

Michele Angelo Lupoi

RECENT DEVELOPMENTS IN ITALIAN CIVIL PROCEDURAL LAW

1. In the last 20 years, a wave of reforms has changed the face of Italian civil procedural law.

The code of civil procedure of 1940 was actually never completely revised but, reform after reform, most of its original provisions have been more or less extensively modified and new rules have entered it. Moreover, many new statutes have been enacted alongside the code, in the context of the so-called de-codification process.

In the most recent efforts at reforming the Italian procedural system, the lawmaker has not appeared to follow a strategic plan, preferring a “patchwork approach”, touching several different institutions and parts of the code.

The main motivator for the last waves of procedural reforms has been the need to reduce the exceedingly long duration of civil proceedings in Italy. The Italian lawmaker has approached this most important problem with the incantation that the time required to obtain judgment in Italy could be reduced by simply intervening on the procedural mechanisms rather than through a radical intervention at the structural level. Crucially, no new investments have been made in the judicial service, preferring “zero-budget” reforms of procedural provisions.

Not surprisingly, at least in the short term, these latest reforms do not appear to have effectively tackled the problems faced by Italian civil justice. As a matter of fact, changing the procedural mechanisms is not enough to reduce the delay in the adjudication of cases and the courts backlog, especially since, at the decision stage, disputes still have to be solved on an individual basis and the time a judge needs to render his decision may not be reduced by statute.

Some of the new provisions, however, in the medium term, may arguably change the way civil proceedings are conducted and the interplay between their main actors, namely the plaintiff, the defendant and the judge, at least if they will be effectively applied by the courts. In other words, from at least some of these innovations, the face of civil justice could effectively be reformed.

In this paper, I will thus examine some of these innovative provisions.

2.

The first of the new features which may change the approach of the parties to civil proceedings in Italy may be found in the new formulation of Art. 115(1) c.p.c., concerning the defendant's duty to deliver a specific opposition against the facts on which the plaintiff's claim is based.

Traditionally, in Italian civil procedure, no duty existed for the defendant to present a defense in court containing a specific rebuttal of the plaintiff's allegations.

First of all, when a defendant does not file a defense and is held in default of appearance, such behavior is qualified as a *ficta contestatio*: in other words, a defendant in default is presumed to contest the plaintiff's claim, thus obliging the latter to fulfill his evidentiary burden in order to have his claim allowed by the court. Such traditional approach is still followed today so that it may even be argued that, sometimes, for a defendant it is more convenient to keep a passive profile rather than file a defense and stand his chance in court. When a defendant does indeed present a defense, however, he is supposed to contest the facts on which the plaintiff's claim is based, if the former wants to compel the latter to satisfy his burden of the proof and offer evidence as to the existence of those contested facts: as a matter of fact, these dynamics might eventually lead to a victory by default for the defendant, should the plaintiff not meet this onus. On the other hand, non-contested facts are considered as admitted by the defendant and should not be proved.¹

The traditional approach, however, was very strict as concerned considering a fact alleged by the plaintiff as admitted by the defendant. Apart from the rather unusual cases where a defendant explicitly admits as to existence of at least some of the circumstances described in the original claim, for a very long time, case law ruled that it was enough for a defendant to simply state that he "opposed" the facts alleged by the plaintiff to come to the conclusion that he had "contested" the plaintiff's claim.

Things, however, gradually evolved: first, with the statute on labor proceedings of 1973, which imposed on the defendant the duty to "take position" on the facts alleged by the plaintiff, with the consequence that facts which were not specifically contested by the defendant were considered as admitted, so that the plaintiff no longer was under the burden to prove them. In ordinary civil proceedings, it took longer for the Supreme Court

¹ See A. Carratta, *Il principio della non contestazione nel processo civile* (Milan, Giuffrè, 1995).

(Cassazione) ⁽²⁾ to start ruling that facts only generically contested had to be considered as admitted. There were contradicting decisions on this point, however, and courts were generally not ready to consider “silence” on the part of the defendant as a form of tacit (implicit) admission of a fact alleged by the plaintiff.

Finally, the lawmaker, with law no. 60 of 2009, changed the situation, by adding a few words to art. 115(1) c.p.c. ⁽³⁾ As a matter of fact, in compliance with the new version of such provision, the defendant now has a burden to specifically contest facts which she alleges not to be true. If such burden is not duly complied with, the judge will consider those facts as uncontested (and therefore relieve the plaintiff from the burden of proving them). ⁽⁴⁾

Today, therefore, when a defendant does not clarify his position *vis à vis* a certain set of facts or situations, he will be deemed to have accepted those facts as true. This burden of the defendant to specifically contest the alleged facts, however, is only effective in relation to rights of which a party may freely dispose of.

The standards which the defendant must meet in his denial of the facts alleged by the plaintiff are not yet set. It is felt that she should specifically point out the circumstances, in the plaintiff’s petition, that she considers to be untrue, but some argue that the new provision might effectively require the defendant to present her own version of the relevant facts on which the plaintiff’s claim is based. As an example, in a recent decision, a court of first instance held that, in a dispute concerning the conditions of an immovable located in Italy, it was not enough for the defendants to simply reply that they were not in the conditions to appreciate the plaintiffs’ allegations since they were domiciled in France.⁵

The principle of specific contestation does not operate as concerns legal qualifications of facts or evaluations which may derived from facts. Even if a fact is not contested, moreover, wanting formal requirements of an juridical act are still not cured: for instance, it was found that, when a contract requires to be stipulated in writing, the inexistence of the written document may not superseded by non-contestation from the counterpart ⁽⁶⁾.

² See Cass. SU 23 January 2002, n. 761.

³ Del Core, ‘Il principio di non contestazione è diventato legge: prime riflessioni su alcuni punti ancora controversi’, GC, 2009, II, 275; A. Tedoldi, ‘La non contestazione nel nuovo art. 115 c. p. c.’, RDP, 2011, 76.

⁴ B. Sassani, ‘L’onere della contestazione’, <www.judicium.it>.

⁵ Trib. Cuneo 5 October 2010, GM, 2011, 1041.

⁶ Trib. Rovigo-Adria 10 Septembr 2009; Trib. Piacenza 2 February 2010, <www.ilcaso.it>.

Moreover, even when a fact is not contested by the counterpart but its existence is positively denied by the evidentiary materials gathered in the course of the proceedings, it will not be taken into consideration by the judge.

It is also not yet clear the final moment, in the course of the proceedings, when the parties waive their right to contest the facts on which the counterpart's claims or defenses are based. Most commentators, however, believe that parties should contest the facts on which the other parties rely, at the latest, in the first (or in the second) written brief filed after the first hearing ⁽⁷⁾.

Commentators agree that non contestation of a fact is irreversible: in other words, a party may not deny a fact which she has previously either explicitly or implicitly admitted.

Clearly, the principle of specific contestation introduced in Art. 115 c.p.c. imposes a more active role on the side of both the parties and the lawyers and more intense communications between them. As a matter of fact, in order to effectively reply to another party's brief, a lawyer now has to analyze its content alongside his client, who should be aware of the consequences possibly deriving from a lax response. Commentators agree that the new provision might make lawyers liable for failure to efficiently inform their clients about the factual contents of another party's brief.

This new provision has now been effective for two years but it is still too early to appreciate its effects on the conduct of civil proceedings in Italy. Judges, however, appear to be ready to consider alleged facts as not contested in the face of weak or generic denials on the side of the other parties. Moreover, case-law will likely sanction a party who denies facts which are then ascertained to be true with extra costs (see *infra*). Arguably, this should lead parties to be more cautious in their defenses and avoid unsustainable denials of alleged facts, in order to concentrate the evidence gathering phase of the proceedings only on factual issues which are really in dispute.

3. – The prohibition of “surprise” decision from the court.

Law no. 69 of 2009 contains another important innovation (at least at the statutory provisions level), concerning the relationship between the parties and the judge.

Italy adopts an adversarial model of civil proceedings, inspired by the principle “audiatur et altera pars” (let the other party be heard too). The right of the parties to be “heard” must

⁷⁾ A. Briguglio, ‘Le novità sul processo ordinario di cognizione nell’ultima, ennesima riforma in materia di giustizia civile’, GC, 2009, II, 264.

be implemented and protected throughout the proceedings, at all levels and in every circumstance, since any step of the procedure must be taken after all the interested parties have had a chance to express their own point of view.

The contemporary approach to the right to be heard extends it not only to the relations between the parties but also as concerns the relationship between the parties and the judge. The new formulation of Art. 101 CPC, as revised in 2009, enshrines this new approach into the law, making it clear that the parties have a right not to be subject to “surprise” decision from the judges: it is indeed surprising for the litigants (and a violation of their right to be heard) when the final judgment is taken on grounds and issues which were neither raised nor debated among them in the course of the proceedings. Such situation might take place in relation to the legal qualification of the relevant facts (as a matter of fact, the judge is always free to apply the legal provisions she deems more appropriate for the given case, irrespective of the qualifications given by the parties) or to procedural or substantial issues which the law allows the judge to raise of her own motion.

The new text of Art. 101(2) CPC, therefore, now forbids such “surprise” decisions, in so much as it requires the judge, when he decides to raise an issue of his own motion, to always give the parties a time-limit to file a brief and a reply on such matters, before he may render his judgment. The rationale of this new provision is that the parties should always be enabled to try and “change the mind” of the judge before the latter gives his decision.⁸

The procedural reforms of 2009 also introduced rather effective new provisions concerning legal costs, in order to sanction vexatious litigation.

As a general rule, in Italy, the losing party also pays for the winner’s legal costs, in compliance with existing professional fees.⁹ The losing party will also normally pay the costs of any party or court-appointed expert.

The code of civil procedure, moreover, sanctions vexatious litigation with aggravated costs. Vexatious litigation may be defined as the situation where the losing party is found to have either sued or defended herself in bad faith or inexcusable fault.

⁸ Buoncristiani, ‘Il nuovo art. 101, comma 2°, c. p. c. sul contraddittorio e sui rapporti tra parti e giudice, RDP, 2010, 399; Giadi, ‘Il principio del contraddittorio e la nullità della sentenza della “terza via”’, RDP, 2010, 826; A. Proto Pisani, ‘Appunti su questioni rilevabili d’ufficio e principio del contraddittorio’, FI, 2010, V, 301.

⁹ Art. 91 CPC.

Traditionally, on the counterpart's request, the court may order the losing party to pay both legal costs and damages (Art. 96 CPC). In practice, this sanction is not often allowed by Italian courts, since the winning party must prove that she suffered some extra damages as a consequence of the dispute she had to bring or resist to. Case law shows that such proof is a very hard one to give.

In 2009, law no. 69 however, added a new paragraph to Art. 96 CPC, stating that, in any case, in granting orders for costs, the judge may, even on his own motion, sentence the losing party to pay, to the counterpart, a sum of money equitatively awarded. This new provision is much more effective than the traditional one: here, there is no need to prove that the losing party has caused any actual damage to the counterpart: the mere fact that she was found to have sued or resisted in bad faith is deemed enough to sentence her to pay for these extra costs ⁽¹⁰⁾. Moreover, the law does not fix any limits to the amount of money which the judge may award: in other words, the court now enjoys complete discretion in sanctioning vexatious litigation. Case law refers to this new sanction as a form of punitive award ⁽¹¹⁾, to safeguard both private and public interests ⁽¹²⁾.

Case law shows that judges are applying this new provision rather extensively, as a reaction to clearly abusive practices ⁽¹³⁾, i.e. procedural behaviors in bad faith or with the intent to disrupt or interfere with the fast and efficient dispatching of the case ⁽¹⁴⁾. As a way of example, a judge held a plaintiff to be liable for these extra costs since she had petitioned for seizure against the defendant's properties without filing a document in her possession which clearly showed that her case was unfounded. It is believed that, in the medium term, the application of the new Art. 96(3) CPC may help effectively curtailing vexatious litigation in Italy. On the other hand, the advisability of granting the court such wide discretionary powers is questioned, since it may infringe upon the parties' right of action or defense when the judge adopts low standards of culpability ⁽¹⁵⁾.

¹⁰ A. Briguglio, 'Le novità sul processo ordinario di cognizione nell'ultima, ennesima riforma in materia di giustizia civile', GC, 2009, II, 270; *Trib. Piacenza* 7 December 2010, <www.ilcaso.it>.

¹¹ *Trib. Varese* 23 January 2010, *ord.*, <www.ilcaso.it>

¹² *Trib. Piacenza* 7 December 2010, <www.ilcaso.it>

¹³ See, e.g., *Trib. Salerno* 27 May 2010, <www.ilcaso.it> and *Trib. Varese* 23 January 2010, *cit.* which refer to an abuse of the right of action.

¹⁴ For instance, many decisions mention the serious culpableness or malice of one of the parties: see *Trib. Salerno* 27 May 2010, *cit.*; *Trib. Padua* 10 November 2009, *ord.*, GM, 2010, 1858; *Trib. Piacenza* 7 December 2010, *cit.*; *Trib. Verona* 1 July 2010, *ord.*, GD, 2010, No. 49-50, 24; *Trib. Modena* 22 September 2010, n. 1208, <www.giuraemilia.it>.

¹⁵ See for instance *Trib. Terni* 17 May 2010, GM, 2010, 1834, stating that Art. 96(3) CPC may sanction also common culpability (*colpa comune*).

In an attempt to encourage parties to reach an amicable agreement in the course of the proceedings, Art. 91(1) was redrafted in 2009¹⁶: the new formulation specifies that, if the judge allows the claim in an amount which is not more than the one which was proposed by the other party in an attempt to settle the dispute and which the winning party refused without good reason, the latter will have to pay the costs which the former sustained after making such proposal. In other words, when an offer to settle is made during the procedure, the other party now has to balance that offer against the plausible outcome of the dispute, in order not to have to sustain part of the costs of his adversary.

The new provision also encourages defendants to balance their options in the proceedings and come up with reasonable settlement proposals before the case goes on to the deliberation phase. It also raises some procedural doubts, however. For instance, the law does not clarify the requirements the mentioned “proposal” should comply with. Commentators agree on the fact that such proposal should be in written form and that it should be formally brought to the attention of the judge. For instance, it may be formulated by the party in the course of a hearing or written down in one of the briefs filed in court. Possibly, even a proposal made by the party before the start of litigation could be taken into consideration, for example when it was sent in a written communication to the would-be plaintiff.

The reform of 2009 also tried to restrict access to the Italian supreme Court (Cassazione). The enormous caseload of the Cassazione (and the related delays in the dispatching of cases) is one of the main problems of the Italian appeal system. The source of such problem lies in the Constitution which grants the parties the right to file a petition (*ricorso straordinario*) to the *Corte di cassazione* against any judgment (*rectius*, decision) which, in the civil field, adjudicates upon a subjective right and is not subject to any other form of review: Art. 111(7).¹⁷ This provision not only brings before the Cassazione a large number of extraordinary petitions, but also represents a major obstacle to any attempt of keeping cases out of the supreme Court, e.g., by adopting a system based on leave to appeal.

In an attempt to making it harder to bring cases before the court, in 2006, a new formal requirement of the petition before the Court was introduced: as a matter of fact, as a general rule, a *ricorso* was required to present specific legal questions (*quesito di diritto*),

¹⁶ See A. Doronzo, NLCC, 2011, 767 ff.

¹⁷ Art. 111(7) Const.

in order to enable the Court to state corresponding legal principles (*principio di diritto*). Allegedly, this new requirement was meant to put an emphasis on the role of the *Cassazione* as a court strictly concerned with the interpretation of the rule of law. However, it also worked as an effective workload-reducing factor for the Court, since, according to Art. 366bis CPC, whenever the legal question was omitted or not properly formulated, the petition was struck out. The case law of the *Cassazione* showed that the Court was ready to give a very strict and formalistic notion of *quesito di diritto*, therefore making a large number of petitions inadmissible on purely procedural grounds. This position was unsatisfactory and in 2009, Art. 366bis CPC was quickly repealed. No formulation of legal questions in the *ricorso* is therefore required now.

Law n. 69 of 2009, however, introduced a new form of “filter” for petitions to the Supreme Court (¹⁸), in order to try and make access to the *Cassazione* harder for *prima facie* frivolous or unfounded appeals, thus reducing the court workload. According to the new Art. 360bis CPC, a *ricorso* will be deemed inadmissible if the decision appealed against has solved the relevant legal issues in compliance with the case law of the *Cassazione* and the claimant does not show good reason to revert those precedents or if the complaint concerning the violation of fair trial principles appears to be manifestly unfounded.

Reference to the application of the *Cassazione* precedents by the lower courts should not be interpreted as a form of *stare decisis*. Rather, the new provision tries both to encourage lower courts to follow the Supreme Court case law, therefore making the outcome of decisions more predictable; and to compel the petitioner to consider the advisability of filing a *ricorso* against a decision which most likely will be confirmed by the Supreme Court. However, if good reasons are shown, the *Cassazione* may always decide to reverse its own case law and follow a new interpretative track.

In Italy there is no proper doctrine of contempt of the court. There is no general automatic sanction for debtors who do not voluntarily comply with a court order.

At certain conditions, however fraudulent non-compliance with a court decision can be punished as criminal felony (Art. 650 CP).

In recent years, several sectorial new provisions have introduced remedies to try and coerce a reluctant debtor to “voluntarily” comply with an order given by the judge. By way

¹⁸ A. Briguglio, ‘Chi ha paura del “filtro”?’, <www.judicium.it>; *Il nuovo giudizio di Cassazione*, G. Ianniruberto, U. Morcavallo (eds.) (Milan, Giuffrè, 2010), p. 137 ff.

of example, mention may be made of Art. 140 (7) of DLGS No. 206 of 6 September 2005 (the so-called Consumer Code) which states that, in decisions aimed at safeguarding the collective interests of consumers, the judge may establish a deadline for complying with any order given therein and also fix a pecuniary penalty (from 516,00 to 1.032,00 euros), for each repeated failure to comply or for each day of non-compliance, according to the seriousness of the situation. A similar fine was introduced by Art. 6 of DLGS No. 231 of 9 October 2002, n. 231, on combating late payment in commercial transactions.

Finally, in 2009, Art. 614*bis* has been brought in the code of civil procedure, introducing a general *astreinte* to sanction non compliance or violations of judicial orders to perform or not to perform an action (¹⁹). In other words, this court's order should induce a debtor to voluntarily comply with a judicial decision, under threat of (mounting) pecuniary sanctions in case of failure to do so, making it more convenient for the obliged party to comply with the order rather than not (²⁰).

Upon the party's application²¹, when releasing an order, the judge may determine a sum of money according to the circumstances of the case which the party receiving the order will be bound to pay should she fail or be late to comply with it, unless such remedy appears to be manifestly unfair. In case of failure to comply or repeated infringement, the creditor will thus have a title to enforce against the debtor's asset. It will then be the burden of the debtor to raise an opposition against the enforcement, should he contest failure to comply with the judge's order. The distribution of the burden of the proof will shift from the creditor to the debtor, depending on whether repeated violation or failure to comply is alleged (²²).

This new remedy has still a limited scope of application (e.g., it cannot be obtained to enforce an order to deliver an asset or release an immovable property nor in the context of

¹⁹ C. Asprella, 'L'attuazione degli obblighi di fare infungibile e di non fare', GM, 2011, 117; Lombardi, 'Il nuovo art. 614-bis c. p. c.: l'astreinte quale misura accessoria ai provvedimenti cautelari ex art. 700 c. p. c.', GM, 2010, 401; E. Merlin, 'Prime note sul sistema delle misure coercitive pecuniarie per l'attuazione degli obblighi infungibili nella l. 69/2009', RDP, 2009, 1548; R. Caponi, 'Italian civil justice reform 2009', *cit.*; G. Miccolis, NLCC, 2010, 1047.

²⁰ M. Bove, *op. cit.*, 1.

²¹ See Tribunale Terni 4 August 2009.

²² M. Bove, 'La misura coercitiva di cui all'art. 614-bis c. p. c.', <www.judicium.it>, 8; E. Merlin, *op. cit.*, 1552.

labour relationships)²³, but it is now being used rather effectively, e.g., in the context of *interim* provisions or provisional orders²⁴.

It is submitted that the parties may even voluntarily include an *astreinte* in the context of a judicial settlement.

The lawmaker, in a rather spasmodic attempt to improve the parties' procedural armoury, with law No. 69 of 2009 also brought a new procedural model into the Italian legal order: as a matter of fact, Arts. 702*bis* ff. were inserted in the CPC, introducing the *procedimento sommario di cognizione*, a notion which may roughly be translated as summary proceedings.²⁵

Actually this new procedural remedy comes to enrich a very long list already. Actually, in the Italian legal order, more than 30 different procedural models may be identified. Critics even wonder if the need was felt of a new addition...

The term "summary" is used here in a rather different connotation than in other forms of summary proceedings already existing in Italy.

As a matter of fact, in Italian civil procedure, the term "summary" has various meanings and implications. Roughly speaking, the judge's ascertainment is "summary" when it is not exhaustive, or it is based on a lower standard of persuasion (e.g.: the likelihood of the existence of a right) or on certain types of evidence only.

The new summary proceedings, however, are functional equivalents of ordinary ascertainment proceedings: as a matter of fact, the judge's final decision is given the same authority and effects of an ordinary judgment. This means that the word "summary" here does not refer to an investigation which is not complete or exhaustive as to the existence of the relevant facts, but rather to a simple and fast evidence gathering phase, for cases which may be decided on the basis of the relevant documents or of just a limited amount of oral evidence.²⁶ In other words, these new proceedings are destined to be used in simple

²³ See E. Silvestri, 'The devil is in the details: remarks on Italian enforcement procedures', in C. H. Van Rhee, A. Uzekac (eds.), *Enforcement and enforceability. Tradition and reform* (Antwerp, Intersentia, 2010), 213

²⁴ *Trib.* Terni 4 September 2009, *ord.*, FI, 2009, No. 9, *Anticip. e novità*, 9; *Trib.* Cagliari 19 October 2009, GM, 2010, 394; *Trib.* Verona 9 March 2010, *ord.*, GM, 2010, 1857.

²⁵ R. Caponi, *Italian civil justice reform 2009, cit.*; Guaglione, NLCC, 2010, 1118; M. A. Lupoi, 'Sommario (ma non troppo)', RTDPC, 2010, 1225.

²⁶ *Trib.* Varese 18 November 2009, *ord.*; R. Caponi, in G. Balena, R. Caponi, A. Chizzini, S. Menchini, *La riforma della giustizia civile* (Turin, Giappichelli, 2010), p. 206.

cases²⁷, where the facts are not contested or may be easily ascertained²⁸, so that the trial may be being fast and effective. As a matter of fact, the first published decisions appear to have been granted in just a few months, therefore within a delay which is not even comparable to that of ordinary proceedings. For this reason, many commentators promote the use of this procedural model, even though court's practices sometimes express suspicions, if not open hostility towards it.

Summary proceedings are an alternative to ordinary ascertainment proceedings.²⁹ In other words, the plaintiff is free to choose among these two procedural models.

However, if a plaintiff chooses to file a petition for summary proceedings, he cannot be sure that the judge will uphold such choice. As a matter of fact, at the first hearing, the judge will review the case and the parties' defence and decide whether to move the case to the tracks of ordinary proceedings or to keep it as a *procedimento sommario*. The defendant, on the other hand, might want to induce the judge to move to the ordinary track, by bringing new claims, defences and evidentiary requests, in order to make the case more complex.³⁰

Summary proceedings are admissible only for disputes within the competence of the *Tribunale* at first instance, where the case falls to be decided by a single judge. Summary proceedings may not therefore be tried before either the *Giudice di pace*³¹ or the Court of Appeal³².

Any type of claim within this scope of application may be tried with summary proceedings.³³ Moreover, it must be possible to decide the case through a summary evidence gathering phase (i.e. through simple and fast evidentiary activities, performed in an informal setting, without strict application of the legal rules).³⁴

²⁷ *Trib. Varese* 18 November 2009, *ord.*; M. Bove, 'Il procedimento sommario di cognizione di cui agli articoli 702-bis ss. c. p. c.', <www.judicium.it>, 6.

²⁸ *Trib. Varese* 18 November 2009, *ord.*; B. Capponi, 'Note sul procedimento sommario di cognizione (art. 702-bis e segg. c. p. c.)', <www.judicium.it>, 3.

²⁹ A. Briguglio, 'Le novità sul processo ordinario di cognizione nell'ultima, ennesima riforma in materia di giustizia civile', GC, 2009, II, 260; L. Dittrich, 'Il nuovo procedimento sommario di cognizione', RDP, 2009, 1582.

³⁰ See R. Caponi, in G. Balena, R. Caponi, A. Chizzini, S. Menchini, *op. cit.*, p. 198.

³¹ *Trib. Modena* 18 January 2010, *ord.*; L. Dittrich, *op. cit.*, 1585.

³² *Trib. Modena* 18 January 2010, *ord.*

³³ F. P. Luiso, 'Il procedimento sommario di cognizione' <www.judicium.it>, 1; S. Menchini, 'L'ultima "idea" del legislatore per accelerare i tempi della tutela dichiarativa dei diritti: il processo sommario di cognizione', *Corriere giuridico*, 2009, 1026; *Trib. Modena* 18 January 2010, *ord.*; M. Bove, 'Il procedimento sommario di cognizione di cui agli articoli 702-bis ss. c. p. c.', <www.judicium.it>, 1; L. Dittrich, *op. cit.*, 1586.

³⁴ F. P. Luiso, *op. cit.*

It is up for the judge at the first hearing to decide on how to let the case proceed. There are no fixed guidelines nor clear cut standards for the judge's decision. Ideally, in order to be "simple", the evidence gathering phase should be confined to just one hearing³⁵, but even a series of hearing is considered to be compatible with this procedural model, as well as the need to gather oral or expert evidence (³⁶). When complex and articulated evidence gathering must take place, the case should be moved to the ordinary track.

In these summary proceedings the court enjoys important discretionary powers and the rules may be applied in rather flexible ways. In order to try and provide some operative guidelines, some *Tribunali* have even released Protocols to govern for their own local practices.

As a matter of fact, at the first hearing, the judge decides the track the proceedings will take: as it was pointed out earlier, if the judge comes to the conclusion that no evidence needs been gathered or that a fast and informal evidence gathering place may be enough to ascertain the relevant facts, then the case will go on as summary proceedings. Otherwise, the ordinary track will be taken and the judge will fix a hearing to perform the activities listed in Art. 183 CPC (see at §). Once the ordinary track is taken, it is not possible to bring the case back on the summary one: so to speak, the change of track is irreversible.³⁷ The relevant decision, moreover, may not be appealed against. In other words, the judge enjoys an uncontrolled discretion in deciding which track to follow. Rather often, summary cases are moved to the ordinary track simply because the judges' backlog is so congested that they are not in the position to devote to summary proceedings the immediate attention they deserve.

When the case proceeds on the summary track, any relevant and admissible evidence is collected irrespective of formalities under the judge's direction. The notion of informal evidence gathering must not be taken to mean that the burden of the proof is superseded or that a lower evidentiary standard needs be reached in order to allow the claim on the alleged facts. Rather, the judge will be in the position not to strictly follow the rules of the code concerning the way evidence is gathered in the course of the proceedings. For

³⁵ R. Giordano, 'Il procedimento sommario di cognizione', GM, 2009; *Trib.* Taranto 2 March 2010, *ord.*, <www.ilcaso.it>.

³⁶ G. F. Ricci, *La riforma del processo civile. Legge 18 giugno 2009, n. 69* (Turin, Giappichelli, 2009), p. 110; *Trib.* Taranto 2 March 2010, *ord.*, <www.ilcaso.it>; *Trib.* Brescia 10 february 2010, *ord.*, <www.ilcaso.it>.

³⁷ S. Menchini, *op. cit.*, 1030.

example, some commentators believe that, in this context, witnesses may be heard with no need to previously set out the questions they will be asked.³⁸

In this procedural model, concentration and orality govern the operations of both the parties and the judge. This means that as soon as the evidence is collected, the judge may require the parties to orally discuss the case.

When oral arguments have been heard, the decision is taken in the forms of an *ordinanza*, possibly directly at the very same hearing. In practice, the judge may also give the party the possibilities to file written brief, and reserve his decision outside of the hearing.³⁹

The *ordinanza* which is granted at the end of summary proceedings at first instance is in reality the functional equivalent of a full judgment. As a matter of fact, it may be appealed against like it was a judgment, before the Court of Appeal. If not timely appealed, the *ordinanza* becomes *res judicata* and enjoys the same authority granted by Art. 2909 CC to judgments.

³⁸ G. F. Ricci, *op. cit.*, p. 110; L. Dittrich, *op. cit.*, 1595; *Trib. Varese* 18 November 2009, *ord.*

³⁹ L. Dittrich, *op. cit.*, 1596.

Mediation and conciliation

Twenty years of procedural reforms have failed to make civil justice more efficient and faster. The new remedies and provisions instituted in 2009 may have some beneficial effects in the medium term, but they appear unlikely to cure the structural crisis of the Italian machinery of justice.

As some sort of last resort, in 2010, the lawmaker looked at ADR as a tool to try and reduce the court's caseload.

As a matter of fact, Italy was under the duty to implement in national legislation the principles set forth by the European Directive No. 52 of 21 May 2008, on certain aspects of mediation in civil and commercial matters. Art. 60 of Law No. 69 of 2009, therefore, granted the Government the power to issue a *decreto legislativo* on mediation, following certain guidelines (which were themselves based on the standards set by the Directive).

On 4 March 2010, *DLGS* No. 28 was thus enacted⁽⁴⁰⁾. This piece of legislation for the first time introduced a general discipline for mediation in Italy, filling an important lacuna in the system.

⁴⁰ See R. Caponi, 'Italian civil justice reform 2009', *ZZPint*, 2009; D. Noviello, 'Considerazioni in merito al rapporto tra mediazione e processo alla luce del decreto legislativo n. 28/2010', <www.comparazioneDIRITTOCIVILE.IT>; Amerio, Appiano, Boggio, Comba, Saffirio, *La mediazione nelle liti civile e commerciali. Metodo e regole* (Milan, Giuffrè, 2011); Armone, Porreca, 'La mediazione tra processo e conflitto', *FI*, 2010, V, 95; M. Bove, 'La riforma in materia di conciliazione tra delega e decreto legislativo', <www.judicium.it>; A. Carratta, 'La via italiana alla conciliazione: luci ed ombre nel decreto legislativo sulla "mediazione finalizzata alla conciliazione nelle controversie civili e commerciali"', in Auletta, Califano, Della Pietra, Rascio (eds.), *Sull'arbitrato. Studi offerti a Giovanni Verde* (Naples, Jovene, 2010), p. 141; S. Chiarloni, 'Prime riflessioni sullo schema di decreto legislativo di attuazione delle delega in materia di mediazione ex art. 60 legge n. 69/2009', <www.ilcaso.it>; F. Cuomo Ulloa, 'Novità in materia di conciliazione e mediazione', *Contr.*, 2009, 640; D. Dalfino, 'Mediazione, conciliazione e rapporti con il processo', *FI*, 2010, V, 101; F. P. Luiso, 'La delega in materia di mediazione e conciliazione', *RDP*, 2009, 1257; C. Punzi, 'Mediazione e conciliazione', *RDP*, 2009, 845; G. Raiti, 'La delega in materia di mediazione e di conciliazione delle controversie civili e commerciali ex art. 60 Legge n. 69 del 2009', in *Sull'arbitrato. Studi offerti a Giovanni Verde, cit.*, p. 657; G. F. Ricci, *Il procedimento di mediazione di cui al D.LGS. 4 marzo 2010, n. 28* (Turin, Giappichelli, 2010); R. Tiscini, 'Vantaggi e svantaggi della nuova mediazione finalizzata alla conciliazione: accordo e sentenza a confronto', *GC*, 2010, II, 489; R. Tiscini, 'Il procedimento di mediazione per la conciliazione delle controversie civili e commerciali', <www.judicium.it>; E. Zucconi Galli Fonseca, 'La nuova mediazione nella prospettiva europea: note a prima lettura', *RTDPC*, 2010, 653.

The main flaw of this important reform is that it seems to consider mediation more as a tool to reduce the courts' caseload than as the expression of a new cultural approach to litigation. In particular, it appears rather suspicious of the role of lawyers and Italian lawyers, in turn, have expressed very hard opinions on the new *decreto legislativo*, especially in so much as it makes a preliminary attempt at mediation as a mandatory precondition for certain types of disputes.

In this new piece of legislation, "mediation" is intended as the activity of a third and impartial person (the mediator), aimed both at assisting two or more parties in searching an amicable agreement to solve a dispute between them and at making a proposal to solve such dispute. Concerning the mediator, the law specifies that he has no power at all to adjudicate the dispute or render binding decisions for the parties. In other words, in the provisions of *DLGS* No. 28, two different models of mediation are mixed: on the one hand, the so-called facilitative mediation (where the mediator only helps the parties reach an agreement on their own terms), and on the other, the so-called adjudicative mediation (where the mediator, if the parties fail to reach an agreement of their own, finally offers them a proposal to solve their dispute, which the parties are then free to accept or refuse within 7 days, even though their refusal to do so might have some negative consequences on the costs of future litigation: see §). As a general rule, such proposal may not refer to any declaration made by the parties nor to any information acquired in the course of mediation (Art. 11).

On the other hand, "conciliation" is defined as the positive result of mediation, i.e. the agreement which settles the dispute between the parties. In other words, following the guidelines of the EU Directive, mediation and conciliation are considered not as two different types of A.D.R., but rather as, respectively, the proceedings which the party go through in order to solve their dispute, and the result of such proceedings.

DLGS No. 28 of 2010 refers to four different "models" of mediation:

- voluntary mediation: here, the parties mutually agree (without being obliged to do so) to try and mediate a dispute between them, before going to Court;
- court-proposed mediation: Art. 5 (2) empowers the judge, in any stage of the proceedings (and even at the appeal level) to propose to the parties to try to mediate the dispute; if the parties agree to do so, the case is postponed and the parties are remanded before a mediator;
- contractual mandatory mediation: here the parties are bound by a contractual clause to try and mediate the dispute before going to court;

- finally, and most controversially, mandatory mediation Art. 5(1): as a matter of fact, from 21 March 2011, the lawmaker has made it mandatory to preliminarily try to mediate several types of disputes, before enabling the plaintiff to bring a case before the court. In particular, this mandatory attempt is required in disputes concerning rights *in rem*, division of common properties, wills and successions, family agreements (*patti di famiglia*), lease contracts, free-loan contracts, medical liability, libel, insurance, banking and financial contracts. From March 2012, pre-trial mediation should become mandatory also in relation to condominium disputes and to claims for damages deriving from road or maritime collisions.

In other words, the lawmaker has introduced a restriction to the right of access to justice. This mandatory attempt to mediate, however, is not in itself unconstitutional as concerns the delay it causes to the start of the action in court, since mediation proceedings may not last longer than 4 months and such time-limit is likely to be considered by the Constitutional Court as not excessive. The real problems lies with the costs of this preliminary mediation, which may be rather high when the value of the case is not small and when the parties to the dispute are many. It is submitted that the Constitutional Court might find this economic implication in violation of some Constitutional fundamental rights, such as the right of access to justice and the principle of equality.⁴¹

The basic idea behind mandatory mediation is that a plaintiff, before being entitled to serve his originating claim, should file an application with one of the mediation institutions approved by the Ministry of Justice, to try and mediate the case. If such preliminary mandatory mediation is not duly attempted, at the first hearing, either upon the defendant's objection or even *ex officio*, the judge will remand the parties to mediation, fixing the following hearing after a delay of 4 months. It is not clear, however, how should the judge react upon being informed, at that second hearing, that none of the parties has filed an application for mediation in the time given for that purpose. While some commentators argue that the judge should let the proceedings move forward, there are reasons to believe that the law imposes a stricter solution, i.e. the discontinuance of the proceedings.

The mediation institution, upon receiving the plaintiff's application, will appoint a mediator and invite the other parties to take part in the mediation proceedings. If this is case, the mediator will try to help the parties reach an agreement and conciliate their

⁴¹ On access to court and its limitation through financial burdens *see* N. Trocker, 'Civil procedure as a part of the Constitutional project: the fundamental guarantees of the parties', in M. De Cristofaro, N. Trocker (eds.), *Civil justice in Italy* (Tokyo, Jigakusha, 2010), p. 57.

dispute. When this attempt is successful, the parties agreement will be made enforceable by the competent *Tribunale*. If the attempt fails (or if four months pass without the parties reaching an agreement), mediation ends and the parties are free to bring their dispute before the courts.

Art. 11(1) of *DLGS* 28 of 2010, however, enables the mediator, even on his own initiative (if the institutions regulations so allow), to formulate a mediation proposal to the parties: in other words, it is up to the mediator to propose a solution to the dispute. The parties are of course free to accept that proposal or not. However, if the case goes on before the judge, the fact that the winning party refused a mediator's proposal which was substantially confirmed by the final judgment will have an influence on the costs of the proceedings.

The lawmaker clearly considered that making it mandatory to at least try to mediate a dispute before starting litigation will reduce the courts' workload. In order to achieve this important goal, it has tried to lead even reluctant litigants to participate in such attempt: as a matter of fact, Art. 8(5) of *DLGS* No. 28 expressly states that, if a party refuses to take part in the mediation proceedings without "good reason", the judge will evaluate such behavior as an evidentiary argument in the course of the subsequent judicial litigation. It is still too early to say whether the courts will adopt stricter or laxer standards, as concerns the notion of "good reason" in this context.

Not every kind of dispute may be mediated. Following the guidelines of the EU Directive, Art. 2 of *DLGS* No. 2 specifies that only disputes in civil and commercial matters concerning rights of which the parties may freely dispose of (*diritti disponibili*) may be subject to mediation.

Interestingly, the Italian implementation of the Directive does not limit mediation to transnational disputes, but extends this form of A.D.R. also to national cases.

DLGS No. 28 of 2010 does not regulate mediation proceedings in every detail. On the contrary, it specifies - Art. 3(1) - that the proceedings are governed by the regulation of the institution chosen by the party. Such regulation however must satisfy certain minimum standards, namely confidentiality of the proceedings (see also Art. 9) and impartiality of the mediator, who should also be adequate in granting fair and speedy progress of the mediation sessions. Art. 3(3) also specifies that the acts of the mediation proceedings should not be subject to formal requirements. In other words, a deformedalized procedure is provided, mostly based on orality and with minimum exchange of written materials.

Some procedural guidelines, however, are fixed by statute.

First of all, Art. 4 makes clear that, in order to start the mediation, the interested party has to file an application in an institution of his choice. No rules concerning venue are given, and the applicant enjoys complete freedom of selection. In the application, the name of the institution, the parties, the object and the reasons for the claim should be indicated. Upon receiving the application, the institution appoints a mediator and sets the first hearing with the party within 15 days of the moment the application was filed.

When he is appointed, the mediator is required to sign a declaration of impartiality; he should also make a disclosure about facts or circumstances that could make him biased. The law forbids him from receiving any compensation directly from the parties (Art. 14).

The institution sends a copy of the application and communicates the date set for the meeting to the other parties (Art. 8). The actual progress of mediation is then left to the regulations approved by the institutions. The law just says that the mediator should make an effort in order to lead the parties to amicably settling their dispute. If the case may be, the mediator may also be coadjuvated by “experts” (whose role in the proceedings is not clear...).

If the case is settled, a written report is written and duly signed by the parties and the mediator (Art. 11). It may be made enforceable by the *Tribunale*, upon the party’s application for exequatur, unless it is deemed to be in violation of public policy or mandatory provisions.

If, on the other hand, the parties do not reach an agreement, each of them has the prerogative to bring the case before the competent court.

In the course of the proceedings, however, the judge may take into consideration the fact that the winning party refused a mediator’s proposal which was substantially confirmed by the judgment, at the time of issue his final decisions on costs. The judge may also consider the fact that a party refused to take part in the mediation in order to reinforce his opinion on the merits of the case.

Apart from this, however, there is an absolute prohibition for the parties to reveal anything that was said or done in the course of mediation, unless all the parties agree to release to the judge these pieces of information. The mediator has a confidentiality obligation and has a privilege against being heard as a witness in the course of the proceedings (Arts. 9 and 10).

Finally, in this survey of the most recent procedural reforms in Italy, mention must be made to the introduction of class-actions in the Italian legal system.

Some forms of proceedings for the protection of collective or superindividual interests have existed in Italy for a few years, with rather limited scope of applications and without a clear reform project⁴² (e.g., in labor law, concerning the repression of anti-union conducts, actions for environmental protection and measures against the use of vexatious clauses in consumer contracts under Art. 140 of the Consumer Code).

In recent years, however, the need was felt to introduce a new general collective remedy to safeguard situations where individual action could not be effective or where there are several subject potentially involved in a juridical relationship. The CPC, of course, regulates proceedings where more than two parties are involved or where third parties join or are joined in. Such ordinary rules however may not handle in an effective way proceedings where tens, if not hundreds or thousands of parties are involved.

After long scientific discussions and political debate, a brand new “action for collective redress” was introduced by Law No. 244 of 24 December 2007 in Art. 140*bis* of the Consumer Code.⁴³ This original remedy basically gave Associations and Committees, included in a special registry held by the Government, standing to bring collective proceedings for the protection of consumers’ rights. The original version of Art. 140*bis* was supposed to enter into force a few months after the approval of Law No. 244. However, mounting political and economic opposition to the new remedy led to an initial postponement of its entry into force. As a matter of fact, big firms, banks and insurance companies were particularly worried about the consequences that this collective redress could have on their business. In the end, the original version of Art. 140*bis* never entered into force. Under a new Government, a completely new version of Art. 140*bis* was drafted and introduced in the Consumer Code by law No. 99 of 23 July 2009.⁴⁴

⁴² M. Taruffo, ‘La tutela collettiva nell’ordinamento italiano: lineamenti generali’, RTDPC, 2011, 103 ff.

⁴³ See R. Caponi, ‘The collective redress action in the Italian legal system’, *ZZPInt*, 2009; G. Costantino, ‘La tutela collettiva risarcitoria. Note a prima lettura dell’art. 140-bis del codice del consumo (2008)’, in *Riflessioni sulla giustizia (in)civile (1995-2010)* (Turin, Giappichelli, 2011), p. 729.

⁴⁴ See C. Punzi, ‘L’“azione di classe” a tutela dei consumatori e degli utenti’, RDP, 2010, 253 ff; G. Costantino, ‘La tutela collettiva risarcitoria 2009: la tela di Penelope’, FI, 2009, V, 388 ff.; M. Bove, ‘La trattazione nel processo di classe’, <www.judicium.it>; G. Costantino, ‘L’azione di classe ai sensi dell’art. 140-bis del codice del consumo. La sentenza di accoglimento. Il giudizio preventivo di ammissibilità’, in *Riflessioni sulla giustizia (in)civile (1995-2010)* (Turin, Giappichelli, 2011), p. 743; S. Menchini, ‘I primi provvedimenti relativi all’azione di classe dell’art. 140-bis cod. consumo’, <www.judicium.it>, S. Menchini, A. Motto, *Art. 140 bis*, <www.judicium.it>.

The new provision finally entered into force on 1st January 2010: the remedy provided for therein is no longer an action for collective redress, governed by Associations and Committees, but a class action in the proper sense, which may be promoted by individual consumers. The new remedy aims at protecting homogeneous individual rights of consumers and users, as an alternative and non-mandatory procedural device which may be used by individual members of the class, even through associations or committees he may be part of, in order to ascertain liabilities and obtain a judicial award for damages suffered and restitutions. In other words, in the Italian class action, only individual rights having a homogeneous nature for all the members of a class of consumers or users may be protected, leaving collective or superindividual interests outside of the scope of application of Art. 140*bis*. Moreover, it is believed that the new provision does not create new rights but only provides a new remedy to protect existing rights and claims.

More specifically, Art. 140 *bis* applies to:

- contractual rights of a plurality of consumers and users who find themselves in an identical situation *vis à vis* the same enterprise, including rights deriving from mass contracts and contracts based on forms drafted by one of the parties only;
- identical rights vested on final consumers of a specified product, *vis à vis* the same producer, even when no direct contractual relation exists;
- identical rights to restore damages deriving to the same consumers and users from unfair business practices and anti-competition behaviors.

In order for a class action to start, an individual consumer, eventually supported by an association or a committee, needs to file an application to the competent *Tribunale* to certify such action and open it to the other members of the class.

Only the proposing plaintiff becomes a party of the proceedings in the proper sense of the terms. Individual members of the class who join are not considered parties and do not enjoy procedural powers, nor may they appeal the final decision: however, once they have joined in, they are bound by the outcome of the proceedings.

The *Tribunale* always tries and decides a class-action with a panel of three judges.

The claim is proposed with a *citazione*, which must be served not only on the defendant enterprise but also on the public prosecutor (pubblico ministero), who may take part in the preliminary phase of these proceedings, until the court decides whether to certify the class action or not.

As a matter of fact, the proceedings are divided in two stages.

At the first hearing, the court is called upon to decide on the issue of certification. If an affirmative decision is taken, the case goes on as a certified class action. Otherwise, the claim is dismissed. In other words, in the certification stage, the court verifies the “seriousness” of the grounds on which the plaintiff wishes to propose his class action as well as the adequacy of the plaintiff to represent the whole class.

Para. 6 of Art. 140*bis* sets the factors which the court is requested to check at this stage:

- whether the claim is manifestly ungrounded,
- whether there is a conflict of interests between the plaintiff and the class,
- whether the individual rights are not homogeneous,
- whether the plaintiff is not in the position to adequately protect the interest of the class.

In other words, in this preliminary stage, the court must check both that the proposed class action is not *prima facie* groundless⁴⁵ and that the proposing plaintiff may appropriately represent the whole class of suitors.

Of course, the court must also check whether the claim is brought effectively by a consumer or a user. The notion of consumer is given by Art. 3, letter c) of the Consumer Code as the person who acts for a purpose which can be regarded as being outside his trade or profession. On the other hand, according to the same provision, a producer is the physical or legal person who acts for a purpose within her trade, commerce, art or profession or an intermediary of such person.

At the end of the preliminary hearing, the court decides with an order whether the claim may be certified as a class action. If the claim is dismissed, the court awards costs against the losing plaintiff and may even order its decision to be properly advertised.

If, on the other hand, certification is granted, the court will establish the terms and conditions to advertise its decision, in order to put the members of the class to timely join. Moreover, the order will define the nature of the individual rights which will be adjudicated upon in the class action, setting the standards which will be used to determine whether joining members will be accepted or not in the action.

A deadline (within 180 days of the time the decision is advertised to the public) is also fixed for class members to join in.

As it was mentioned above, in this model of class action, only the promoting plaintiff is considered a party to the proceedings. In order to join, members do not need to instruct

⁴⁵ See A. Giussani, ‘La prima “uscita” della class action all’italiana soffocata da meccanismi preclusivi penalizzanti’, GD, 2010, No. 27, 16: *App. Turin* 27 October 2010, *ord.*, GD, 2010, No. 47, 60.

lawyers and they may also delegate the plaintiff to file their applications to join the class. By joining, they are not empowered to perform any procedural activity, but they will be bound by the court's final decision.

The Italian class action is based on an opt-in system. By joining the class action, members waive their right to bring individual claims for the case cause of action. Only joining members will be bound by the decision, while subjects vested with the same rights will be in the position to promote individual claims even if the class action is finally rejected. However, after the time-limit for joining as member of the original class-action has expired no further class-action may be proposed concerning the same factual situation *vis à vis* the same producer. Any subsequent class action, as a matter of fact, will be merged with the one previously filed.

Moreover, any waiver of settlement between the parties will bind only joining class member who expressly gave their consent to them. In other words, agreements in the course of the proceedings require another opt-in from the members of the class.

In the order which certifies the class action, the *Tribunale* also plans the course of the proceedings, taking into consideration the adversary principle and a fair, efficient and expeditious administration of the action. In particular, the schedule of the evidence gathering phase is set and any other procedural issue is ruled upon, without any unnecessary formalities.

If the claim is finally allowed, the *Tribunale*, in its judgment, either directly awards the sums which are due to the members of the class or sets an homogenous standard for awarding such sums.

The judgment may be appealed against and the producer may apply for a stay of the enforceability of the decision. In deciding whether to grant such a stay, the Court of Appeal has to consider the global amount awarded against the producer, the number of claimants and the hardship in recovering the sum paid, should the appeal be allowed.

So far, only very few claims have been brought to have a class action certified⁴⁶: to the knowledge of this writer, only one of such claims has so far been allowed, by the *Tribunale* of Milan, in relation to an anti-flu vaccine⁴⁷.

⁴⁶ See *Trib.* Turin 27 May 2010, *ord.*

⁴⁷ *Trib.* Milan 20 December 2010, *ord.*

The Italian system of civil justice is in a state of permanent modification and reform.

The dust raised by law no. 69 of 2009 has not yet settled and already new projects of reform are being discussed in Parliament.

At the time of writing, a draft law is being worked on to try and reduce the enormous backlog at the ordinary appeal level and a proposal of decreto legislativo to reduce the number of procedural models is being examined by the Government.

In the next few months, moreover, crucial decisions are expected from the Constitutional Court concerning the compatibility of mandatory mediation with the procedural fundamental rights set by the Constitution. Many critics believe that the Court is likely to seal the fate of this new ADR system.

Italian academics and practitioners surely never get bored when dealing with procedural issues. However, one often feels a sense of futility looking at these uncoordinated, unsystematic and sometimes ill-fated efforts of the lawmaker. The main frustration comes from noticing that the most promising new remedies (like the *procedimento sommario di cognizione*) remain basically unused because of structural faults in the adjudication system and sometimes lack of will in individual adjudicators.

Nonetheless, one should always be optimistic: some of the new features described above might, if properly applied, produce a positive impact on the development of civil proceedings, creating a more cooperative relationship between the parties and the judge and reducing vexatious or futile litigation. ù

Mediation could also play its part but some major changes in the actual system are required, especially as concerns mandatory mediation.

The future is not bright, but not pitch dark either.