to reform the Italian civil judicial system and to deal with the backlog of pending cases. Published in the *Italian Official Gazette* on September 12, 2014, the Decree officially entered into force on September 13, 2014. Within 60 days of publication, the Italian Parliament must convert the Decree into law; otherwise, it will retroactively cease to be effective. During the conversion process, the Parliament could make amendments to the text of the Decree.

Decrees are issued by the government in cases of necessity and urgency. In the present case, according to the Decree's explanatory report, it was necessary and critical for Italy to reduce the duration of Italian court proceedings in order to put an end to its violations of the "reasonable time" requirement for a fair trial set forth in Article 6(1) of the European Convention on Human Rights. Moreover, the government aims to transform the Italian justice system from a burden on the country's growth to a driving force to assist in resolving the nation's economic crisis.

The new measures are designed to reduce the workload of Italian courts by diminishing the average time required to obtain a decision in civil cases. This would make Italy a more attractive country for foreign investment and work toward the ultimate goal of accelerating

economic growth. The Decree was also inspired by a decision to leverage the professional capabilities and skills of Italian lawyers in the judicial system.

The main changes introduced by the Decree include:

- The possibility to refer pending cases to arbitration conducted by panels comprising lawyers who have been members of the relevant Italian bar for more than three years (Articles 1 and 9);
- The introduction of the so-called "settlement negotiation assisted by legal counsel" or "assisted negotiation" as an out-of-court means to resolve disputes, which would become a mandatory prelitigation step for disputes pertaining to certain specific matters (Articles 2–5);
- The possibility to interrupt statute of limitations by inviting the counterparty to proceed with assisted negotiation (Article 8);
- A reduction in the number of cases in which the judge may order that each party bear its own costs, thereby discouraging potential losing parties from bringing proceedings as a dilatory tactic (Article 13);
- The possibility to convert ordinary proceedings into summary proceedings to accelerate the taking-of-evidence phase (Article 14);

- The introduction of written affidavits to accelerate the hearing-of-witnesses phase (Article 15);
- Reductions in the periods during which Italian courts are closed in summer, judicial deadlines and hearings are suspended, and judges take holiday leave (Article 16);
- An increase in the interest rate applicable to pending legal proceedings to limit the use of vexatious litigation by debtors as a means of delaying payments (Article 17); and
- Measures directed to simplify enforcement proceedings and make them more effective (Article 18–20).<sup>1</sup>

## Referring Pending Civil and Commercial Court Cases to Arbitration (Article 1)

Under Article 1 of the Decree, the parties to pending first instance or appeal court cases that have not yet reached the decision phase—provided that such cases do not concern rights that cannot be disposed of (e.g., labor, pension, and social security disputes)—may jointly request the judge to refer their dispute to arbitration. Once the judge verifies that the dispute is eligible for arbitration, according to the requirements, he or she orders the transmission of the relevant file to the president of the board of the local bar association (“*Consiglio dell’Ordine degli avvocati*”).

The arbitrators are chosen either by the disputing parties, or by the bar president, from lawyers who have been members of the local bar for more than three years and who have not been subject to disciplinary measures. The proceedings then continue before the arbitrators, without prejudice to the effects already produced by the claim brought before the court (i.e., the interruption of statute of limitations, etc.). The award rendered has the same effects as a court judgment, as provided for by Italian arbitration law.<sup>2</sup>

As regards appeal cases referred to arbitration under Article 1 of the Decree, Article 1 paragraph 4 of the same Decree provides that the award shall be issued within 120 days; otherwise, the appeal proceedings must be resumed before the relevant court in the next 60 days. If appeal proceedings are not so resumed, the proceedings are declared extinct and the first instance judgment becomes final. The appeal proceedings also need to be resumed if the award has been annulled, within 60 days after the annulment decision became final.

Finally, Article 1 paragraph 5 of the Decree provides that the Ministry of Justice may issue regulations to reduce arbitrators’ fees in the above-mentioned cases and that, unlike what happens in traditional arbitral proceedings, the parties would not be jointly liable for the fees due to arbitrators.

The provision, in essence, enables parties to a commercial dispute to opt out of lengthy court proceedings in order to have their dispute decided more quickly by arbitrators. Moreover, it gives an active role to Italian lawyers, who will act as arbitrators more often. Arbitration proceedings before a panel of lawyers acting as arbitrators would, in the government’s opinion, be less expensive than conventional arbitration proceedings.

## Settlement Negotiation Assisted by Legal Counsel (Article 2)

Article 2 of the Decree introduces the so-called “settlement negotiation assisted by legal counsel,” or “assisted negotiation,” by allowing the parties to attempt to amicably resolve their dispute before referring it to litigation or arbitration. According to the same article, the negotiation agreement is an agreement by which the parties agree to cooperate in good faith to amicably resolve their dispute with the assistance of their legal counsel.

The negotiation agreement, to be concluded in writing, must specify the term within which the amicable solution should be reached, which may not be shorter than one month, and must describe the matter in dispute, which may not concern rights that cannot be disposed of. Lawyers have an ethical duty to inform the client of the possibility to opt for assisted negotiation as a means for resolving their dispute.

Moreover, according to the Decree, assisted negotiation is a mandatory prelitigation step in certain types of disputes, i.e., most consumer protection disputes, damages caused by road and marine accidents, and collection matters not exceeding €50,000. In general, if the invitation is refused or not accepted within one month, the mandatory step is deemed satisfied. The fact that a negotiation attempt has not been made could either be objected *ex parte* or *ex officio* by and during the first hearing. If the negotiation has not started, the judge grants the parties 15 days to invite the other party to negotiate.

Pending the mandatory negotiation phase, the parties may always obtain interim measures. Furthermore, assisted negotiation is not a mandatory step for a number of special proceedings, including, *inter alia*, injunctive proceedings, preemptive technical expertise directed to settle the dispute, opposition against enforcement proceedings, *in camera* proceedings, and, in actions for damages in criminal proceedings, which may be directly initiated by the interested party.

Under Article 4 of the Decree, the judge may negatively evaluate a party's refusal to opt for assisted negotiation and could take this conduct into account when deciding on the allocation of legal fees.

The settlement agreement obtained through the assisted negotiation is immediately enforceable and amounts to a title for levying execution. The legal counsel involved in the negotiation have the power to certify the authenticity of the signatures and that the agreement complies with mandatory rules. Should the same legal counsel enforce the agreement that they contributed to form, they would incur an ethical breach of the lawyers' code of conduct.

Under Article 8 of the Decree, the statute of limitations—which is usually interrupted by a judicial/arbitral claim—would now also be interrupted from the date of the invitation to conclude an assisted negotiation. From the same date, forfeiture is also prevented only once.

By means of the assisted negotiation, the government introduces a new alternative dispute resolution method, adding it to mediation, which is already an option for parties to civil and commercial disputes and a mandatory prelitigation step in specific types of proceedings.<sup>3</sup> In the assisted negotiation, a primary role is again entrusted to the involved lawyers, as opposed to mediation proceedings, where a specific mediation entity and a mediator are involved. In the case of voluntary mediation, the lawyers' involvement is optional.

## Measures to Improve the Efficiency of Italian Civil Proceedings

Within Section IV of the Decree, Article 13 narrows down the cases in which the judge has the power to order that each party bear its own legal fees and procedural expenses. In

fact, some Italian judges tend to make extensive use of such power, thus encouraging potential losing parties to bring proceedings as a dilatory tactic and causing unjustified damages to the winning party. Hence, Article 13 now provides that legal fees and procedural costs will always be borne by the losing party; a judge can order that each party bear its legal fees only if both parties partially lose the case, if the legal issue in dispute is new, or if there has been a variation in the relevant case law.

Another measure introduced to accelerate civil proceedings is the provision under Article 14, in which the judge, after hearing the parties at the first hearing, could *ex officio* order that a case brought before him as “ordinary proceedings” be transformed into “summary proceedings” according to Article 702bis ff. of the Italian Code of Civil Procedure, if he finds that the case is not complex and does not require a lengthy taking-of-evidence phase. In such summary proceedings, instead of granting the parties three terms of respectively 30, 30, and 20 days, and adjourning the case to a hearing set many months thereafter (which amounts to the standard course of the taking-of-evidence phase), the judge invites the parties to point out at the same hearing the evidence upon which they intend to rely, including documents and contrary evidence. Upon request, the judge may invite the parties to do so at a following hearing, granting only a 15-day term for indicating direct and documentary evidence and a 10-day term to indicate contrary evidence.

Considering that to date, only the inverted process was possible (i.e., only summary proceedings could be transformed into ordinary, lengthier proceedings), this measure seems to be a step in the right direction in terms of accelerating the civil judicial process.

Moreover, with the aim to further accelerate and simplify the taking-of-evidence phase, Article 15 of the Decree contains a provision introducing for the first time in Italy the possibility for parties to produce written witness statements (similar to the affidavits used in common law systems or to the *attestations* under Article 200 ff. of the French *Code de procedure civile*). In line with the government's intention to grant lawyers with a primary role in the reorganization of the judicial system, lawyers themselves have the power to identify the witness and obtain his or her declaration, an authority that was

traditionally entrusted to the judge. Nevertheless, the judge may always order that the person who provided the affidavit be heard as a witness in court.

Article 16 of the Decree was added by the government just before the Decree was published in the *Official Gazette* on September 12, 2014. Such provision reduces the summer period during which Italian Civil courts are closed, hearings are suspended, and judicial terms/deadlines stop running. This period, which previously ran each year from August 1 to September 15, now will run from August 6 to August 31. Moreover, pursuant to this provision, judges' annual holidays are reduced from 45 to 30 working days.

The Italian national association of judges reacted negatively to this measure, claiming it is merely symbolic and would not have the effect of reducing the duration of civil justice matters. The government has a contrary opinion in this respect. It will be interesting to see any developments occur during the conversion of the Decree into law by the Parliament (if finalized).

## Measures Directed to Protect Creditors and Simplify Enforcement Proceedings and Make Them More Efficient

Section V of the Decree contains the government's proposals for measures directed at protecting creditors and measures directed at simplifying enforcement proceedings.

Article 17 of the Decree proposes that the legal interest rate be increased up to the highest rate applicable to late payments, under the relevant European Union legal framework on fighting late payments, from the date legal proceedings are initiated, provided that the parties have not agreed on a different interest rate. This measure is directed at preventing lengthy civil proceedings from becoming a means for debtors to obtain a "discounted loan," given the applicability, to date, of the low legal interest rate pending litigation.

The government also proposed measures directed at reforming Italian enforcement proceedings, which are infamously characterized by a low recovery rate and a lengthy time for collection. One of the most relevant bottlenecks in the enforcement process is that each enforcement procedure, no matter the probability of success, automatically receives a

docket number and is assigned to a judge upon request of the court bailiff who dealt with the relevant foreclosure (*"pignoramento"*). Automatically registering the large inflow of enforcement cases, a considerable number of which are abandoned due to the low prospect of satisfaction, was an inefficient use of clerks' time and other court resources. Therefore, Article 18 of the Decree introduces a provision that obliges the interested party, i.e., the creditor, to request that the enforcement case be assigned a docket number and thus assigned to a judge, by submitting an *ad hoc* request (the so-called "*nota di iscrizione a ruolo*") by electronic means.

Moreover, when the debtor has no personal assets but has one or more credits vis-à-vis third parties that owe money (i.e., employers, banks that hold the debtor's current account, etc.), Italian law provided that the relevant enforcement proceedings be brought before the judge of the third party's domicile (Article 26 of the Italian Code of Civil Procedure). Therefore, if there were more than a single third party, and if they all had a different domicile or place of business, the creditor should have brought as many enforcement proceedings as the number of third parties, each before the relevant local judge. Given the inefficiency of this system, Article 19 of the Decree now modifies Article 26 of the Italian Code of Civil Procedure, providing that the judge of the place where the debtor has its domicile is competent, except when the debtor is an Italian public entity (in order to avoid overloading the courts of the cities in which Italian public entities typically have their headquarters, i.e., Rome and Milan). Therefore, in most cases, an interested creditor could bring a single enforcement proceeding vis-à-vis all third parties, which, according to another measure introduced by the Decree, will be able to provide their declaration (that they owe money to the debtor against which the enforcement proceedings are brought) via registered mail or by electronic certified email, without having to provide such declaration in court at a specific hearing fixed by the judge, bearing all associated legal costs and expenses.<sup>4</sup>

Furthermore, Article 19 of the Decree introduces the possibility, with the authorization of the judge and during the foreclosure phase, for court bailiffs to use electronic means and browse through digital registers and online databases searching for attachable assets owned by the relevant debtors. This measure, which boosts the search powers of court

bailiffs, is intended to put Italy in line with the most developed European standards in this area and to make Italian enforcement proceedings more efficient and effective. In this respect, the Decree also contains measures directed at further motivating court bailiffs by connecting the amount of their remuneration to the sums, or to the value of the assets, that they were able to find and seize.

Moreover, according to a new measure contained in Article 19 of the Decree, the enforcement judge may issue an order extinguishing enforcement proceedings in advance as soon as it appears, based on the judge's evaluation, that the creditor would not obtain reasonable satisfaction from such proceedings.

## Conclusions

In the light of the above, it appears that the Italian government is focusing on the reform of the judicial system in order to boost the country's economic development and increase the level of foreign investment. In addition to the civil area, the government is also working on new measures to be applied to criminal justice, with the overall goal of halving the backlog of pending cases.

In any event, the contents of the present Decree must still be confirmed by the Italian Parliament during the law conversion process. The amendments and fine-tuning that may be made during the conversion process must be closely monitored, along with the practical effects of the introduced measures.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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## Endnotes

- 1 The Decree also contains, *inter alia*, measures directed to simplify the procedure to obtain a divorce (Arts. 6 and 12) and the procedure to transfer judges from one office to another (Arts. 20), as well as measures directed to monitor judicial activities and the other dispute resolution methods for statistical purposes (Arts. 11 and 19). These measures are not analyzed in the present *Commentary*.
- 2 See Art. 824*bis* of the Italian Code of Civil Procedure, providing that: "...the award has the same effects of the judgment issued by a court judge." Moreover, a decision of the joint divisions of the Italian Supreme Court recently underlined that the arbitrators' activities have jurisdictional nature and may thus substitute for the functions of a court judge (see Italian Supreme Court, joint divisions, October 25, 2013, no. 24153, in *Diritto & Giustizia*, December 17, 2013).
- 3 See Italian Legislative Decree, March 4, 2010, no. 28, recently modified by Law Decree 21, June 21, 2013, no. 69, concerning mediation finalized to the conciliation of civil and commercial disputes. According to the recent changes to such law, attempting mediation is a mandatory prelitigation step in condominium disputes, real estate, division of property, inheritance matters, family disputes, lease and loan-for-use matters, medical liability, libel and insurance, and banking and finance contract disputes.
- 4 To date, employers still had to render such declaration in court at a hearing fixed by the judge for this purpose.