

Post-lockdown litigation: Phase 2 special rules for court proceedings



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Introduction

In response to the COVID-19 outbreak, the government adopted a severe lockdown policy (so-called 'Phase 1' of the emergency), including suspending all court proceedings and related deadlines in civil and commercial matters. The suspension lasted from 9 March 2020 until 11 May 2020 and applied to all types of proceeding, with only a few matters excluded and a rigorously applied option to claim an exception where the postponement would have caused severe detriment to the parties' interests.

As the number of new COVID-19 cases thankfully decreased throughout the lockdown, as of 18 May 2020 the government moved to Phase 2, which will see a lifting of the lockdown, although rules ensuring social distancing and the prohibition of gatherings are still in place. Therefore, along with other business activities, litigation in civil and commercial matters can now resume. However, like other activities, court litigation requires special measures to ensure social distancing in the courts' premises and judicial offices while meeting the overall objectives of social and economic recovery from the devastating effects of the pandemic.

Current legal framework

The current framework of special (COVID-19-driven) provisions applicable to litigation in civil and commercial matters is the result of the hectic stratification of emergency legislation, which is currently meant to last until 31 July 2020. However, some of the special measures currently in force are likely to be extended beyond that deadline and may become permanent.

The core of the emergency legislation was enacted through Article 83 of Government Law Decree 18 of 17 March 2020 (the so-called 'Healing Italy Decree'). This was then finalised, with numerous amendments, by means of Law 27 of 24 April 2020, which entered into force on 29 April 2020. Shortly after, Government Law Decree 28 of 30 April 2020 introduced new measures which are currently in force but will require conversion into law by means of a new act of Parliament within 60 days, with the possibility of new amendments being introduced at that stage. Moreover, additional provisions exist in different acts, including relevant measures relating to debt enforcement actions and insolvency proceedings, which were enacted through Government Law Decree 23 of 8 April 2020 (the so-called 'Liquidity Decree').

As a result of the emergency that guided the adoption of the new rules, the resulting legal framework presents gaps and ambiguities. It gives the chief justice of each territorial court the power to adopt specific measures to effectively ensure that social distancing and safety requirements are met, in light of the specific logistics of each judicial office. In order to ensure some degree of uniformity, guidelines have been issued by the Superior Judicial Council of Judges and Prosecutors, the National Lawyers' Council and the Directorate General for Automated Information Systems at the Ministry of Justice. Pursuant to these guidelines, some of the largest courts in the country – including those in Rome and Milan – have adopted their own rules and guidelines, which have served as a model for other courts, thus limiting the risk of a confusing patchwork of local measures implementing the emergency legislation.

Filing new claims before courts

Some of the new measures affect how parties may institute a new action before the Italian courts.

Power of attorney

The new emergency legislation has introduced a significant derogation to the well-established principle of Italian procedural law that the client must sign the endowment with power of attorney to counsel in the physical presence of either a notary public or the counsel, to allow the receiver to certify the client's signature. To avoid physical contact, the new legislation allows for a simplified method of conferral of power of attorney, whereby the client can simply transfer electronically (as a PDF document) the conferral of power of attorney duly signed, along with a copy of the ID of the client or their representative signing the power of attorney.

Mandatory mediation or counsel-assisted negotiation as pre-requisite for instituting court proceedings

Many claims in Italy (based either on their low value or specific nature) require a mandatory preliminary attempt at settling the dispute through mediation or counsel-assisted negotiation. In Phase 1, all of these procedures (as well as arbitral proceedings with the arbitral seat located in Italy) were subject to the *ex lege* suspension.

In Phase 2, all abovementioned procedures may resume, provided that social distancing is ensured. In particular, mediation meetings must be held remotely via telematic means, provided that all parties involved in the mediation agree. Telematic mediation meetings are the sole option available during Phase 2; however, they will remain possible also after the emergency.

Filing of parties' briefs of summons and defence

To reduce the need to access the courts' premises, parties must file all of their briefs electronically, including the claimant's initial brief of summons and the defendant's initial brief of defence which, before the pandemic, could still be filed as hard copies. This change is greatly facilitated by the fact that electronic filing has been fully operative in Italy in civil and commercial litigation for more than 10 years and, since 2015, has been mandatory for all briefs other than initial ones.

More importantly, electronic filing has now been introduced with respect to proceedings pending before the Supreme Court, which was not possible before the state of emergency. However, the new electronic filing has been introduced as a mere option for the parties, as an alternative to the previous, paper-based filing, which is still possible before the Supreme Court.

Pending cases and court hearings

Prior to the COVID-19 emergency, Italian procedural rules did not permit the use of electronic instruments to hold hearings remotely. This was regarded as a requirement implementing a due process rule, under which the parties must be simultaneously present before the judge, in person or represented by their respective counsel. Therefore, the COVID-19 outbreak raised concerns as to the possibility of balancing safety requirements and compliance with due process rules.

In Phase 1, with the sole exception of extremely urgent hearings (which could sometimes be held electronically), the emergency measure adopted by the government was a generalised *ex lege* postponement of all hearings to a new date to be established by the competent court.

In Phase 2, the range of options made available to parties and the courts is more diverse and articulated.

Further postponement of hearings

Under Article 83(7)(g) of the currently applicable government law decree, the chief justice of each territorial court may order *ex officio* the postponement of one or more hearings scheduled to take place prior to 31 July 2020 (current deadline for Phase 2) to a later date.

It is commendable that most Italian courts (including those in the most relevant forums for domestic and international business) have opted to use this solution only in exceptional circumstances, thus signalling a willingness to favour a fast resumption of judicial activity.

Replacement of hearings by written submissions

In cases where attendance of a hearing is typically limited to the judge and the counsel for the parties (ie, the first hearing of appearance, the hearing for the admission of evidence requested by the parties in their briefs and the hearing for the final restatement of the parties' requests for relief), the court can communicate to the parties that the hearing is replaced by the submission of written briefs to be filed within the deadline set in the court's communication, provided that the parties can put forward in their written briefs only claims and requests that are procedurally admissible at that stage of the proceedings.

Following the parties' written submissions, and without any further contact and discussion between the court and the parties, on the date of the hearing the court will issue the relevant decision on the continuation of the proceedings.

Hearings held through electronic means

Unlike in Phase 1, when the prevailing rule seemed to be inspired by due process concerns aimed at limiting hearings without the parties' physical presence, in Phase 2, the prevailing rule seems to be inspired by a generalised reliance on the functional equivalence of hearings held through electronic means of communication to those held in presence, at least insofar as the hearing requires the participation of judges, counsel, parties and court clerks only and excludes third parties (eg, witnesses and experts).

As far as the practical management of online hearings is concerned, Microsoft Teams is the Ministry of Justice's chosen platform. At least seven days prior to the scheduled hearing, the court must communicate to the parties the link to be used to access the virtual hearing room.

On opening the hearing, the court must warn the parties that all participants must keep both their cameras and microphones on for the entire duration of the hearing, and that any form of recording of the hearing is strictly forbidden. The court must then identify all attendees and the information must be included in the meeting minutes. Subject to the court's permission, during the hearing, the parties may exhibit or otherwise refer to documents by using the online platform's share function.

In the context of rules on hearings to be held entirely online, it is somewhat surprising that Article 83 of the government law decree currently in force (28/2020) requires that the judge be physically present at the court's premises, thus adopting an approach that, although not hindering the requirement of social distancing imposed by the persistent risks of COVID-19, is inconsistent with the more general approach favouring all forms of remote working, including that of judges.

Hearings held in person

Hearings may take place in the physical presence of all parties only in limited and residual cases, mainly where there is a need to ensure attendance by third parties (eg, witnesses and experts). In this event, specific prescriptions must be issued with a view to assuring social distancing and protecting participants' health.

Other provisions affecting court litigation

Unsurprisingly, given the broad range of effects of the COVID-19 pandemic, emergency legislation has been enacted in multiple areas and in pursuance of multiple goals, with a view to favouring Italy's social and economic recovery. Therefore, in addition to measures specifically dealing with court proceedings, other emergency measures are likely to have a direct or indirect impact on litigation.

Among these measures are those aimed at protecting businesses against the risk of enforcement and insolvency proceedings connected with the financial hardship caused by the pandemic. Under the current emergency legislation, debt enforcement actions aimed at obtaining repossession of immovables are unenforceable prior to 30 October 2020 and applications for the declaration of insolvency of debtors are inadmissible prior to 30 June 2020, although, paradoxically, the debtor's directors and auditors may not be exempt from liability in the event that the insolvency worsens.

Comment

In recent years, Italy has made considerable efforts to find a cure for the chronic delays of its judicial system and make litigation in Italy more palatable to foreign investors. Online filing and consultation of the courts' documents have been key factors in improving the system. The dramatic situation produced by the COVID-19 pandemic has imposed an additional effort to move the conduct of proceedings online and to replace, where possible, certain hearings with an exchange of written pleadings.

Italian litigators hope that the pandemic emergency will end soon so that they can return to presenting their cases in the courtroom. However, there could be a positive impact if some of the provisions adopted during the emergency remain in place and further improve the efficiency of litigation in civil and commercial matters in Italy.

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