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The Italian Labyrinth of Adjudicating Employment
Rights: in Search of ‘Ariadne’s Thread’

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European University Institute
Max Weber Programme

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Abstract

This paper belongs to a comparative research network coordinated by Professors Susan Corby and Pete Burgess and it deals with the process of adjudicating substantive employment rights in Italy. In particular, the study is developed along three levels of investigation: first, the industrial relations background; next, the court system, from its beginnings to the present day; and finally, the extra-judicial system, e.g. conciliation and arbitration. In so doing, the author takes into account the complex framework of legislation, and the main important official data on Italian procedures, in order to reconstruct it and then evaluate the effectiveness of each system. Despite the long-standing problems (delay, complexity, cultural resistance to alternative dispute resolution, ecc.) that historically characterize Italian employment rights adjudication, even the recent provisions do not seem to fill the gaps in the system in order to make it more effective and efficient. After illustrating the judicial and extra-judicial processes, and the position of administrative and trade union bodies, and the different procedures available to a single worker, the paper makes some concluding observations with the aim of stimulating a debate on the possibility of involving more trade unions in the process of adjudicating employment rights.

Keywords

Adjudicating employment rights; industrial relations; judicial system of worker protection; extrajudicial employment dispute resolution; administrative and trade union bodies.

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Max Weber Fellow, 2011-2012 and 2012-2013

Introduction

Italy is unique in that on the one hand there are no special labour courts, unlike many other countries (for instance, Germany, Sweden, Great Britain), while on the other hand there are specialist chambers within the civil court system. Moreover, the process of adjudicating substantive employment rights is supported in Italy not only by this specialist branch of the civil courts but also by special procedural rules that are intended to provide workers with speedy and effective protection where employment law has been breached. Although the roots of this special labour micro-system go back many years¹, the most important reform dates back to the 1970s (in particular to law no. 533 of 11 August 1973 for individual hearings and to art. 28 of law no. 300/1970 for cases involving trade unions). Since then, the system for individual employment rights claims has been amended, but not radically altered, several times, with the scope of reducing the time it takes to adjudicate rights, and the latest amendment – regarding dismissal law – was last August 2012.

In Italy, as in other countries, there are a number of reasons why special provisions exist for the adjudication of workers' individual legal rights; there are basically two reasons why the legislator has provided this field with special rules: *a)* to redress the balance between often powerful employers and individually vulnerable workers; and *b)* because collective rights are often intertwined with individual rights. Each of these needs is protected by the law through a constellation of specific safeguards, both procedural and substantive (such as the possibility of obtaining legal satisfaction of the worker's right even before the end of the judicial trial; a reversal principle regarding the burden of proof in favour of workers; a special legal action for trade unions which can be taken either in addition to an individual one or alone, etc.). But there is also a third reason, perhaps the most important in Italy, why the process of adjudicating employment rights has been intensively reformed many times, especially recently: there is a need to have special procedures for employment rights disputes that take less time than is required to pursue 'ordinary' civil cases². This is because for the people 'who make the game' these disputes involve their work and therefore their livelihood: if all other contracts are concerned with *having* for the parties (contractors), although the employment contract is still about *having* for the employer, for the worker it is about *being*, in a broad sense³. As will be shown, however, despite special procedures and recent measures to relieve the courts by providing extra-judicial dispute resolution mechanisms, employment litigation in Italy still cannot be described as speedy.

This paper is organised as follows: first the industrial relations background is examined and then the court system from its beginnings to the present day is considered. Next, we look at extra-judicial provisions – conciliation and arbitration – before making some concluding observations.

Background: the actors and structure of collective bargaining

Industrial relations in Italy have been characterised in recent history by close interconnections between trade unions, political parties and economic events⁴. This resulted in a monolithic structure for trade union/employer contracts and collective bargaining during the fascist regime⁵, and a plurality of actors and outcomes in the post-World War II period. With its article 39, the Italian constitution provides for a 'median' model of industrial relations which has never been realized; as a consequence, trade unions

¹ M. Taruffo, *La giustizia civile in Italia dal '700 ad oggi*, Bologna, Il Mulino, 1980. The historical origin of individual labour justice can be found in Law no. 295 of 15 June 1893, inspired by the French model of *Conseil de prud'hommes*. The *Collegi dei probivi* function was merely conciliatory and aimed to restore social peace between capital and labour, without dealing with collective rights.

² Ministry of Justice, Direzione Generale di Statistica, 2011, p. 1-2, at <http://webstat.giustizia.it/AreaPubblica/default.aspx#>.

³ F. Santoro Passarelli, *Nozioni di diritto del lavoro*, Naples, Jovene, 1948.

⁴ See T. Treu, *Labour Law and Industrial Relations in Italy*, The Netherlands, Kluwer, 2007 for a full discussion. Different perspectives on industrial relations are linked with two general frames: the job and the economic system in M. Carrieri, *La regolazione del lavoro*, Rome, Ediesse, 2011, p. 29 ff.

⁵ Law 3 April 1926, no. 563 and the related Regulation 1 July 1926 no. 1130.

have remained private actors and their collective agreements have never reached the *erga omnes* effect as is outlined by the Constitution. Thus, as far as industrial relations are concerned, Italy traditionally follows those pluralistic systems that are historically and structurally characterized by a high level of voluntarism and a minimal degree of legalization. Freedom of association, provided for under Article 39 of the Italian Constitution and implemented through law 300/1970, was inspired by U.S. labour legislation adopted during the New Deal⁶. It includes a number of union rights relating both to the individual worker and to trade unions. Surrounding this core of legal rights, regulation is effected through a jungle of autonomous and heteronomous sources: collective agreements, bipartite and tripartite accords, joint opinions, and specific items of employment legislation that it is difficult to systematically address.

As we note below, over the course of the evolution of the Italian industrial relations model there have been repeated initiatives to redraw the boundaries between different levels of bargaining as well as efforts to achieve a degree of consensus between the main actors over the structure and rhythm of bargaining and employee representation.

During the period 1968-1973 a 'bi-polar' model of bargaining emerged which was almost unique in Europe, characterised by a high level of autonomy between different levels of bargaining. Beginning in 1975, this was succeeded by a trend towards the centralisation of bargaining, culminating in the first tripartite agreement concluded in 1983 (Protocollo Scotti), which aimed at setting up a 'neocorporatist' industrial relations system. During this period, and following the 'Hot Autumn' of the late 1960s, the 1970s and 1980s saw a relatively stable phase in terms of the constitution of the principal actors, as the main union confederations were affiliated with corresponding political parties: the CGIL with the Italian Communist Party, the CISL with the Christian Democrats, and UIL with the Social Democrats. Despite political differences, there was a fairly high level of practical cooperation both at workplace level in terms of employee representation and in concluding sectoral collective agreements. These political alignments came under strain in the immediate wake of the end of the Cold War and the subsequent implosion of the political landscape in Italy – driven on additionally by the exposure of political corruption. Since then, the union confederations have nominally been politically independent, although with continuing alignments to political groupings sympathetic to their aims and policies.

The most significant framework agreement on collective bargaining was agreed in 1993 between the government, the main trade union confederations, and the employers. This abolished the system of wage indexation, and created a new structure and rhythm for collective bargaining that led to a fairly high level of bargaining centralisation in which sectoral bargaining was to be guided by official inflation predictions, with scope for workplace bargaining on issues such as productivity or performance. In addition, the agreement provided for a reform intended to add more coherence to unions' workplace organisational structures with the aim of promoting internal democracy and grassroots participation.

Cracks in this system of moderate concertation began to appear in the early-2000s, when an agreement ('Pact for Italy') was struck between the Berlusconi government and two of the large union confederations (CISL and UIL), but which CGIL, the largest federation, refused to sign. While the previous model of tripartite concertation had involved some reciprocity between all the actors, including the government and its budgetary policy, this latter period of social dialogue was aimed at obtaining social partners' prior consent to legislative proposals, but without entailing any financial commitment on the part of the state. However, this method of social dialogue was seen as unsuccessful and was followed by numerous calls for a return to the concertation route by both the trade unions and Confindustria⁷. Even though there was a perception of a general need to reform the structure of collective bargaining, no important outcomes were achieved, in particular because of disagreements amongst trade unions.

Despite agreement on a common platform for revising the structure of collective bargaining in 2008, the period 2009-2011 was a time of strong inter-union conflict. The main cause was a 2009

⁶ O. Kahn Freund, *Labour and the Law*, London, Stevens & Son, 1972, p. 6 ff.

⁷ G. Giugni, *Diritto sindacale*, Bari, Cacucci, 2010, p. 215 ff.

agreement between the main employer organisation, Confindustria, and CISL and UIL to reform collective bargaining and revise the 1993 arrangements. CGIL refused to sign, in particular due to the scope for local ‘opening clauses’ that would allow for derogation from sectoral agreements (EIRO, 2009b). However, the growing intensity of the economic crisis led to improved relations among the main trade union confederations in mid-2011, when a joint agreement on bargaining and representativeness was signed between all three main unions and Confindustria. This provided for a new negotiating structure and regulated the issue of opening clauses, allowing for ‘temporary and experimental’ derogation from sectoral provisions. This agreement, and some of its consequences, together with Fiat’s decision to leave Confindustria, have generated a new model of bargaining, the so-called ‘Fiat Model’ (according to which company-level agreements are considered as being at the same level as national ones), and also a high level of litigation, the main litigant being *Fiom-Cgil*, the metalworking section of CGIL, which has found itself excluded from representation at FIAT due to its refusal to sign a company-level agreement.

Despite the ongoing evolution of its structure, Italian collective bargaining continues to take place at three levels. Firstly, there are inter-sectoral agreements, which may take the form of a tripartite policy accord or a bipartite agreement between social partners, depending on whether or not the outcome is also signed by the government. Secondly, there is sector-level collective bargaining. This was the keystone of the industrial relations system until June 2011; it aimed to safeguard minimum income and a range of matters regarding working conditions, such as hours, information rights and work organisation. Finally, there are decentralised agreements, which may be signed on a company, district or regional basis, and enable the parties to agree detailed arrangements for such matters as productivity, innovation and work organisation that reflect the immediate context.

Furthermore, in recent years, a good deal of conflict between government and trade unions, and in particular the CGIL, has revolved around proposals to relax the law on dismissals and allow scope for local workplace agreements. In 2011, a new set of provisions was introduced permitting further negotiated derogation (known as ‘proximity bargaining’, Art. 8, Decree Law 138/2011) both from the provisions of sectoral agreements and from certain aspects of statute law, provided the changes accord with the Italian constitution, EU-level requirements, and international obligations⁸.

As a result of collective provisions in the most recent inter-sectoral agreements and the new legal provision allowing company and district collective agreements to have an *erga omnes* effect (‘proximity bargaining’), decentralised collective bargaining has become increasingly important. Concurrently, in the case of enterprises not affiliated to Confindustria or other employer confederations, and according to the so-called ‘Fiat Model’, the company-level agreement has to be considered at the same level as national ones. Therefore, perhaps partly because of the earthquake triggered by Marchionne in the field of industrial relations with the ‘Fiat model’, an axis shift in the structure of collective bargaining in Italy is taking place from the national to the decentralized level.

Nevertheless, national agreements have also recently been given a boost. On 31 May 2013 all three main trade union confederations and Confindustria signed a cross-industry agreement aimed at identifying the bodies that can legitimately negotiate national collective agreements and at defining the parameters of national agreements, thereby setting out what appears to be the first step towards making national agreements apply *erga omnes*, as originally envisaged in the Italian Constitution (art. 39, par. 2, 3 and 4) but never formally implemented.

Although in Italy there are no official data, a (perhaps optimistic) EIRO report in 2009⁹ estimated that collective bargaining coverage at the industry level was around 80 percent, while

⁸ EIRO, *Unions slam new law allowing opt-outs on labour rules*, 2012,

at <http://www.eurofound.europa.eu/eiro/2011/10/articles/it1110019i.htm>. Before 2011, local workplace agreements were still subject to the provisions of those at industry level, but now, following the two recent above-mentioned intersectoral agreements, they are able to modify the regulations contained in national collective agreements “within the limits and in line with the procedure that national company agreements themselves permit”.

⁹ EIRO, *Italy: Industrial relations profile*, 2009a, at <http://www.eurofound.europa.eu/eiro/country/italy.pdf>; J. Visser, *The quality of industrial relations and the Lisbon Strategy*, in European Commission, *Industrial relations in Europe*, 2008, Luxembourg, Office for the Official Publications of the European Commission.

decentralised collective bargaining coverage was much lower: around 30-40 percent¹⁰. OECD data, updated to the third quarter of 2012, show that the employment rate in Italy was 44.1 percent seasonally adjusted, with almost 23 million employed workers and almost 26 million economically active in the population, including unemployed workers. As for trade union density, it was 49.7 percent 20 years ago in the trade unions' golden age. Since then, data from the OECD¹¹ indicate that it was 35.4 per cent in 1999, fell to 33.2 per cent in 2006 and rose to 35.1 per cent in 2010¹². Even though as an absolute value the number of active workers who are members of a trade union is slightly increasing¹³, the number of non-members is rising drastically¹⁴. The slight increase in trade union density in recent years is perhaps a response by workers to the economic crisis¹⁵.

Adjudicating employment rights: a portrait of the past

If working conditions strictly depend on the industrial relations system, both in terms of improving on the *status quo* and regulating the framework, the infringement of workers' rights rigorously depends on the rules and the Courts established by each jurisdiction to ensure compliance. Looking back to history, the first step towards a labour judicial system was in 1893. Inspired by the *conseil des prud'hommes* in France, the so-called *Collegi dei probiviri* were established by law 295/1893¹⁶.

These types of Court used to have the task of amicably settling the conflicts between capital and labour arising after both industrial revolutions. These courts were tripartite: for each case there were two lay judges, one representing employers and the other employees. The court was chaired by an experienced lawyer appointed by the President by means of a royal decree following nominations from the Ministries of Justice and Industry. The establishment of these *Collegi* was not mandatory for the whole country or for all kinds of industry and, as a consequence, their coverage was patchy¹⁷. Although collective issues remained beyond the *Probiviri's* jurisdiction, they did have jurisdiction in respect of individual employment contracts and thus were able to fill in gaps in the civil code and provide equity¹⁸.

Moreover, certain features of the old *Collegi* are still to be found today in law 533/1973: these include the investigative powers of the judge to collect evidence before the hearing, the provision of

¹⁰ G.P. Cella and T. Treu, *Relazioni industriali e contrattazione collettiva*, Bologna, Il Mulino, 2009. As the authors say, the data probably represent an overestimation (p. 139).

¹¹ At http://stats.oecd.org/Index.aspx?DatasetCode=LFS_SEXAGE_I_R. Trade union membership as a percentage of all employees was 35.6%, updated in 2008. For this data and a brief overview of the Italian industrial relations profile, see R. Pedersini, *Italy: industrial relations profile (online)*, at <http://www.eurofound.europa.eu/eiro/country/italy.pdf>.

¹² For a study of the evolution of trade union membership, see I. Regalia, *Quale rappresentanza. Dinamiche e prospettive del sindacato in Italia*, Roma, Ediesse, 2009, p. 123 ff., where she shows that trade unions have an opportunity to recruit two categories of workers: young people and white-collar workers. See also M. Carrieri (note 3).

¹³ For instance, there were 2,618,122 active working CGIL members in 2010 and 2,650,528 (42.2%) in 2011. Trade Unions usually publish this set of data, for which see the following links: http://www.cgil.it/ChiSiamo/Quanti_Siamo.aspx ; <http://www.cisl.it/gli-iscritti/> ; <http://www.uil.it/organizzazione/iscritti.htm> .

¹⁴ T. Treu, *Il futuro delle relazioni industriali*, in *Lavoro, Mercato, Istituzioni. Scritti in onore di Gian Primo Cella*, edited by L. Bordogna, R. Pedersini and G. Provasi, Milan, Franco Angeli, 2011, p. 551.

¹⁵ See T. Treu, (note 14) for a crystal clear analysis regarding the potential scenarios of Italian industrial relations.

¹⁶ Prior to this law, individual labour disputes were not covered by special rules, either procedural or jurisdictional. G. Chiovenda, *Principi di diritto processuale civile*, Naples, Jovene, 1923; D. Napoletano, *Diritto processuale del lavoro*, Rome, Jandi Sapi, 1960.

¹⁷ *Ex multis*, see P. Calamandrei, *Il significato costituzionale delle giurisdizioni di equità* (1920), in *Opere giuridiche*, III, Napoli, Jovene, 1968, p. 3 ff.; A. Segni, *I tribunali del lavoro in Italia*, in *Studi di diritto processuale in onore di Chiovenda*, Padova, Cedam, 1927, p. 769 ff.; U. Romagnoli, *Sindacati e diritto. Le origini del pensiero giuridico-sindacale in Italia*, in *Studi storici*, I, 1973, p. 3 ff.

¹⁸ E. Redenti, *Il contratto di lavoro nella giurisprudenza dei probiviri*, in *Rivista di Diritto Commerciale*, 1905, pp. 356 ff.

oral evidence, and the issuing of a judgment in which the facts of a dispute are evaluated and the reasoning shown¹⁹.

Between the experience of the *Collegi dei probiviri* (until 1925) and the “pretori d’assalto” (literally storming magistrates) (from 1973), Italy lived through the totalitarian fascist regime, which eradicated workers’ rights through legislation introduced in 1926 (law 563/1926); for instance, strikes attracted criminal sanctions and only fascist trade unions were recognised. At the same time, a special labour Court for adjudicating collective rights and for appealing *probiviri* decisions was established. This was a special branch of the Appeal Court and at each hearing it was composed of three judges and two citizens with expertise in employment problems appointed by the President from ‘untarnished’ people listed in a special register.

In 1928, a Royal Decree (no. 471), replaced in 1934 by a further Royal Decree (no. 1037), officially abolished the tripartite *Collegi dei probiviri* and jurisdiction passed to the ordinary civil courts presided over by a single judge, but with employer and employee representatives as advisers. This also introduced a special fast-track procedure²⁰ and gave a major role to the fascist trade unions. This was because before workers could bring a case they were required to notify their trade union and request conciliation²¹. Each worker complaint had to be mandatorily addressed to the sectoral trade union before the action²²: the function of that complaint was not only to bring the situation of the contrast between the worker and the employer to the attention of the union, but also to allow the union control. This so-called ‘trade union gangway’ enabled unions to exert control and monitor litigation²³. As noted above, however, these decrees also provided for conciliation to resolve employment disputes. If a matter was not settled and litigation ensued, there were special procedures within the civil courts.

The only rule to protect the worker was the opportunity to eventually recognise the right to obtain part of a payment, although without any specific enforcement, within a context characterised by an unfillable gap between the Court and the workers, not filled by the attendance of fascist trade unions²⁴.

If, historically, the procedural rules applied by the special labour branch of the Court under the fascist regime were technically a qualitative step toward a complete procedural civil system, on the other hand they marked a regression in the protection of workers. The above-mentioned regulations were aimed first at resolving labour disputes by conciliation instead of commencing legal proceedings, and then at regulating labour disputes before the courts as special trials within the civil ones.

Further reform in 1942 again restructured employment disputes, removing employer/employee advisers and treating both individual and collective labour disputes as ‘ordinary’ civil disputes. Some differences remained with regard to certain procedural aspects: in particular, a greater power of the judge to collect proofs; provisions for compulsory conciliation; and an opportunity for trade unions to participate in the trial. While the previous two systems outlined employment actions as substantially different and quicker in procedure, the 1942 reform turned labour dispute resolution into civil trials within the ordinary civil hearing, until 1973. Nevertheless, after the writing of the Italian Constitution, especially in the 60s and 70s, the debate became somewhat heated because of the ban on instituting special judges (Art. 102.2 Constitution) and opposition from the trade unions.

¹⁹ G. Chiovenda, *Le riforme processuali e le correnti del pensiero moderno*, in *Saggi di diritto processuale civile*, vol.I, Roma, Soc. Ed. Foro It., 1930, p. 389 ff.

²⁰ A. Proto Pisani, *Le controversie in materia di lavoro*, in G. Branca (ed), *Commentario della Costituzione*, Bologna-Rome, Zanichelli-II Foro Italiano, 1987; L. Mortara, *Il processo nelle controversie individuali di lavoro: passato, presente e futuro*, in *Giurisprudenza Italiana*, 1934, IV, p. 211 ff..

²¹ N. Jäger, *Diritto processuale del lavoro*, Padova, Cedam, 1935; C. Grassetti, *La conciliazione delle controversie individuali*, in *Rivista Giuridica del lavoro*, 1950, I, p. 239 ff.

²² This obligation required the worker to join the fascist union.

²³ G. Trisorio Liuzzi, *La conciliazione obbligatoria e l’arbitrato nelle controversie di lavoro privato*, in *Rivista di Diritto Processuale*, 2001, 56, 4, p. 948 ff.; A. Nascosi, *Il tentativo obbligatorio di conciliazione stragiudiziale nelle controversie di lavoro*, Milan, Giuffrè, 2007.

²⁴ The totalitarian phase opened a chasm between the judges and the workplaces that was only relatively overcome later through the coercive measures provided for by law no. 300 of 20 May 1970.

As we note below, from a procedural point of view the most important achievement in widening the legal protection of workers was law no. 533/1973; this acted as a *pendant* to the substantive provisions in Law no. 300/1970. The reform carried out in 1973 outlined a dynamic hearing very close to the needs of the weaker side of the employment relationship and to the values involved in it. The new generation of judges, the so called “pretori d’assalto”, did the rest: the application of procedural rules for protecting civil and constitutional rights in the workplace was the best tool to achieve the substantive equality that is enshrined in the Italian Constitution (art. 3)²⁵. The rainy season had ended to make way for fine weather.

The judicial system: the legacy of the Twentieth century

The system of worker protection after the Second World War was based first on the Constitution, promulgated in 1948, which contains fundamental principles relating to workers, such as freedom of association, the right to work and equality before the law irrespective of distinctions such as gender, race and language; and secondly on three statutes:

- law 604/1966 on individual dismissals;
- law 300/1970, the so-called Workers' Statute;
- law 533/1973 on individual employment rights disputes, the most important law procedurally.

The new legal framework came into being from the main need to remedy the general crisis of the civil trial, which manifested itself clearly through the “scandalous duration of the proceedings”²⁶. Previously, in 1966 the legislator had already given district judges (*pretori*) jurisdiction over disputes arising from the application of the individual dismissal law. The philosophy of the single judge was subsequently confirmed in the Workers' Statute and the labour dispute reform, law no. 533/1973.

Each of these laws combined both procedural and substantive protection of rights, as the legislator thought that the extension of rights without any procedural rules would be an end in itself. According to this principle, over the years the legislator established an employment rights adjudication system which was more effective, fast and close to the worker, with the district judge as main player. He exercised his function according to the principles of immediacy, concentration and orality. For the first time, a more effective protection of workers’ rights was put above the defence right of employers, the economically stronger contractor, overturning the false equality of the parties which was typical in the dynamics of civil trials. This new employment order attributed great powers to the judge which were unknown to the law of the time; it introduced mechanisms designed to discourage the interest of the economically and socially stronger side to draw out the proceedings. The judicial process became much more investigative than adversarial because the district (first instance) judge was given wide powers of investigation, the so-called *principio inquisitorio*²⁷, and could gather evidence independently of the parties. For instance, he/she could ‘call additional witnesses, order “free interrogation” of the parties, order inspection of the workplace and ask for written or oral evidence from union representatives’²⁸.

Other measures aimed at speeding up proceedings included oral evidence during the hearing, the reading out of the decision at the close of the judicial hearing, and enforcement of the first-level decision if it provided for pecuniary compensation in favour of the worker (art. 420 ff. Code of Civil

²⁵ R. De Luca Tamajo, *Gli anni '70: dai fasti del garantismo al diritto del lavoro dell'emergenza*, in P. Ichino, *Il diritto del lavoro nell'Italia repubblicana*, Milan, Giuffrè, 2008, p. 102 ff.

²⁶ V. Ciocchetti, *Crisi e paralisi nella giustizia del lavoro e previdenziale italiana*, in *Il Foro italiano*, 1999, 4, IV, p. 113 ff.

²⁷ G. Tarzia, *Manuale del processo del lavoro*, Milan, Giuffrè, 2008, p. 170 ff.

²⁸ B. Hepple, *Industrial Tribunals*, London, Justice, 1987, p. 61.

Procedure). In short, this was a revolutionary reform²⁹ because it guaranteed as much space as possible to mediation of the conflict through the work of judges and their special powers.

However, the major limitation of the 1973 reform was that these new-style hearings only had the power to award monetary compensation to workers, and could not issue injunctions for specific performance (for instance, if they had found discrimination of trade union activists). Art. 28 of law no. 300/1970 was introduced to fill this gap, but only to protect rights, including individual ones but in any case connected with trade union activity; on the other hand, art. 700 of the civil procedural code regulated individual complaints, but it was a regulation with no specific labour protection application and was borrowed from the civil order.

At this time there was a new generation of judges, the so-called *pretori d'assalto*, (literally 'storming magistrates'), chosen from among the judges who worked as *pretori*, who were district judges with jurisdiction over small claims and petty offences. According to Hepple³⁰, 'the national average of decisions *in favour* of the worker by the *pretori* was three to one, compared to about four to one *against* the worker in British employment tribunals' (our emphasis). In short, the *pretori* applied the legislation in a manner sympathetic to workers³¹.

The changes outlined above, however, were not totally effective³², given the socio-economic differences between regions in Italy. While in some courts, usually medium-sized ones and those in the industrialised centre-north of Italy, court hearings were speeded up, in others, especially the larger ones and in the centre-south of Italy, with the exception of Naples, hearings were often delayed because employers procrastinated³³.

Although scholars generally appreciated the positive aspects of the reform, other scholars and trade unions criticised these judicial proceedings, essentially because of their lack of union involvement, which was limited to a discretionary request for information³⁴. Indeed, one reason for this was because the *pretori* rarely used their powers to order union access to the workplace or requested information from trade unions.

In the 1990s, far from any speeding up of court proceedings in respect of individual employment rights disputes, such proceedings became more protracted with delay becoming common almost everywhere in the country, possibly partly as a result of a new round of legislation, in particular law 51/1998, which introduced a number of reforms to civil procedures. Meanwhile, a judge replaced the *pretore* and the Tribunal (the first instance court in the civil court system) replaced the *Pretura*, with a special labour branch constituted within the civil court. The same framework was also applied to the upper level, with a labour branch established within the Court of Appeal. The procedural rules, however, did not suffer any important changes compared with those previously applied before the *pretori*.

During that period, as a result of laws 80/1998 and 387/1998, proceedings became even lengthier when the same courts that had adjudicated private sector workers' individual employment rights disputes were given the additional responsibility of adjudicating civil servants' individual

²⁹ L. Montesano and F. Mazziotti, *Le controversie di lavoro e della previdenza sociale*, Naples, Jovene, 1974; G. Perone, *Il nuovo processo del lavoro*, Padova, Cedam, 1975; G. Ianniruberto, *Il processo del lavoro rimosso*, Padova, Cedam, 1999.

³⁰ B. Hepple, *Labour Courts: some comparative perspectives*, in *Current Legal Problems*, 1988, 41, p. 173.

³¹ R. De Luca Tamajo (note 25).

³² N. Picardi, *Primi risultati di una ricerca sui tempi del processo del lavoro*, in *Rivista Trimestrale di Diritto e Procedura Civile*, 1979, p. 279 ff.; A. Proto Pisani, *Lavoro* (controversie individuali in materia di), in *Novissimo Digesto Italiano*. Appendice, Turin, Utet, 1983, p. 625.

³³ V. Sgroi, *Relazione del procuratore generale presso la Cassazione per l'anno giudiziario 1988*. Parte seconda: *la giustizia civile. Riflessi internazionali della durata dei processi. La situazione della Cassazione*, in *Giustizia Civile*, II, 1989, p. 74.

³⁴ T. Treu, *Azione sindacale e nuova politica del diritto*, in T. Treu, *L'uso politico dello Statuto dei lavoratori*, Bologna, Il Mulino, 1975, p. 33 ff.; U. Romagnoli, *Autorità e democrazia in azienda: teorie giuridico-politiche*, in Id., *Lavoratori e sindacati tra vecchio e nuovo diritto*, Bologna, Il Mulino, 1974, p. 271 ff.; E. Ghera, *Interessi collettivi e processo del lavoro*, in *Rivista Giuridica del Lavoro*, 1973, 1, p. 4 ff.

employment rights disputes, replacing the administrative courts which had until then had jurisdiction over those matters³⁵. This brought an influx of new cases, which inevitably increased the already heavy case-load in the courts³⁶.

The judges and the courts

The judges

Judges in Italy are career judges, as in Sweden and Germany. This contrasts with the position in common law countries, such as Great Britain and South Africa, where judges are only first appointed in mid-career after previously serving as lawyers (or a legally related job such as in academia) and acquiring significant legal experience.

All Italian judges are assigned and appointed for life by the Ministry of Justice according to their rankings in competitive examinations which are open to all who have a law degree³⁷. After success in these competitive examinations and a brief period of training, the President of the Tribunal decides on the posting, which could be labour, bankruptcy or another civil branch if the successful candidate has opted for the civil area. Subsequently, judges may be moved from one branch to another, or if they have some years of service, they may be promoted from a first instance court to a higher court.

The courts

There are three levels in the court system: the Tribunal, the Court of Appeal and the Supreme Court, each of which has a special chamber exclusively for employment jurisdiction, although, as noted above, these employment chambers do not have specialised judges. Usually, individual employment law cases after having been heard at first instance are then appealed because an appeal can be lodged both on fact and law. In 2012, the number of employment law appeals to the Court of Appeal increased by 1.1 per cent compared to the previous year, but distinguishing between private sector and public sector cases, the latter increased by 20.7 per cent³⁸. The Court of Appeal has almost the same powers as the first instance court, but the provision of new evidence is limited by the principle of necessity. In theory, one can only appeal to the Supreme Court on a point of law, but in practice the number of disputes at this level shows that most judgments are appealed³⁹.

The size of the panel of judges increases according to the level of the hearing: from a single judge at first instance, to five judges in the Court of Appeal, and to five or nine judges at the Supreme Court⁴⁰. Where several judges sit together (Court of Appeal and the Supreme Court) there is just one judgment and dissent is not announced, so the parties never know whether there is unanimity or not. Interestingly, unlike German judges, Italian judges do not usually wear robes, apart from at the highest level in the Supreme Court.

³⁵ G. Garofalo, *Osservazioni sul sistema contrattuale e sulla giurisdizione*, in G. Naccari (ed), *La riforma del lavoro pubblico*, Rome, Ediesse, 1993, p. 121.

³⁶ V. Ciochetti (note 26) p. 118; Aa.Vv., *La giustizia del lavoro: disfunzioni, inefficienze, proposte di rivitalizzazione*, in *Rivista Critica di Diritto del Lavoro*, 2004, 3, p. 475 ff.

³⁷ European Commission for the Efficiency of Justice, 2012. The total number of judges in Italy is 8,943, with 4,735 men and 4,208 women; see <http://astra.csm.it/organicoOrdinari/orgord.php>. There are no statistical data on the gender of the judges according to the level of the Court, but what evidence there is suggests that women are concentrated at the lower levels (such as in Tribunals or Court of Appeal), rather than in the Supreme Court. This is for two reasons: first because women were only allowed to compete to become a judge in 1966 (law no. 66 of 9 February 1963); second, even though the ranking of winners of the last 15 years' competitions contain many more women than men, women have not accrued the necessary service to gain promotion to the higher courts.

³⁸ Relazione sull'amministrazione della Giustizia, 2012, p. 74, at

http://www.cortedicassazione.it/Documenti/Relazione_anno_giudiziario_2012.

³⁹ Rapporto Statistico del settore civile, 2012, at http://www.cortedicassazione.it/Documenti/CCStatisticheCivile_2012.pdf.

⁴⁰ The court is composed of nine judges when they decide conflicting judgments in the Supreme Court (the so-called decision by "sezioni unite").

As noted above, although one long-standing concern has been to speed up the Italian adjudication process, data concerning the length of proceedings make gloomy reading. According to the European Commission for the Efficiency of Justice (2012)⁴¹, the average length of proceedings for employment dismissal cases at first instance was 619 days in Italy in 2006 compared to 80 days in the Netherlands and 369 days in France. The Ministry of Justice, with data updated to 2011⁴², distinguishes between the public and private sectors and provides data for all employment law cases. It gives a slightly lower figure: the average length of time an employment law case took was 536 days for private sector disputes and 604 days for public sector ones. This increased to 971 days (private sector) and 944 days (public sector) from filing a claim at first instance to the Court of Appeal judgment, and 1,105 days for the Supreme Court's judgment⁴³.

In theory, no more than 60 days should elapse between the date of initially lodging a claim and the first hearing, and after that there should be a very limited number of hearings, all of them strictly regulated by the need to gather evidence that the judge considers important. However, in practice this does not happen and, although the special employment rights procedure takes about half the time of ordinary civil proceedings (1,602 days in the Court of Appeal and 1,127 days in the Tribunal), the aspiration to speed up proceedings that was part of the 1973 reforms has never been realised.

Until recently, there was no fee for lodging or hearing employment rights disputes, but this free-of-charge principle was abrogated in 2011 and now a fee has to be paid to lodge a claim. Where a claimant has a gross income of less than €32,298.99 the fees to file an employment claim before Tribunals and the Court of Appeal are reduced by half in comparison to other civil cases and are related to the value of the claim. For example, the fee is €25 (£192; \$291) to start the hearing in a case of individual dismissal. This does not apply in the Supreme Court, where there is no distinction between employment cases and other civil cases.

It is mandatory for both employers and workers to have legal representation and each side bears its own costs. Even if a worker is eligible for legal aid because of income level, she/he generally has to cover the costs related to the lawyer (except below a very low threshold of income), and eventually, if the case is lost, is required to pay the winner's costs⁴⁴ according to an amount decided by the court. This applies at all three court levels⁴⁵. Despite this, the unions do not provide their members with a lawyer, but sometimes they provide pre-judicial legal advice in order to evaluate the prospects of success.

In spite of the fact that fees were imposed in 2011, in 2012 there was an increase in the number of claims, both in absolute terms in comparison with employment rights hearings in 2011, and in relative terms when compared to civil claims generally, which decreased (-6.1 percent). Considering first instance proceedings, public sector employment cases increased significantly: in 2011 they rose by 21.5 percent compared to 2010, with a further increase in 2012 of 8.7 percent compared to 2011. Private employment sector employment cases also increased, although to a lesser extent than public sector employment cases: in 2011 there was an increase of 8.7 percent compared to 2010, and in 2012 there was a rise of 2.8 percent compared to 2011.

Looking solely at new employment claims, (i.e. not all employment claims before the courts) the increasing number of employment rights disputes is a cause for concern: these were up by 34.9 percent for the public sector and 15.7 percent for the private sector, compared with a fall for other new

⁴¹ At http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp.

⁴² See Ministero della Giustizia, 2011, Direzione Generale di Statistica, at <http://webstat.giustizia.it/AreaPubblica/default.aspx#>.

⁴³ From the statistical data of the Supreme Court it seems that the average length of proceedings before the Supreme Court has decreased by about 2.8 months. See Rapporto Statistico del settore civile, anno 2012, at http://www.cortedicassazione.it/Documenti/CCStatisticheCivile_2012.pdf.

⁴⁴ Of course, it is the opposite if she/he is the winner.

⁴⁵ In reality both lawyers ask for more than what the judge decides and they can ask the party they have represented to pay according to the rate applied in practice ("tariffe forensi").

civil hearings (in 2011 -8.3 percent; and in 2012 -6.1 percent). Indeed, in the light of these developments, the Supreme Court has interpreted the increase as a symptom of Italy's economic crisis⁴⁶.

Unfortunately, in Italy there are no available statistics on the success rate of employment dispute hearings in the courts. Looking at economic dismissal cases heard in some specific courts, some economists have suggested that the results are akin to those of 'Russian roulette'⁴⁷. Judges are often influenced by local labour market conditions, which are very different across Italy, and will often decide in favour of workers where there is a high level of unemployment⁴⁸.

Extra-judicial dispute resolution, today

So far, this paper has focussed on the court system and adjudication by judges, but extra-judicial dispute resolution mechanisms are becoming increasingly important in Italy, both conciliation and arbitration.

Conciliation

There are two types of conciliation: first, so-called administrative conciliation, where conciliation is carried out by a special board at the Area Labour Directorates, which are sub-regional units of the Labour Inspectorate; and second, conciliation carried out according to the provisions of a collective agreement. There can also be *ad hoc* conciliation, provided by the *Collegio di Conciliazione e Arbitrato*.

Administrative conciliation occurs when a labour inspector has detected an infringement of a worker's rights or where an alleged infringement has been reported by an employee or a trade union. It concerns workers' economic rights or employment claims arising from unfulfilled employer obligations and contribution payments. Such conciliation is carried out by a tripartite panel established at each Area Labour Directorate. Typically, the panel is composed of the local labour inspector (or his/her substitute) in the chair and four representatives (or their substitutes), consisting of two representatives of the employers and two representatives of the employees, nominated by the most representative organisations at national level. The attempt at conciliation can lead to a settlement in the form of a legally enforceable agreement signed by a labour inspector or the settlement can be enforced by a court order at the request of a single party. In 2012 (law no. 92/2012), mandatory administrative conciliation as a precondition for initiating court procedures was only required for cases of individual dismissal for economic reasons (*giustificato motivo oggettivo*).

Alternatively, conciliation can be carried out according to the provisions of a collective agreement⁴⁹. A report must be filed with the Area Labour Directorate if conciliation is successful. If it is not, extra-judicial administrative conciliation can, and usually is attempted.

Between 1998 and 2010, at the beginning of the hearing the judge was required to ascertain that an attempt at conciliation between employer and employee had been made; otherwise the case could not be heard. In 2010 (law no. 183/2010, the so-called *Collegato Lavoro law*), such conciliation became discretionary and as a result failing to engage in conciliation no longer precluded the filing of

⁴⁶ See *Relazione sull'amministrazione della Giustizia, anno 2012*, p. 77, *passim*, at http://www.cortedicassazione.it/Documenti/Relazione_anno_giudiziario_2012.pdf.

⁴⁷ A. Ichino and P. Pinotti, *La roulette russa dell'articolo 18*, 2012, at <http://archivio.lavoce.info/articoli/pagina1002912.html>.

⁴⁸ A. Ichino, M. Polo, and E. Rettore, *Are judges biased by labor market conditions?*, in *European Economic Review*, 2003, 47, 5, p. 913 ff.

⁴⁹ For an example regarding the commerce sector, see G. Lucchetti, *Il "collegato lavoro" alla prova dei fatti: conciliazione, certificazione arbitrato e welfare privato nel nuovo c.c.n.l. commercio*, in *Argomenti di Diritto del lavoro*, 2011, 4-5, p. 942 ff.

an employment claim. It may be that this change was made because few settlements were reached through conciliation⁵⁰.

There is, however, an exception. The judge is still required to ascertain at the beginning of the hearing whether conciliation has been attempted where an employment contract has been 'certified'. This certification procedure was introduced in 2003 to prevent future disputes about the type of employment contract (such as whether the worker was a temporary worker or an employee) and such certification is carried out by a Commission⁵¹. Commissions can be found in a variety of places: at the Area Labour Directorates, the provinces, the bilateral bodies established by national collective agreements, or universities. Furthermore the composition of the Commission varies: for example Commissions at the Area Labour Directorates include a labour inspector (or substitute), together with officials from INAIL (Istituto Nazionale Infortuni sul Lavoro), which deals with occupational illness and accidents, and INPS (Istituto Nazionale di Previdenza Sociale), which manages the social security system; at universities the Commission is composed of labour law professors, researchers, and lawyers who specialise in labour law.

Data on conciliation is collected by the Ministry of Labour only in respect of administrative conciliation and indicates that the conciliation process usually ends without a settlement, particularly in the public sector. For example, in 2012, out of 1,758 public sector disputes, including new and pending claims, only 58 were settled through administrative conciliation, while in the private sector out of 69,647 disputes 32,423 were settled through administrative conciliation. Conciliation in both sectors was not even started in many cases, for instance because of the absence of a party. Looking specifically at individual dismissals for economic reasons (*giustificato motivo oggettivo*) in the private sector, out of 10,675 attempts at conciliation 4,023 were settled, 3,667 failed, 1,848 were abandoned, and 1,137 were still in progress⁵².

Arbitration

Individual employment rights disputes in Italy can also be resolved through arbitration, with a third party who is not a judge making the decision. There are two kinds of arbitration, both regulated by law, but the main difference is the effect of the award because only one kind is legally enforceable. This latter kind is called *arbitrato rituale* (or arbitration by law, otherwise known as *arbitrato di diritto*) and the decision of the arbitrator can, if necessary, be enforced by a judicial order (*exequatur*). This kind of arbitration, however, applies only if certain conditions are met: first, it has to be provided for by law or by a collective agreement (art. 806 ff. Code of Civil Procedure); second, both parties have to agree to go to arbitration; third, it does not cover all statutory rights, for instance some constitutional rights cannot be adjudicated by arbitration. It does, however, cover not only employees but also workers who are neither employees nor genuinely self-employed.

Whereas the award emanating from *arbitrato rituale* can be judicially enforced, this does not apply to the other kind of arbitration known as *arbitrato irrituale* (literally 'non-ritual arbitration'), where any award is akin to a gentleman's agreement. Otherwise, the two kinds of arbitration are virtually indistinguishable: in terms of the type of dispute that can be arbitrated; in the fact that arbitration is only available if it conforms to a specific law or to a collective agreement; and in that the parties to the dispute have to agree to go to arbitration.

Non-legally enforceable arbitration (*arbitrato irrituale*) has been enhanced by recent legislation, the *Collegato lavoro* law 183/2010. As a result there are now four ways that non-legally enforceable arbitration can be conducted:

⁵⁰ M. De Cristofaro, *Il nuovo regime delle alternative alla giurisdizione statale (ADR) nel contenzioso del lavoro: conciliazione facoltativa ed arbitrato liberalizzato*, in *Il Lavoro nella Giurisprudenza*, 2011, 1, 19, p. 58, commenting on Supreme Court, Labour branch, 25 June 2009, no 14954; A. Vallebona, *Introduzione al Trattato di diritto del lavoro*, in M. Persiani and F. Carinci (eds), *Il diritto processuale del lavoro*, IX, XXVI, Padova, Cedam, 2011, p. XXVI.

⁵¹ Workers are able to appeal to the judicial authorities against certification.

⁵² Ministry of Labour and Social Policies, Divisione generale per l'attività ispettiva, *Rapporto annuale sull'attività di vigilanza in materia di lavoro e previdenziale*, 2012a, at http://www.lavoro.gov.it/NR/rdonlyres/E45EFA51-8217-4CBD-B52B-D0A77E9F8F76/0/Rapporto_annuale_vigilanza_2012.pdf.

1. Arbitration can be conducted by a panel composed on a tripartite basis during, or immediately following, administrative conciliation with the same panel (a district labour inspector plus two employee and two employer representatives), if the parties agree (this is essentially con/arb as in South Africa);
2. Arbitration can be carried out according to the provisions of a collective agreement (art. 412 ter);
3. Arbitration can be carried out by the “Certification Commission”, as mentioned above⁵³;
4. Arbitration can be carried out by a tripartite panel (*Collegio di Conciliazione e Arbitrato*) composed of a member for each side (employer and union) and an arbitrator jointly appointed by them from law professors at universities or lawyers able to plead at the Supreme Court (art. 412 quarter). Usually both the employer and the employee are represented by a lawyer⁵⁴.

Only in this fourth type of *arbitrato irrituale* are the fees set out: these depend on the value of the claim and have to be paid in advance (five days before the arbitration hearing). They are calculated as 2 percent of the value of the claim to the chairperson and 1 per cent to the other arbitrators. The parties share the fee for the chairperson, and each side reimburses the arbitrator who is on their ‘side’, although workers can sometimes be refunded by their union.

Non-legally enforceable arbitration (*arbitrato irrituale*) represents a missed opportunity because it is so limited. As noted above, it can only be conducted when it is specifically provided for by law or by a collective agreement; the parties’ own wishes are not a sufficient trigger⁵⁵.

There is, however, an important exception. Under law 183/2010 the parties can agree in advance to go to arbitration rather than the courts, signing a clause to that effect in the individual employee’s contract of employment (*clausola compromissoria*). There are, however, a few safeguards (unlike pre-mandatory employment arbitration agreements in the USA): the clause cannot be signed before 30 days of employment; it has to be approved by a certifying Commission; and it has to be provided for by a collective agreement. Nevertheless, this takes little or no account of the fact that normally the employee is in a much weaker position than the employer, especially at the beginning of the employment relationship⁵⁶.

Finally, mediation has never been used in civil cases, according to the latest data from the Ministry of Justice⁵⁷. This is perhaps because there is uncertainty over its legitimacy, given art. 2113 Civil Code⁵⁸ and the latest jurisprudence of the Italian Constitutional Court (6 December 2012, no. 272), which rejected the mandatory nature of mediation⁵⁹. Given that mediation is essentially indistinguishable from conciliation, however, as both leave the decision about whether or not to settle

⁵³ L. Zoppoli, *Certificazione dei contratti di lavoro e arbitrato: le liaisons dangereuses*, in Aa. Vv., *Sull’arbitrato. Studi offerti a Giovanni Verde*, Naples, Jovene, 2010, p. 927 ff.

⁵⁴ In the first and last types, the arbitrators can decide according to equity principles, but this option is usually not provided for by collective agreements.

⁵⁵ P. Ichino and T. Treu, *Interventi al Senato della Repubblica*, 2010, at <http://www.pietroichino.it/?p=10402>.

⁵⁶ There are only a few collective agreements that have enabled the parties to agree to this clause and they try to impose limits. For example, within the Tertiary sector the clause cannot cover such matters as sexual harassment and illness. P. Licci, *L’arbitrato*, in B. Sassani and R. Tiscini (eds), *I profili processuali del collegato lavoro*, Rome, Dike, 2011, p. 71.

⁵⁷ Ministry of Justice, Direzione Generale di Statistica, *Mediazione civile ex D.L. 28/2010: Statistiche al 31 luglio 2012*, at <http://webstat.giustizia.it/AreaPubblica/Analisi%20e%20ricerche/Mediazione%20Civile%20al%2031%20luglio%202012.pdf>.

⁵⁸ G. Stipo, *La risoluzione alternativa delle controversie in materia di lavoro: mediazione, conciliazione, arbitrato*, in *Nuova Rassegna di legislazione dottrina e giurisprudenza*, 2012, 6, p. 654 ff.

⁵⁹ It was introduced as mandatory by law no. 28/2010 but is now only discretionary as a result of the Constitutional Court’s decision.

firmly in the hands of the disputing parties – unlike arbitration – and that conciliation is already provided for in employment rights cases (see above), this is unlikely to have any practical import in the employment arena.

Conclusions

In Italy, there are special chambers in the civil courts for the adjudication of disputes concerning employment rights, but paradoxically the judges themselves do not specialise and may or may not remain in the employment chambers.

Outside the civil court system there are labyrinthine provisions making it difficult for workers to know how to enforce their rights. For instance, there are two types of conciliation (administrative conciliation and conciliation as a result of collective agreements); there are *ad hoc* commissions and a maze of certifying commissions; there are also two kinds of arbitration (legally enforceable arbitration and non-legally enforceable arbitration), the boundaries of which are not completely clear because of their similarities in function and structure⁶⁰. This complexity may be because the trade unions and government do not share a common approach; for example, they could (but do not) collaborate in order to create a class of labour dispute arbitrators⁶¹. Importantly trade unions are also wary of arbitration.

The complex framework of legislation and the ineffectiveness of alternative dispute resolution procedures⁶² confirms concern over the legislation affecting adjudicating employment rights and the distance from the constitutional principle of a "fair trial" (art. 24 Italian Constitution).

Another long-standing problem in Italian employment rights adjudication is the time taken for a case to go through the court system from filing the claim to the handing down of the judgment. Despite the reforms carried out in 1973⁶³, the ever growing number of disputes and inadequate financial resources have led to delays in the system year after year. Yet despite this evidence of delay in the judicial system, there is still a strong cultural resistance to alternative dispute resolution⁶⁴ and a preference by the parties for litigation, with trade unions being unwilling to take labour disputes away from judges as they seem to consider that only the courts can adequately protect workers' rights⁶⁵. There is an old English adage: justice delayed is justice denied and certainly in Italy's employment rights adjudication in the civil courts there is much delay.

⁶⁰ See M. Bove, *Art. 808 ter c.p.c.*, in S. Menchini (ed), *La nuova disciplina dell'arbitrato*, Padova, Cedam, 2010, p. 65 ff., for a full discussion.

⁶¹ D. Borghesi, *L'arbitrato ai tempi del collegato lavoro*, 2011, at www.judicium.it.

⁶² Aa.Vv., *La giustizia del lavoro: disfunzioni, inefficienze, proposte di rivitalizzazione*, in *Rivista Critica di Diritto del Lavoro*, 2004, 3, p. 475 ff.

⁶³ L. Montesano and F. Mazziotti, cited; G. Perone, *Il nuovo processo del lavoro*, Padova, Cedam, 1975; G. Ianniruberto, (note 29).

⁶⁴ P. Ichino, *Il lavoro e il mercato*, Milano, Mondadori, 1996.

⁶⁵ G. Canale, *Arbitrato e collegato lavoro*, 2011, at www.judicium.it.

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