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ITALY AND COVID-19: NOTES ON THE IMPACT OF THE PANDEMIC ON THE ADMINISTRATION OF JUSTICE*

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Summary: 1. Introduction. – 2. Judicial Proceedings in the Time of COVID-19. – 3. Remote Hearings: the Way Forward? – 4. Is ADR a Viable Solution? – 5. Conclusion.

The COVID-19 pandemic has forced governments around the world to adopt special measures to limit the spread of the contagion. In the field of the administration of justice, social distancing and other health safety measures have brought about alternatives to the normal management of judicial business. This essay presents an overview of the solutions devised by the Italian authorities to handle civil disputes in the time of COVID-19.

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Key words: COVID-19, remote hearing, online adjudication, written briefs, online mediation.

1. INTRODUCTION

The year 2020 will be remembered as a true *annus horribilis*. No one anticipated a global pandemic of Biblical proportions and its serious consequences for our societies, not to mention for the world economy. According to the International Monetary Fund, we are facing an unprecedented global recession which in its severity can be compared only to the Great Depression of the 1930s.¹

In this alarming situation, it is almost unavoidable to turn – as a sort of consolation – to literary accounts of pandemics that afflicted humanity in the past, in order to see whether the modern world is faring better in dealing with a similar danger. Let us consider what Thucydides wrote about the Plague of Athens of 430 B.C.:

It is said, indeed, to have broken out before in many places, both in Lemnos and elsewhere, though no pestilence of such extent nor any scourge so destructive of human lives is on record anywhere. For neither were physicians able to cope with the disease, since they at first had to treat it without knowing its nature, the mortality among them being greatest, because they were most exposed to it, nor did any other human art avail. And the supplications made at sanctuaries, or appeals to oracles and the like, were all futile, and at last men desisted from them, overcome by the calamity.²

Could we find words better than these to describe what has happened as COVID-19 has spread across the globe hitting country after country, while the scientific medical community confesses that no effective cure is currently available? Thucydides tells us the Athenians were not successful in dealing with the plague nor in mitigating its effects on their society.

For ourselves, we all continue to live under the many different measures adopted by our national governments in their efforts to mitigate the effects of COVID-19. Italy opted for a strict lockdown that initially centered on limited areas, but later was extended to the entire country. As a consequence, freedom of movement was severely restricted and non-essential economic activities were shut down from early March to early May. The lockdown applied to the judicial business of Italian courts, too, which necessitated the adoption of special measures for the management of pending cases.

This essay presents an overview of the special measures taken with principal reference to civil and commercial cases, mindful though that looming in the background is the

1 According to the document titled *World Economic Outlook Update, June 2020: A Crisis Like No Other, An Uncertain Recovery* (available at <<https://www.imf.org/en/Publications/WEO>> accessed 24 August 2020), the growth of the global economy in 2020 is projected at -4.9 percent. The same source emphasizes that, “The COVID-19 pandemic has had a more negative impact on activity in the first half of 2020 than anticipated”; also maintaining that, “The adverse impact on low-income households is particularly acute, imperiling the significant progress made in reducing extreme poverty in the world since the 1990s’.

2 Thucydides, *History of the Peloponnesian War*, Book 2 (translation by Charles Forster Smith for the Loeb Classical Library edition, William Heinemann and Harvard University Press 1919, rev edn 1928) 341.

risk of another lockdown, since as of mid-August Italy has seen a worrying surge in the contagion that could further delay the return to the normal activity of the judicial system.

2. JUDICIAL PROCEEDINGS IN THE TIME OF COVID-19

As a consequence of the rapid and uncontrolled spread of COVID-19, since February 2020 the Italian Government has adopted a series of statutory instruments aimed at enforcing the recommendations issued by the World Health Organization with a view to containing the tragic effects of the pandemic. The statutory instruments address a variety of subjects, which detracts from their clarity and brings about countless problems in their interpretation. This may be due to the pressure imposed by the escalation of the pandemic for quick action to be taken, likely making it difficult to pay close attention to the subtleties of legislative drafting. Be that as it may, it is worth outlining a number of the rules specifically affecting the administration of justice, whether civil, criminal or administrative.³

One of the first and most comprehensive statutory instruments enacted by the Government contained a number of provisions concerning civil justice. This instrument laid down different rules for two different timeframes. The first ran from 9 March through 15 April. During this timeframe, all hearings were postponed *ex officio* to a date later than 15 April. All deadlines provided for by the laws in force regarding the performance of any activities concerning adjudication were suspended. If a deadline was set to begin to run during the suspension period, the deadline would instead begin to run only at the end of the suspension period. Similarly, all deadlines concerning out-of-court mediation and assisted negotiation (when they are mandatory and supposed to take place within specific deadlines) were suspended.

A few exceptions to these rules were contemplated. They concerned urgent matters such as alimony and child support cases, as well as the adoption of interim measures for the protection of fundamental rights, just to mention a few examples specifically listed. There was also a general clause according to which suspension did not apply to proceedings in which delay could cause ‘serious harm’ to the parties to the case, according to an evaluation of the circumstances of the dispute at hand made by the judge who was presiding over the court before which the case was pending.

The second timeframe was scheduled to run from 16 April through 30 June. During this period other steps could be taken: in particular, the heads of the judicial offices were granted the power to implement the measures that appeared necessary with a view to guaranteeing that all the health safety requirements laid down by the Ministry of Health were complied with. For instance, access to the courthouses could be limited, and new guidelines for the management of proceedings were supposed to be announced.

3 References to the extraordinary measures adopted by the Italian Government in the field of the administration of justice are mainly in Italian, which makes it unhelpful to cite them in an essay intended for an international audience. Among the very few reports written in English, see Massimiliano Blasone, ‘Law Must Go On. The Reaction of Italian Civil Justice to the COVID-19 Epidemiological Crisis’ [23 April 2020] <<https://www.coe.int/en/web/cepej/compilation-comments#Italy>> accessed 24 August 2020.

As far as virtual hearings were concerned, from the reading of the statutory instrument it seemed that they could be authorized only after 10 April, that is to say, during the second timeframe. In reality, virtual hearings were scheduled even earlier, at least for urgent matters and when interim measures were requested. According to the relevant rules, virtual hearings could take place only provided that the equality of arms of the parties was guaranteed and insofar as the personal presence of the parties themselves was not required. The technical provisions issued by the Ministry of Justice provided that the programs to be used for virtual hearings were either Skype for Business or Microsoft Teams, keeping in mind that both programs had to employ infrastructures and areas of data centers that were restricted to the Ministry of Justice.

Later in the spring, new rules were laid down, providing that all deadlines concerning civil, criminal and administrative procedures were extended to 11 May. The entering into force of a few statutes governing bankruptcy and insolvency procedures was postponed to 1 September, 2021.

As far as hearings in civil cases were concerned, if the case fell within the list of matters that were deemed urgent and could not be delayed, the hearing could take place via remote connection, provided that the attendance of only the attorneys for the parties was required (meaning that the personal attendance of the parties themselves could be dispensed with). In any other case (and always provided that the attendance of only the attorneys for the parties was required), the hearing would be substituted with an online exchange of written briefs whose contents had to be limited to the petitions and the conclusions of law advanced by the parties. The order would be issued by the judge in charge of the case later on, meaning outside the hearing.

The High Council for the Judiciary prepared several protocols that courts and local bar councils could sign laying down the rules applicable to hearings conducted via remote connection and to hearings substituted with an online exchange of written briefs. More protocols were drafted by judges presiding over courts of first instance for the management of cases. The basic idea was that, at least in times of crisis and mandatory social distancing, adjudication would have to rely more and more on written briefs and motions exchanged via the Web, since orality was expected to be confined to the appearance of lawyers and judges thanks to the two versions of application software that was authorized for conducting hearings via remote connection. Of course, a more extensive use of the rules governing online civil cases presupposes that lawyers, bailiffs, court clerks and judges can master these very rules, which is not always the case. Furthermore, the state of cabling throughout the country and, in particular, the fiber optic wiring, is not optimal in a number of areas, most of all in the southern regions of the country. When the emergency is finally over, it will be necessary to reconsider the whole national policy in the field of IT innovation for the strengthening of the technological devices designed to allow online adjudication and mediation, smart working, teleworking, distance education and the like, so as to be ready should a situation similar to the one we face today with the COVID-19 pandemic occur in the future.

Later on still, new rules were adopted with a view to relaxing the stringent limits imposed by the lockdown. Italian courthouses officially reopened on 12 May. This so-

called 'Phase 2' in the administration of justice did not begin in a successful way, and the day after its start the Italian press emphasized how the chaotic situation caused by the overlapping of rules often inconsistent, if not contradictory was exposing the tragic frailty and backwardness of the Italian justice system.

All deadlines had been suspended until 12 May. On 12 May, a new window of time started. According to the new rules, judicial activities could resume and continue to be carried out until July 31. It is important to underline that for the whole month of July deadlines and any proceedings not considered urgent were stayed. This is not one of the new rules enacted for the pandemic emergency, rather it is a rule that has been in force for decades. In practice, the normal operation of the judicial machinery is put on hold for the summer month of August and is supposed to resume on 1 September. This holds true most of all for new cases, the ones in which the first hearing (which, according to Italian civil procedure, is the first contact between the parties and the judge in charge of the dispute) has not been scheduled yet. In practice, if you had commenced a case on May 18, the first hearing would be scheduled and expected to take place only after September 1, with the specific date unknown, at least for the time being.

For cases already pending, the new rules entrusted the judge presiding over the court with the power to adopt all the organizational measures necessary for the management of the court's caseload, in concert with the measures other authorities are responsible for, with regard to maintaining the necessary public health guidelines inside the courthouse. Among the organizational measures adopted, the most important ones have been the mandatory protocols devised by the presiding judge and the local bar associations. And these very protocols have been the major source of inefficiency and confusion. The Italian lawyers' professional association counted no fewer than 200 different protocols adopted for the management of different types of disputes, according to both the subject matter and the court in charge.

Browsing through these protocols, one understands that essentially the development of pending cases takes place in two forms, that is – remote hearings and the so-called 'paper hearing', which is a fiction, since there is only an exchange of written briefs and motions submitted through the technologies available under what Italians call PCT (*processo civile telematico*, in other words 'online adjudication').

As mentioned above, remote hearings can take place via two platforms authorized by the Ministry of Justice: Skype for Business and Microsoft Teams. The incomprehensible rule is that the judge must be physically present in his or her office, while the parties and their lawyers may be elsewhere.

3. REMOTE HEARINGS: THE WAY FORWARD?

The pandemic has caused the closing of courthouses virtually around the world. The traditional, 'physical' court hearing has given way to a variety of alternatives with mixed results, as one can learn from visiting an interesting website named 'Remote Courts Worldwide', managed by Professor Richard Susskind.⁴

⁴ The site is available at <<https://remotecourts.org/>> accessed 2 August 2020. The site is constantly updated with information added from countries across the globe.

As far as Italy is concerned, many specific rules concerning the development of remote hearings have been enacted, and one could describe extensively the details concerning the structure of the briefs and motions of the so-called ‘paper hearings.’ This kind of analysis, though, would be useful only for Italian legal professionals, who – in fact – can rely on quite a number of essays, commentaries, posts on social media and blogs devoted to the subject.⁵

Two points are worth emphasizing. First, the negative attitude of many ‘insiders’ (whether scholars, attorneys or judges) towards the virtualization of justice, which is considered acceptable in an emergency, but repugnant if intended to become the new normal. Second, remote hearings seem to give rise to a number of issues. To start with, there are many technical challenges owing to the fact that different areas of Italy have different levels of access to IT. But the real challenge has to do with the principles of open justice and public access to the courts, both enshrined in the Italian Constitution. The limitations these principles suffer are due to the emergency situation that Italy, like many other countries, is experiencing, but many are afraid that what is presented as a temporary restriction in the individual enjoyment of fundamental liberties and rights may become a permanent feature of our society.

In reality, what one may consider the most serious shortcoming in the public debate in the time of COVID-19, is the virtually exclusive concern given to what is happening right now, without much thought at all given to the future. And the future does not look bright. In the months to come, the courts will almost certainly face a flood of new cases, and no one seems to be paying serious attention to that. As a matter of fact, one can hardly find a single sentence written hinting at the problem or alluding to possible strategies to cope with the approaching high volume of new lawsuits. In this regard, this author’s opinion is that legislators should devise new procedures devoted to the disposition of COVID-19-related civil and commercial disputes. I suppose that changes in substantive law could help reduce the number of incoming cases, at least in some matters. So far, one of the first statutory instruments enacted at the outset of the pandemic provided that if compliance with the measures imposed as mandatory in order to contain the pandemic made the duly performance of contract obligations impossible or delayed, the defaulting party could appeal to *force majeure* and be exonerated from any responsibility. In spite of that, one may argue that the issue whether *force majeure* clauses, as well as hardship clauses, become operational in the context of epidemics or pandemics is quite controversial, most of all if the clause generically refers to events or circumstances beyond the parties’ reasonable control. This means that determining whether the wording of the clause covers issues arising from the COVID-19 pandemic is a question of interpretation and is strictly fact-specific. And this could be the source of numerous new disputes, something that Italian courts, already overburdened, could not manage.

5 A recent, comprehensive study of the available alternatives to traditional hearings is offered in Antonio Didone e Francesco De Santis (a cura di), *Il processo civile solidale. Dopo la pandemia* (Wolters Kluwer Italia 2020).

4. IS ADR A VIABLE SOLUTION?

The only saving grace to be found in the debate on how to face the crisis of formal justice due to the restrictions imposed by the pandemic is a renewed interest in mediation and collaborative law. As far as mediation is concerned, if all the parties agree, then it can be held online with remote meetings. This author feels compelled to point out that she is in favor of a more extensive use of mediation strictly as a tool to reduce the caseload of the courts, since she does not nurture any illusory belief in the cathartic power of transformative or humanistic mediation. In other words, mediation appears to be a practical tool suitable for use in dealing with the elevated number of COVID-19-related disputes.

Specifically, as far as online mediation is concerned, 'digital immigrants' such as this author (as opposed to the 'digital native')⁶ are inclined to view online mediation with a good measure of skepticism. The rules allowing online mediation only with the parties' consent, not only in the emergency period (meaning until July 31) but even afterwards, do not say anything about the commercial digital platforms that can be used (in light of the fact that not many mediation centers have established their own platforms). It is reasonable to consider that the same platforms authorized for remote court hearings (Skype for Business and Microsoft Teams) could work for mediation, too. Of course, one may raise a few concerns regarding online mediation. First of all, it is important to demonstrate the parties' affirmative agreement to the use of this particular type of mediation and all its implications. It is also imperative to ensure that the technology used allows all participants to feel secure about the confidentiality of the information they disclose. From a practical standpoint, it is advisable that a breakout room, separate from the general virtual meeting room, is set up and used for caucus proceedings. Finally, for online mediation, there are a number of technical problems to consider, such as the signature of the agreement reached, a signature which can only be digital, with all the problems connected with the different kinds of what we generically call digital signature.

This past June, mandatory mediation was extended to cases concerning failure to comply with contractual terms (or delay in compliance) when the conduct of the defaulting debtor was caused by the duty to abide by the rules laid down with a view to containing the spread of COVID-19. In other words, disputes arising out of breach of contract cannot be brought to court unless the parties have previously attempted to negotiate a settlement agreement through an out-of-court mediation procedure, provided that the defaulting debtor can prove that his behavior was justified by the necessary compliance with the rules issued for infection prevention and control. It is still too early to make an assessment as to the effectiveness of this new rule. Hopefully, it will turn out to be useful to cope with the anticipated torrent of COVID-19-related disputes, even though it is a

6 It is well known that there is a so-called digital divide between people who were born before personal computers and IT technologies became popular and widely used, and those who were born afterwards and can effortlessly master even the most advanced technologies: the former are called 'digital immigrants' as opposed to the latter who are known as 'digital natives': Marc Prensky, 'Digital Natives, Digital Immigrants' [2001] <<https://www.marcprensky.com/writing/Prensky%20-%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf>> accessed 24 August 2020.

rule of thumb that mediation can be made mandatory, but this does not mean that the parties will commit themselves to finding common ground so as to put an end to their dispute with a mutually acceptable settlement.⁷

5. CONCLUSION

The future is a *terra incognita*. No one can confidently predict whether the pandemic will loosen – or tighten – its grip on our societies in the months to come. Even if the situation improves, and hopefully it will, life may not be quite the same as before, and that holds true in the field of justice too.

⁷ In Italy, for the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters the legislators chose to make mediation mandatory in a wide range of cases. The mandatory aspect of mediation means that adjudication cannot begin unless the parties have made an attempt at mediation before one of the mediation providers certified by the Ministry of Justice. If adjudication is begun in spite of the duty to attempt mediation, the judge in charge of the case will stay the proceeding and set a deadline for the appearance of the parties before a mediator; if the parties fail to comply, the case is rejected. Mediation becomes mandatory even when the court orders the parties of a pending adjudication to attempt mediation. On mediation in Italy, see Elisabetta Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 Netherlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement 29.