

The Latest Reform of Italian Appeal Proceedings in Recent Case Law: A Step Towards Faster Civil Proceedings Involving a Higher Standard of Defense

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In recent years, the global economic crisis has forced the Italian legislature to increase interventions in Italian civil proceedings, in an effort to support and re-launch the economy. The lengthy duration and uncertain outcome of civil proceedings are widely recognized as significant obstacles to the development of economic and social systems¹.

In particular, in order to make the Italian market more appealing to domestic and international investors, Italian lawmakers have introduced several reforms to the Code of Civil Procedure (“CCP”) with the aim of creating a more favourable environment for the protection of legal rights. These reforms include, among others, the introduction of a “filter phase” in the appeals process, aimed at reducing the number of groundless appeals²; support for mediation procedures and the amicable resolution of disputes (including fiscal advantages for parties where disputes are settled before litigation is commenced); the increase in fees to be paid when bringing an action; and the provision of punitive sanctions against claimants or defendants who act in bad faith or serious negligence.

The most relevant and most discussed reform concerns the appeal process: the combination of more formal and technical requirements for the deed of appeal – which is no longer a mere request for a new examination of the case – with a “filter phase” aiming to immediately strike off as inadmissible any appeal that is not compliant with said requirements and/or manifestly without grounds, may have a significant practical impact on the length of appeal proceedings.

Any evaluation of the actual impact of the reform is of course premature, but early decisions of appeal courts provide a preliminary indication that is useful as an overview of the implications of the reformed appeal procedure.

A. Background

Historically, parties who were not successful at first instance tended to use appeals as a second examination of the same arguments that were used in the first instance proceedings, in order to obtain a different decision on the same facts. Moreover, as first instance decisions are immediately enforceable in Italy, it was quite common to file a deed of appeal with the sole purpose of suspending the execution of the first decision; the deed of appeal grants each party the right to request

suspension of the enforceability of the decision on the basis of serious and well-founded reasons (*gravi e fondati motivi*), e.g. when the requesting party is at risk of going insolvent.

Consequently, Italian courts of appeal had (and still have) to manage a multitude of often completely groundless cases significantly affecting the duration of second instance proceedings (which have currently an average duration of four to five years, irrespective of the ground cited in the deed of appeal). The new provisions – in an attempt to comply with the recommendation of international institutions such as the European Network of Councils for the Judicial (ENCJ)³ aim to reduce the number of proceedings commenced every year in the courts of appeal. A smaller workload would lead to higher efficiency in the courts' activity, which would in turn enable courts to hand down decisions more quickly than at present.

B. The new provisions and initial feedback from appeal courts

The most important features of the new provisions regarding the appeals process, applicable to proceedings from September 11, 2012, are as follows:

- New and stricter requirements for the deed of appeal

Prior to reform, the appealing party had to include in the petition a summary of the facts and the reason for the petition. The new provisions introduced stricter requirements and require the appealing party to identify in detail: (i) the alleged erroneous sections of the first instance decision; (ii) the amendments that the court should make to the representation of the facts of the dispute; (iii) the alleged breaches of law constituting the grounds of the appeal, together with a clarification of their relevance and impact on the first instance decision. If any one of these requirements is not satisfied, the deed of appeal shall be declared inadmissible.

The Court of Appeal of Rome, giving one of the very first decisions on this point⁴, clarified that the deed of appeal has to be more structured and organic, "*like a Court decision*". Based on the new principles the Court declared the deed of appeal under examination inadmissible as it did not include the proposed amendments to the first instance decision; that is to say, it is not enough to point out the mistake of the judge at first instance - the appealing party must point out what it believes are the specific amendments to be made to the first instance decision.

- The introduction of the "filter phase"

The reforms introduced a "filter phase" aimed at selecting only the deeds of appeal deemed by the court to be likely to succeed⁵. Where the court decides, on the basis of a preliminary examination of the case, that there is no "reasonable probability" of a positive outcome, the deed of appeal will be declared inadmissible.⁶ The decision must be taken at the first hearing, after having heard the parties, and through a motivated decision. When the appeal is declared inadmissible, the appealing party may challenge the first instance decision only before the Court of Cassation⁷.

Appeal courts are now issuing the very first decisions based on this preliminary evaluation of the "probability" of a positive outcome of the appeal, providing the following important clarifications:

- i. the "filter phase" does not contemplate an incomplete or rough examination of the case, but instead requires a full examination of the case on the basis of all available sources (*i.e.* the appealed decision, the deed of appeal, the statement of defense and the entire first instance file) to be done through an informal and simplified procedure⁸: in other words, the screening should be fast but not superficial⁹;

- ii. the reference to the “reasonable probability” of a positive outcome means that the declaration of inadmissibility should apply only to “manifestly groundless” appeals, which do not merit any consideration¹⁰;
- iii. the declaration of inadmissibility cannot be made where the appeal has grounds in case law that is different from the case law referenced by the judge at first instance, or where reliable scholar’s opinions form the basis of the ground of appeal (even if such opinions are not confirmed by case law)¹¹.

Recently, the Court of Appeal of Milan confirmed the above-mentioned principles, pointing out that the inadmissibility of the appeal should be declared only if (i) there is no reason for a different interpretation of the facts to that given in the first instance decision, or there is no need to admit evidence excluded by the judge at first instance; (ii) the decision at first instance adhered to the main relevant case law; and (iii) following an examination of the grounds of the appeal, there appear to be no factors which would lead to a different decision¹².

Where the court does not intend to change its interpretation of the applicable law on which the deed of appeal is based, that deed of appeal will be declared inadmissible, as there would be an insufficient likelihood of success¹³. This new approach will be particularly effective in “serial” proceedings, where the legal issues involved are always the same (e.g. product liability cases and consumers’ claims in general).

This type of filter is already in place in other jurisdictions (e.g. in Germany and England and Wales) but it is completely new to the Italian legal system, which may not be equipped for its implementation; the “filter phase” requires an immediate examination of the case, necessitating more intense court activity which will be difficult in the early stages of the new procedures’ application, as courts still have a heavy workload¹⁴. Therefore, it may be a while before we see an overall reduction in the duration of appeal proceedings.

- The restriction on submitting new evidence

Prior to the recent reform, the parties to appeal proceedings were entitled to ask for the admission of (i) any evidence deemed essential to the decision (*prove indispensabile*) or (ii) any evidence that the parties had not the chance to file during the first instance proceedings, due to reasons beyond their control.

The reform limits the evidence that can be admitted in appeal proceedings to (ii) above; therefore, new evidence is admitted only when the requesting party is able to prove that it had no chance to file such evidence before, due to no fault of their own¹⁵.

The opportunity to have new evidence filed in appeal proceedings is very limited – this means that the parties have to fully prepare and carefully evaluate evidence to submit in the first instance proceedings, bearing in mind that the decision not to request certain evidence will be of no remedy, notwithstanding the fact that – after the completion of the proceedings – a party may realise that such evidence could be essential to the outcome of the case.

C. Conclusions

The new provisions represent a significant step forward, likely to show positive effects on the appeals process in the very near future. The chances of successfully appealing a decision with the sole purpose of obtaining a re-examination of the same case with (hopefully) a more favorable outcome are now very limited. If properly enforced, the new “filter phase” may avoid the winning parties being involved

in proceedings that last years – during which the enforceability of the decision may be suspended – notwithstanding the clear absence of a ground of the deed of appeal¹⁶.

On the other hand, the technical requirements of the deed of appeal, as well as the strict regime for the admission of evidence and the introduction of a “filter phase” carry the risk that a defense that is not planned or prepared carefully enough to comply with the new tight rules would be without a remedy; an omission in the selection of evidence requested in first instance proceedings, or a superficial deed of appeal, may prevent the appealing party from obtaining the correction of the first instance decision. Moreover, the “filter phase” requires the appealing party to structure the deed of appeal such that it clearly and effectively shows the defects of the first instance decision and the ground of the alternative interpretation/reconstruction of the facts (or of applicable law, by reference to relevant case law), in order to allow the court to immediately identify, even through a preliminary and rapid assessment, the ground of the appeal, thereby avoiding an immediate declaration of inadmissibility.

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- ¹ The European Network of Councils for the Judicial (ENCJ), in its Report 2011-2012, clearly states that *"in some countries the poor performance of the judiciary, for instance with respect to timeliness, is one factor that hinders economic development"* and that *"the awareness of the importance of an effective functioning judiciary offers opportunities not only for reform, but also to respond to economic crisis."*
- ² By Law decree No. 83 of June 22, 2012 converted (with amendments) into Law No. 134 of August 7, 2012.
- ³ *"The ENCJ unites the national institutions in the Member States of the European Union which are independent of the executive and legislature, and which are responsible for the support of the Judiciaries in the independent delivery of justice"* (see <http://www.encj.eu/>).
- ⁴ Court of Appeal of Rome, decision no. 377 of January 15 – 29, 2013.
- ⁵ Please note that the innovation has to be read in connection with another recent reform whereby the Italian legislature has introduced measures that allow the Court of Appeal to increase the related legal expenses if the petition is groundless; moreover, if the request to suspend the first instance judgment is rejected after having been determined as groundless, the losing party is required to pay a fine ranging from EUR 250 to EUR 10,000.
- ⁶ The "filter" phase is not applicable to proceedings where the involvement of the Public Prosecutor is required (e.g. bankruptcy declaration proceedings), or to summary proceedings.
- ⁷ However, the Italian Supreme Court will only review points of law and will not consider the facts of the dispute.
- ⁸ Court of Appeal of Milan, decision of February 12, 2013.
- ⁹ Court of Rome, decision of January 23, 2013.
- ¹⁰ Court of Rome, decision of January 23, 2013. According to the Court of Appeal of Catania, where the appeal has only a slight chance of success, the court cannot declare its inadmissibility (decision of February 28, 2013).
- ¹¹ Court of Rome, decision of January 30, 2013.
- ¹² Court of Appeal of Milan, decision of March 4, 2013.
- ¹³ Court of Appeal of Palermo, decision of April 15, 2013.
- ¹⁴ See the observations made by the Court of Appeal of Milan, IV Civil Section, on September 27, 2012, according to which the pending appeal proceedings amount to ca. 450,000, whilst the proceedings before the Court of Cassation amount to ca. 100,000.
- ¹⁵ *E.g.*, when the evidence is made available after the forfeiture terms of the first instance proceedings or even after the first instance decision.
- ¹⁶ 68% of the proceedings brought before the Court of Appeal and the Court of Cassation end with the first instance decision being upheld (observations made by the Court of Appeal of Milan, IV Civil Section, on September 27, 2012).