Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Litigation

Second Edition

Italy: Trends & Developments
LCA Studio Legale

chambers.com

2019

Trends and Developments

Contributed by LCA Studio Legale

LCA Studio Legale is an independent law firm with offices in Italy (Milan, Genoa and Treviso) and in the UAE, where it operates in international partnership with IAA Law Firm. It is active in all main areas of commercial, corporate, banking, finance, restructuring, tax, criminal, real estate and labour law, and, more generally, in all aspects of business law – including IP, new technologies, transportation, art and food law – and in the protection of family assets. LCA's over 120 professionals mainly serve corporate and financial clients and work for industrial, financial and insurance groups, investors and banks, as well as SMEs, family businesses and individual entrepreneurs. The firm has always adopted an international approach, advising Italian companies in their internationalisation processes, and foreign corporations interested in investing or expanding in Italy, as well as multinational corporations involved in multi-jurisdictional transactions. LCA represents clients in court proceedings, arbitrations and alternative dispute resolution, especially in the areas of corporate and commercial law. The firm aims to define the best strategy to combine the effective protection of clients' rights with the need to efficiently resolve commercial disputes.

Authors

Salvatore Sanzo is a partner of the firm and specialises in civil and ordinary litigation and arbitration in the field of corporate, restructuring and bankruptcy law, as well as providing legal advice to businesses in crisis. He also works as a bankruptcy liquidator and commissioner in major national and international insolvency procedures, appointed by various national courts, and as a crisis manager in over-indebtedness procedures. He was recently appointed by the Ministry of Justice as a member of the advisory committee for the revision of the Italian Business Crisis Code. Salvatore is very active in the legal education area, especially on corporate crisis matters and in the preparation of trainees for the Bar exams. He collaborates, as an author and contributor, with many leading Italian publishing houses.

Luciano Castelli is a partner of the firm who has more than 15 years' experience in civil, business and bankruptcy consulting, litigation and arbitration. He has assisted Italian and international clients in large national disputes, and he has often been appointed arbitrator by his colleagues and institutional bodies, including the president of the Court of Milan, the National and International Chamber of Arbitration of Milan, and the president of the Council of Chartered Accountants and Tax Experts of Milan. He is the author of several publications in the areas of commercial, civil and procedural law.

Gian Paolo Coppola is a partner of the firm. He is mostly active in litigation and arbitration for clients operating in various business areas, ranging from traditional industries (oil and gas, construction, fashion, etc) to the most advanced markets (hedge funds, IT companies, etc). He has wide expertise in all areas of company law, business contracts and consumer relations. He has advised in a number of litigation and arbitration procedures concerning corporate bodies and auditors' liability, as well as unfair competition and international contracts. Gian Paolo also sits as arbitrator in national and international ad hoc and institutional proceedings. He is the author of several publications in the area of dispute resolution and has been a solicitor of England and Wales since 2004.

Tiziana Boneschi is a senior counsel who specialises in civil litigation and arbitration, mainly with respect to commercial and contractual law issues, by assisting national and foreign companies that are active in various business sectors. She also has experience in bankruptcy procedures; labour litigation, with particular reference to agency contacts; and enforcement procedures. She specialises in company administrative liability and carries out risk analysis and organisational model drafting. She assists surveillance boards and advises in non-contentious matters with particular focus on commercial and contractual issues, the cleaning of polluted sites, and health and safety procedures in the workplace.

A New Class Action for Italian Consumers

In April 2018, the Italian parliament passed a law shaping a new procedure for class actions. The law will come into force 12 months after its publication in the Official Journal of the Republic; thus, the provisions we examine below will not become applicable before 19 April 2020. This new law entirely replaces the previous regime, which was enacted in 2008 and never really worked.

Under the previous law, only consumers and "users" were allowed to start an action, whereas the possibility of commencing a class action has been expanded under the new law. That possibility will now be granted to whoever intends to assert a claim for damages against a company or public service corporation, either in contract or in tort, due to the violation of "homogeneous individual rights" (*diritti individuali omogenei*).

Any member of the "class" will be entitled to file a claim, and the same right to commence the class action will also be granted to non-profit organisations and associations which aim to protect "homogeneous individual rights". Such associations must be enrolled in a specific register, to be instituted and held by the Ministry of Justice.

The Tribunal of Enterprises, which is the division of the tribunal specialised in company matters and IP law, will have exclusive jurisdiction in class actions. The venue will be that of the registered office of the defendant.

As with the previous law, the proceedings are separated into two different stages: the assessment of the admissibility of the action; and the preliminary activities and the decision of the case.

The recent law also provides for a third stage, dedicated to subscription to the action of members of the class who have not previously joined the class action. Indeed, the third stage represents one of the most significant changes: any person who is entitled to participate in the action may adhere to the claim even after the court has delivered its judgment.

If the court upholds the claim, the judgment will only establish the defendant's liability. The amount of damages will be determined at the end of the third stage of the proceedings. The court, in its judgment, will appoint a representative of the class, who will be entitled to act on behalf of the whole class, including any claimant who joins the action in the third stage. Moreover, the representative is the only person entitled to enforce the judgment, should the defendant fail to pay the amounts due.

Another significant modification entails the possibility for the court, in the second stage of the proceedings, to suggest a settlement proposal to the parties. The same right is granted to the representative during the third stage.

The new law aims to make class actions easier to institute and more widespread by facilitating the procedure and enlarging the area of potential class claimants. Indeed, the previous mechanism was not successful, as only a few class actions have been declared admissible by the relevant courts, and even fewer have been upheld.

Nonetheless, critics argue that the new set of rules appears to be "punitive" for businesses and, in general, defendants, as "homogeneous individual rights", as defined, seem vague and open to unintended claims.

In addition, the rules on evidence will be different for class actions and more favourable to the class: the court may order the defendant to discover all documents significant to the case, a radical innovation in the Italian legal system, which provides for very limited discovery.

Furthermore, the law provides that the unsuccessful defendant will have to pay the representative a specific fee, in addition to the amounts granted to each member of the class. Such fee will be a percentage of the amounts granted to the class. Also, the losing defendant will have to pay a success fee to the class attorneys, in addition to legal costs.

Most importantly, the opportunity granted to the members of a class to adhere to the action not only during the proceedings but also during the determination of damages phase (ie, the third stage), though aimed at ensuring the largest adhesion to the class by anyone entitled to it, may result in companies being unable to evaluate the risks related to the action in advance. Therefore, a defendant may be unable to evaluate the opportunity of a settlement agreement.

Lastly, the fact that the tribunal will also make preliminary rulings on the admissibility of the action in the new regime, may hinder the success of the new law, as this mechanism has already caused most class actions brought in the past to fail. Also, taking into consideration the high complexity of the proceedings, particularly in the third phase, many doubts have been raised as to whether things really will become easier. As usual, only time will tell.

Main Issues on the Reform of Medical Liability

In March 2017, at the end of a long process, the Italian parliament approved Law No 24/2017, reforming the rules governing medical malpractice and liability. The law is widely known in Italy as the "Gelli-Bianco law", named after Federico Gelli and Amedeo Bianco, doctors and members of parliament, who were its main promoters.

The reason why we are examining a law enacted more than two years ago is that many of its provisions have not yet come into force, as the Italian parliament and government have not issued some of the decrees necessary to implement all its technical aspects. Therefore, while many provisions are

already applicable, some are not and will not be for some time, leading to several grey areas which will have to be solved by the courts.

Firstly, the law states the principle that health is a right which is granted not only for the benefit of individuals but also for the community as a whole. In this respect, the law acknowledges that such goal may also be reached by implementing all of the activities aimed at preventing and managing all of the risks connected to medical services. To this end, the law provides for:

- activities for monitoring medical risks, accidents and litigation on a regular basis;
- the appointment of monitoring institutions;
- the transparency of data relating to services offered for all public and private healthcare facilities;
- the obligation for all medical professionals to follow specific guidelines; and
- further obligations for healthcare facilities, the most significant being the fact that insurance for medical risks will become compulsory.

In light of the above, one of the most significant changes to the previous regime brought by the recent law is the identification of different types of liability: healthcare facilities will be considered liable in contract, while medical professionals will be accountable in tort. In other words, healthcare facilities, both public and private, will be held accountable under the agreement entered into with their patients and will also be accountable for the medical professionals that they employ. Conversely, the same medical professionals will be liable in tort, unless they have entered into a specific agreement with the patient.

This implies a remarkable difference in relation to when patients' rights to compensatory damages, in cases of medical liability, are statute-barred: for ten years in the case of damages incurred by contract and for five years in the case of damages incurred by tort. Furthermore, the difference in liability also affects the regime of burden of proof: the patient acting against the healthcare facility will only need to give evidence of the agreement, but, should the same patient take action against the medical professional only, the evidence to be given shall also include the harm suffered, the fact that such harm was a direct consequence of the conduct of the medical professional, and most importantly, the fault or negligence of the latter.

Furthermore, and as provided for by the new law, the conduct of the medical professional must comply with the specific guidelines to be enacted by private and public medical entities appointed by the Ministry of Health. Since no such guidelines have been issued so far, the only reference point is still, two years after the enactment of the recent law, "good" medical practices, as was the case under the previous regime.

Other significant innovations have been provided for in relation to the civil procedure, such as the compulsory attempt to settle the case before commencing legal action by way of a technical assessment (*accertamento tecnico preventivo*) and mandatory mediation, which are both, in the law's provisions, conditions precedent to the legal action.

Furthermore, and as anticipated, the recent law provides that healthcare facilities, either public or private, will be required to enter into an insurance policy covering risks for third-party liability, including all damages caused by medical professionals working in the said healthcare facilities, no matter what their assignments (therefore including those who take care of professional trading, or who are dedicated to experimentation and clinical research). Such compulsory policy insurance will be added to the insurance policy of the medical professional who enters a specific contractual relationship with the patient.

The minimum prerequisites for such insurance – as provided for by the recent law – were supposed to be issued within 120 days from the law's enactment, but such decrees have not so far been issued. As a result, the rules relating to insurance policies for medical liabilities remain, two years after Law No 24/2017 was passed, ineffective and still waiting for the necessary technical decrees for their implementation.

In relation to insurance policies, one of the most innovative provisions by the recent law concerns the possibility, for the patient, to directly sue the insurance company with whom the healthcare facility and/or the medical professional have entered into an insurance policy, for any (alleged) misconduct of the facility or professional. This provision will also come into force after the issuing of the technical decrees establishing the prerequisites of insurance policies. For now, the provision – which was intended to ease claims for damages by patients – remains inapplicable.

In conclusion, the Gelli-Bianco law, anticipated as the law which would finally be able to clarify the main issues relating to medical liability, is still largely ineffective and inapplicable. Legal and medical professionals therefore expect that legal practice will offer many challenging topics and that case law will provide noteworthy developments.

Litigation Funding

People willing to start a lawsuit are often prevented either by fear of losing or lack of economic resources: many legal tools have thus been implemented to relieve actors from part of the risk connected to their judicial action. "Third-party litigation funding" – a mechanism which enables a financing party, unrelated to the dispute, to bear the costs and subsequently receive a percentage of the outcome – is one of these.

This contractual scheme first became popular in common law countries and was then exploited in many non-common

law territories, such as Germany, Switzerland and Hong Kong. However, Italy has not yet adopted this practice.

The origins of "third-party litigation funding" can be traced back to Ancient Greece, where technical assistance was entirely unknown and facing judgment meant bearing the costs for the multiple subjects who cumulatively carried out the activities of a modern lawyer. Ancient Romans, on the other hand, were strangers to the concepts of "absentia" and "judgment by default": therefore, they needed to pay to ensure the appearance of the other party in court.

For this reason, in Ancient Greece and Rome respectively, the so-called *sykophantes* and *calumniatores* were very popular. These subjects, usually of high social status, bore the expenses and burdens of the dispute, in exchange for a percentage of the victorious outcome.

In medieval England, it was common for a third party to finance someone else's dispute: the "champerty" contract, which attributed a portion of the disputed land to the financer, was rife.

However, since both the champerty contract and "maintenance" (the conduct of favouring others in initiating a dispute) allowed local feudatories to maintain a portion of their power and to interfere with the administration of justice, in 1275 King Edward I forbade them. As colonialism took English legislation beyond its original borders, these activities were forbidden and excluded, until the first half of the 1990s, from third-parties' dispute financing in all common-law countries.

The "third-party litigation funding" contract is signed after due diligence is carried out by either the backer or a lawyer. This due diligence usually involves: an assessment of the admissibility of the dispute; various disclosure obligations of the lender; and the obligation of the parties to maintain confidentiality with regard to the acquired information.

The funding contract usually obliges the financed party to: regularly inform the funder on the development of the lawsuit; pay the funder a percentage of the outcome, in the event of victory; and keep all information concerning the proceedings confidential. Moreover, in day-to-day contractual practice, other clauses are added: it is quite common, in Germany, to assign the disputed right to the investor before the lawsuit is instituted; in England, the actor often stipulates that an insurance policy should cover the costs deriving from the prospective loss.

The question is, whether any professional conduct provisions preclude third-party litigation funding from being successful in Italy. Three provisions must be considered:

- the prohibition of all "agreements whereby the lawyer receives a portion of the goods that are the object of the dispute";
- the prohibition of assigning "contentious claims", sanctioned by Article 1261 of the Italian Civil Code, by virtue of which "[...] lawyers, patrons and notaries may not, even through third parties, become assignees of the rights on which a dispute has arisen before the judicial authority"; and
- the duty of secrecy and confidentiality on the part of the lawyer, enshrined in the Lawyers' Ethics Code.

None of these provisions, which were dictated to protect a lawyer's professional decorum and the client's privacy, prevent the development of litigation funding in Italy.

Could investors be scared by other law provisions? Under the Banking Act, all financial intermediaries, in order to negotiate with the public, must obtain special authorisation from the Bank of Italy. Ministerial Decree No 153 of 2015 extends said provision to all European Union intermediaries. Legislative Decrees No 91 of 2014 and No 18 of 2016 regulate the financial activities of monetary funds, respectively allowing Italian and European Union funds to negotiate with the public.

Since the law says nothing about extra-EU funds, it could be concluded that they are not allowed to negotiate with citizens on Italian territory. However, different conclusions can be reached if the presence in the territory of the company that carries out the soliciting activity is taken into consideration.

The application of this criterion would lead, on the one hand, to the exclusion of the territorial nature of the activity whenever the Italian borrower takes the initiative (reverse solicitation); on the other hand, the territorial nature of the activity should be presumed if the extra-EU fund offers a large number of loans to Italian residents over a limited period of time.

In light of all this, the current regulatory framework seems to be within the reach of Italian, European and extra-EU professional operators.

But is it realistic to envisage the spread of litigation funding in Italy? The answer is affirmative.

From a legal point of view, litigation funding is different from a mortgage: while the first does not require the borrower to pay back the lender, the latter does. It is thus an atypical contract. For the interests pursued, it would surely pass the "merit" test of Article 1322 of the Italian Civil Code.

Besides, the new Arbitration Rules of the Chamber of Arbitration of Milan expressly take litigation funding into consideration. Indeed, they require the beneficiary of any such

operation to disclose both its existence and the identity of the funder.

Lastly, from a practical point of view, it must be observed that investors are already interested in the Italian judicial system. The duration of commercial disputes, which places it within the European average, is financially attractive. In addition, the variety of available legal procedures would allow investors to choose from a wide span of possibilities: they could easily finance civil and commercial procedures, anti-trust litigations and class actions.

In conclusion, we expect litigation funding to become widespread and successful in Italy.

Company Directors' Liability

The legal framework of corporations was recently modified by Legislative Decree No 14 of 12 January 2019, which rejuvenated and consolidated the bankruptcy laws into a "Crisis Code". This Legislative Decree will come into force on 14 August 2020, except for a few provisions which are already in force. Article 378 of the Crisis Code, "Directors' Liability", is one such provision.

Article 378 amended Article 2486 of the Italian Civil Code by introducing a third paragraph that regulates the quantification and proof of the harm resulting from directors' unlawful conduct upon the occurrence of a cause for dissolution of the company. Indeed, the new paragraph provides that "when the liability of the directors pursuant to this article is ascertained, and unless a different amount is proven, the indemnifiable damage is presumed to be equal to the difference between the net assets at the date on which the director ceased to hold office or, in the event of the opening of insolvency proceedings, at the date of the opening of such proceedings, and the net assets determined at the date on which a cause for dissolution occurred, pursuant to Article 2486, paragraph 3, of the Italian Civil Code […]". Through the introduction of this new provision, which translated into law a criterion adopted decades before by the jurisprudence, the burden of proof for the plaintiff became much easier.

Before Article 378 of the Crisis Code came into force, the jurisprudence had elaborated two main presumptive criteria, in order to calculate the amount of the damages in the abovementioned cases of directors' misconduct: the criterion of the "difference between assets and liabilities in bankruptcy" and the "difference of net assets" criterion.

While the first criterion matched damages with the difference between the assets and the liabilities resulting from the bankruptcy procedure, the second criterion matched the damages to the difference between the assets of the company when the cause of dissolution occurred, and its assets at the beginning of the bankruptcy procedure.

The second criterion was, by far, the most popular. It was, however, applied with a few corrections:

- the time necessary to ascertain the existence of a cause of dissolution was taken into account when calculating the commencement date;
- the assets at the time of the cause of dissolution were calculated from a bankruptcy perspective; and
- the costs that the company would have to afford – even if the director had adopted the appropriate measures – were deducted from the assets of the company.

The new Article 2486 of the Civil Code should be interpreted in light of these criteria.

Some commentators fear that the application of the new Article may result in punitive action against the directors, forcing them to pay more than they should. This fear may well be unjustified, however: the "principle of full restoration of harm", while requiring that the prejudice is entirely repaired, also implies that nobody should pay more than necessary. Although this principle is not enshrined in the constitution, it can still be qualified as both a public order provision and as the "heart" of the Italian compensation system.

But what impact will Article 378 of the Crisis Code have on proceedings initiated after 16 March 2019?

Two different approaches to the question may be adopted:

- a "procedural" approach, that would make Article 378 applicable to all cases instituted on or after 16 March 2019, regardless of the date of the alleged violations;
- a "substantive" approach, which would limit the application of said Article only to legal actions concerning violations which occurred after that date.

Since the substantive approach would delay the application of the reform, the procedural approach seems more consistent with the intention of the legislators, who chose to let this provision come into force before most of the others. Therefore, all actions instituted as from 16 March 2019 should be regulated by the new Article 2486, regardless of the date of the contested violations.

We must now add some thoughts about the impact of Article 378 of the Crisis Code on proceedings already pending at the date when it came into force.

In this regard, two principles must be taken into consideration:

- the "tempus regit actum" principle, which orders that each act of the proceedings is subject to the law applicable at the time of its occurrence; and

- the "tempus regit processum" principle, which implies that the entire proceedings must be regulated by the law in force at the time of its commencement.

The Supreme Court stated that, although there is no place for the tempus regit processum principle in the Italian system, the tempus regit actum principle must be interpreted in such a way as to give adequate relevance to the principle that no law can be retro-active. Therefore, the interpretation must consider the expectations of those who, having chosen to promote a judgment in accordance with the rules in force, see their chances of either winning or successfully resisting the claim reduced because of the entry into force of a new law.

LCA Studio Legale

Via della Moscova, 18
20121 Milan
Lombardy
Italy

Tel: +39 02 7788751
Fax: +39 02 76018478
Email: milano@lcalex.it
Web: www.lcalex.it

This interpretation of the principle applies to this case, as the new Article 2486 – by making it more difficult for directors to resist the claims – would significantly affect their procedural position, imposing on them a heavier burden of proof. In light of all the above, it seems that the new Article 2486 of the Civil Code is only applicable to cases commenced after 16 March 2019, regardless of the date when the alleged violations occurred.