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The Non-Waivability Principle: Possible Derogations From Collective Bargaining And Re-Assessment Of Individual Bargaining In Assisted Procedures

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The Non-Waivability Principle: Possible Derogations From Collective Bargaining And Re-Assessment Of Individual Bargaining In Assisted Procedures

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This article examines the evolving landscape of Italian labour law, with a focus on the principle of non-waivability and its gradual adaptation to demands for flexibility and competitiveness. Traditionally, the Italian labour law framework has been characterised by a strong non-waivability regime, which protects employees from negotiating away their rights due to inherent power imbalances vis-à-vis employers. However, recent regulatory developments have facilitated a shift towards both collective and individual agreements that allow deviations from statutory provisions, including to the detriment of employees. The article analyses the implications of this trend, exploring key regulatory models that enhance the role of assisted individual negotiations and collective bargaining in employment contracts. It delves into the conditions necessary for lawful waivers of rights, emphasising the importance of impartial third-party assistance in "protected venues" to ensure employee agency in negotiations. Additionally, the article discusses the risks and opportunities associated with the retreat from non-waivability, considering how this shift may fragment employees' legal protection. Ultimately, the article advocates for a balanced approach that fosters individual empowerment within employment relationships, while also underscoring the critical role of collective protections, thereby encouraging ongoing dialogue among stakeholders to adapt to the complexities of the modern workforce.

KEYWORDS: Non-Waivability Principle, Settlement Agreements, Individual Negotiation, Assisted Procedures, Collective Bargaining Agreements

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I. INTRODUCTION

IN ITALY, LABOUR LAW (unlike private law) is commonly perceived as being characterised by an extensive non-waivability regime (Magnani, 2023). This entails that the statutory framework that governs employment relationships renders any private deeds that deviate from it void or, at least, voidable. This is to protect employees, who are assumed to be unable to negotiate fair working conditions and thus protect their own interests (Davidov, 2020). The assumption is based on an objective disparity that exists between employees' bargaining power and that of their employers (Cester, 2008; De Luca Tamajo, 1976; Fontana, 2010; Novella, 2009; Occhino, 2008; A. Zoppoli, 2013), which in turn justifies the law's intervention and the consequent general impossibility of resorting to individual bargaining to deviate from it (Speziale, 2003, p. 278). The content of an employment contract is thus pre-determined (with some exceptions) — in Italy, at least since the adoption of the Italian Civil Code in 1942 and the historical phase following the approval of the Italian Constitution in 1948 (Perulli, 2019) — on the basis of non-waivable legal and/or collective bargaining provisions (Voza, 2007, p. 9). This means that the parties to an employment contract have very limited discretion in determining working conditions; indeed, they may freely determine only when the employment relationship is to be considered established and any stipulations more favourable to the employee compared

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to the applicable non-waivable provisions (Davidov, 2020). Conversely, if the parties to an employment contract were to agree on working conditions less favourable to the employee compared to those in non-waivable provisions, these provisions would directly and immediately replace the less favourable contractual stipulations (Cester, 2016).

However, although non-waivability is the founding principle on which Italian labour law is built, in contrast with general contract law, this principle seems to be gradually giving way to increasing demands for competitiveness and flexibility, together with changing values and ideologies (Cester, 2008). This trend is reflected in an increasingly broad sub-delegation (by law) to collective bargaining in terms of derogations or deviations from statutory regulation and in greater leeway for individual negotiation. Indeed, it is becoming increasingly common for employees to validly consent to deviations from non-waivable provisions, subject to compliance with certain formalities and procedures, for example, with the assistance of impartial third parties envisaged by law. In these cases, "assisted individual negotiation" refers to a procedure in which workers are actively supported and protected by third parties pre-determined by law in "protected venues" (*sedi protette*) where employees may reach settlement agreements with their employers (Voza, 2007, p. 9).[1] As explained below, through these settlements, employees may waive rights that derive from non-waivable provisions, even if the waivers are to employees' detriment.

In light of the above, this article focuses on cases in which the non-waivability principle does not apply in full and considers not only the role of individual bargaining but also that of collective bargaining.[2]

First, the article analyses the regulatory developments that have gradually made it possible for collective bargaining agreements to deviate from the law (even to employees' detriment).

1. See Italian Supreme Court Decision No. 10488 of 1 June 2004.
2. To that end, it is worth remembering that, in the Italian legal system, negotiations between workers' and employers' representatives result in mere (collective) private-law contracts, given that Art. 39 of the Italian Constitution has remained partially non-implemented. Article 39 (2–4) of the Italian Constitution envisages a system in which collective agreements may acquire *erga omnes* effect — binding all workers in the category — provided that unions undergo legal registration and meet democratic standards. Only such registered unions may form representative bodies entitled to sign universally binding agreements. Yet, this constitutional framework has never been implemented through statutory legislation. As a result, collective agreements remain contractually binding only on signatory parties, under the general principles of contract law. This inaction reflects not technical oversight, but a conscious political decision to preserve a flexible, informal bargaining system based on actual representativeness rather than legal formalism (Rusciano, 2013, p. 265).

Second, two distinct regulatory models that have one thing in common will be analysed: both are aimed at enhancing the relevance of employees' waivers in special procedures, with an impartial third party's assistance. More specifically, the analysis will focus on cases in which: (a) an employee may validly consent to settlements that involve waivers of their rights; and (b) parties to an employment contract may supplement or derogate from labour regulations because of concrete flexibility needs.

The manner in which the non-waivability principle has shrunk will be approached from two distinct standpoints: (a) *ex ante*, that is to say when the related rights are established; and (b) *ex post*, when employees waive these rights under certain conditions (De Luca Tamajo, 1976, pp. 32–33). Legal literature generally refers to the first scenario as "assisted private negotiation', whereas it refers to "assisted waivability" when an employee negotiates an employment relationship's terms in derogation from the applicable legal provisions.

The above two distinct standpoints require a preliminary analysis of the assisted procedure's ins and outs given that it is essential for employees' choices to be valid. This analysis will focus on the legal conditions to access assistance in protected venues (i.e., assistance by impartial third parties), which results in lawful waivers by employees that would otherwise be unlawful. Subsequently, the focus will shift to the main legal provisions that embody the "assisted waivability" system, with the aim of detailing the regulatory framework that recognises employees' capacity to negotiate terms of employment contracts that derogate from the law and collective bargaining agreements — this includes part-time contracts, fixed-term contracts, work duties, and remuneration. Indeed, all of these matters have traditionally been regulated by non-waivable provisions or, at the very least, collective bargaining agreements.

Finally, labour law's tendency to re-assess consent, also outside of the assisted procedure, will be analysed. The analysis will pinpoint the risks and opportunities associated with the unconditional retreat of the non-waivability principle: the aim is to provide the main coordinates of the path taken by Italian labour law towards a partial dismantlement of the principle of non-waivability. This path partly coincides with a fragmentation of collective bargaining interests to establish a system that hinges on diverse interests (Del Punta, 2008, p. 307; Mariucci, 2008, p. 213) and heeds calls for tailored labour regulations (Perulli, 2019), while simultaneously maintaining the protection mechanisms envisaged by the "traditional" regulatory framework (Maresca, 2005, p. 469).

This article explores the evolving landscape of Italian labour law, particularly the shift from a rigid application of the non-waivability principle to a more

adaptive framework that accommodates individual bargaining while addressing the complexities of modern work environments. It highlights how organisational transformations, technological advancements, and cultural shifts have influenced this evolution, emphasising the necessity of collective bargaining agreements as crucial mechanisms for safeguarding worker rights. The article ultimately argues for a balanced approach that promotes individual empowerment while preserving essential collective protections, advocating for continuous dialogue among policymakers, legal practitioners, and trade unions to navigate the challenges posed by a rapidly changing work.

II. THE NON-WAIVABILITY PRINCIPLE AND COLLECTIVE BARGAINING: THE NEED FOR FLEXIBILITY AND THE PUSH TOWARDS CONTRACTUAL "DECENTRALISATION"

For some time now, the law has entrusted various aspects of employment to collective bargaining, through which statutory provisions may be supplemented (L. Zoppoli, 2014, p. 34), modified, and even derogated from (Bellomo, 2015; D'Antona, 1990; Giugni, 1986; Mengoni, 1980; L. Zoppoli, 2002, p. 238). Since the mid-1970s (De Luca Tamajo, 1987), Italian labour law's traditional protection mechanism has been updated to make it more suitable for a constantly evolving market (Liso, 1998; Suppiej, 1986, p. 225). This process has unfolded without interruption and has in fact intensified since the 2000s, when reforms were first introduced that subsequently resulted in the non-waivability principle being chipped away at and in contractual "decentralisation" being brought to the forefront (Alvino, 2018, p. 12). The latter is aimed at making the Italian labour market more efficient (Perulli & Speziale, 2011), boosting productivity, and raising employment rates (Ales, 2011; Santoro Passarelli, 2015, p. 62).

Today's complex interplay between regulatory sources (legal and collective) shows that the current Italian legal framework is very different compared to the previous one, in which the relationship between statutory provisions and collective bargaining agreements was characterised by unidirectional non-waivability (Novella, 2009, p. 4, my translation), whereby both the law and collective bargaining agreements focused primarily on enhancing worker protection (Ferraro, 1981).

The relationship between statutory provisions and collective bargaining provisions must thus be explored following a partially different logic than that followed in the past (Alvino, 2018, p. 23). This new logic must acknowledge collective bargaining's multifaceted role (Martelloni, 2012, p. 436), which involves

actions that go beyond worker protection in accordance with Italian labour law (Lamberti, 2020, p. 3). Indeed, these actions can sometimes focus on maintaining employment levels and ensuring competitiveness, even at the cost of conceding something in terms of individual rights (Santoro Passarelli, 2015, p. 61).

In addition, collective bargaining has gradually shifted from the national level to the local/company level, which has led to previously uniform Italian industrial relations being challenged. In other words, the law and national collective bargaining agreements are no longer the sole sources for non-waivable rules that bound employers and employees alike and could not be disregarded in individual negotiations or by workers' representatives at the company level (Alvino, 2018, p. 15; Perulli & Speziale, 2011; L. Zoppoli, 2015, p. 38).

The most evident break from that traditional system occurred with the introduction of Art. 8 of Law Decree No. 138 of 13 August 2011 (converted into Law No. 148 of 14 September 2011), which encourages "proximity collective bargaining agreements" among "Measures to Support Employment." More specifically, Art. 8(2-*bis*) stipulates that company-level collective bargaining agreements concerning the matters listed in the decree may derogate from statutory provisions and national collective bargaining agreements, on condition that the derogations comply with the Italian Constitution, EU law, and international labour conventions. These agreements may concern various matters that have always been central to non-waivable labour regulations, including work duties, classification and categorisation of workers, surveillance of workers, working hours, and non-standard employment contracts. Art. 8 has fuelled a heated debate in legal literature (Barbieri, 2012, p. 461; Carinci, 2011; Del Punta, 2012, p. 31; De Luca Tamajo, 2012; Magnani, 2012, p. 1; Pessi, 2011, p. 537; Scarpelli, 2012, p. 493), particularly on two aspects: (a) the fact that it attributes general effectiveness (*erga omnes* effect) to company-level collective bargaining agreements, i.e., these agreements regulate the employment contracts of, and are binding on, all company employees, even those who are members of trade unions that were not signatories to the contract; and (b) the suitability of these agreements to derogate from national collective bargaining agreements and from otherwise non-waivable statutory provisions. These agreements' general effectiveness significantly alters the traditional relationship between law and collective bargaining (A. Zoppoli, 2013) and that between collective bargaining agreements negotiated and signed at different levels (Brollo, 2012, p. 371). The law thus grants workers' representatives at the company level a crucial role in striking a balance between the interests involved, by attributing to them

significant powers to derogate from legal provisions and granting the result of their negotiations *erga omnes* effect.

The partial alteration in the relationship among sources that has resulted in collective bargaining players (even at the company level) having regulation, supplementation, and derogation powers in relation to statutory provisions, is not without risks in terms of the level of protection for workers. It is not by chance that the most important Italian trade unions have shown a relevant degree of scepticism towards this derogation mechanism.

The proximity collective bargaining agreements under Art. 8 have not been widely adopted (Imberti, 2013, p. 255). The concern is clear: If the negotiated provisions are seen as unilaterally worsening workers' conditions, unions risk losing support and legitimacy among the workforce.

A further critical issue concerns the possibility that the general inderogability of the law, which plays a central role in labour law, may be weakened through the negotiating intervention of actors who lack sufficient representativeness (Carinci, 2011, p. 27). The relevant legal provision suffers from significant ambiguity regarding the criteria for identifying the workers' representatives entitled to conclude such agreements. In the absence of explicit reference to the quantitative thresholds applied in other areas of trade-union law in order to select those unions that have agency, the danger arises that bargaining may take place without genuine democratic legitimacy. This would allow minority or weakly representative unions to affect non-waivable labour rights that concern the entire workforce, thereby paving the way for a form of negotiated derogation from collective rights. Such a mechanism risks turning collective bargaining into a discretionary tool, detached from guarantees of representativeness or external oversight.

Within this normative framework, the principle of non-waivability may be eroded not by means of explicit legislative intervention, but rather through bargaining practices undertaken by actors whose representative legitimacy remains insufficiently established. This scenario gives rise to a structural tension between the pursuit of greater contractual flexibility and the preservation of legal certainty — two values that have long co-existed, albeit in delicate balance, within continental labour law systems.

In response to this tension, an alternative regulatory model could envisage the negotiation of derogatory options at the company level, subject to subsequent validation through individual workers' consent. This option — although collectively defined — would not produce legal effects per se, but would become operative only upon explicit acceptance by the workers concerned. Such a mechanism would allow workers to assess the proposed framework in light

of their personal interests, and to opt in voluntarily, thereby reinforcing both democratic legitimacy and contractual equilibrium.

This type of mechanism is consistent with the so-called "multiple-choice technique" (Biagi, 2001, p. 261). It establishes a relationship of interdependence between collective agreements and individual contracts. The employee, in agreement with the employer, is allowed to choose among several packages of organisational flexibility, all of which are defined through collective negotiation. Such a system, at least in theory, could help reduce the costs associated with fully mandatory norms, without falling into the trap of unilateral flexibility favouring the employer (Novella, 2009, pp. 433–434). Moreover, this approach reflects a model of assisted derogability already well known in Italian labour law (Del Punta, 2014, p. 26; Maresca, 2009, p. 101) — namely, those situations in which the possibility to depart from statutory protections is made conditional on an individual assistance procedure (see section IV).

III. THE WAIVER OF RIGHTS THAT DERIVE FROM NON-WAIVABLE PROVISIONS BY EMPLOYEES IN A PROTECTED VENUE: WHAT DOES THE ASSISTED PROCEDURE ENTAIL?

Over time, Italian labour law has assigned a growing role to workers' individual private autonomy vis-à-vis collective and statutory labour standards. It is now essential to explore how employees' individual bargaining power has evolved. First, the focus will be on "assisted private negotiations" cases in which parties to an employment contract may enter into lawful settlement agreements through which an employee waives rights attributed under non-waivable provisions. Second, "assisted waivability" cases will be analysed, i.e., cases in which parties to an employment contract introduce *ex ante* (i.e., since the establishment of the employment relationship) clauses that deviate from the law or collective bargaining agreements.

As mentioned, Italian labour law is characterised by more favourable terms for workers, expressed through the principle whereby rights may not be freely transferred, which is a supplementary principle to that of non-waivability. This entails that employees generally cannot freely negotiate when it comes to the rights granted under legal provisions applicable to their employment contracts (Lamberti, 2020, p. 19).

Indeed, Art. 2113(1) of the Italian Civil Code stipulates the invalidity of waivers, settlements, and agreements in general, concerning workers' rights

envisaged by law or by collective bargaining agreements (De Luca Tamajo, 1976, p. 32 *et seq.*). In this case, non-waivability (of statutory provisions and collective bargaining agreements) is reflected in the non-transferability of non-waivable rights as an *ex post* form of protection for workers. It follows that, if an employer and an employee enter into an agreement requiring that the employee waive their rights, the employee may seize a labour court to have the agreement declared void, within six months from the termination of their employment contract.

This even if the agreement was entered into when the employment relationship was still in place, under the assumption that the employee might not be in a position to bring a claim against their employer if the employment relationship is ongoing (De Stefano, 2014). This represents an important deviation from the general regime of private law, in accordance to which the statute of limitations for rights is 10 years, except for rights arising from specific causes (such as obligations arising from torts and obligations in the corporate context), for which the statute of limitations is five years.

The general principle whereby the above waivers and settlements are invalid is curtailed by virtue of Art. 2113(4) of the Italian Civil Code, which expressly states the validity of settlement agreements between employers and employees, including those through which employees waive law-derived rights, on condition that these agreements are entered into in the abovementioned protected venues. Art. 2113(4) clarifies that "protected venue" means, alternatively: (a) a labour court (if a lawsuit has been initiated); (b) conciliation commissions at labour inspectorates; (c) a venue established by collective bargaining agreements; (d) the conciliation board; or (e) an arbitral tribunal. Without delving into the historical developments that led to Art. 2113(4)'s current wording (Voza, 2007, p. 77 *et seq.*), it is worth reiterating that, over time, the Italian legislator has granted additional third parties the power to validate workers' consent to waive their rights. In this regard, certification commissions have been established to carry out the assisted procedure with a view to reaching a settlement, and, more recently, lawyers of the parties to an employment relationship have been authorised to attempt settlements in the assisted procedure.

The law does not specify what the assisted procedure should consist of. However, all parties authorised by law to carry out the same (Pera, 1990, p. 109) must assist employees by clarifying the meaning, implications, and consequences of their waivers. In other words, they must ensure that employees' consent is genuine, freely given, and based on clear and understandable information. In this regard, the Italian Supreme Court has specified that "assistance" is

> [A]n action that supports the same party [i.e., the worker] in caring for their interests, by clarifying obscure or uncertain aspects of the settlement they are about

> to enter into and by providing technical assistance in drafting the clauses that will regulate that settlement [our translation].[3]

Therefore, assistance is to be understood as removing the information deficit and bargaining power imbalance that the Italian legislator evidently assumes as the rationale for the general invalidity of waivers (Voza, 2023). Impartial third parties must thus play an active role — not merely a "notarial" role (Novella, 2009, p. 416; Pera, 1990, p. 9) — and must adequately inform employees, check the content of agreements and its lawfulness, and, more generally, ensure that employees' consent is freely given (Lamberti, 2020, p. 157; Voza, 2007, p. 43), which is essential to these agreements' lawfulness. Indeed, an employee is the sole party who may determine whether an agreement conforms to their interests (Voza, 2007, p. 107). It follows that assistance provided in a protected venue may be considered effective even if the impartial third party does not concur with the choices made in the agreement, which are attributable solely to the free and informed will of the employee, who, for the purposes of Art. 2113(4), is certainly not obliged to share the assisting third party's opinion.

The signing of an agreement between an employee and their employer in a protected venue pursues a dual objective: (a) it ensures the employee's free and informed consent when waiving their rights, and (b) it reduces the number of in-court disputes. The latter objective was pursued to the fullest with the introduction of a since-repealed mandatory conciliation procedure (Novella, 2009, p. 350 *et seq.*) — to be carried out in a protected venue — as an essential requirement for an employee to legitimately bring a claim before a labour court. Following the repeal, litigation is curtailed through the described procedure under Art. 2113(4) of the Italian Civil Code.

Generally, this procedure occurs *ex post*, typically after an employment relationship ceases or, in any case, when an employee's rights have accrued,[4] and

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3. See, among many, Italian Supreme Court Decision No. 10488 of 1 June 2004.
4. Case law (see, *e.g.*, Italian Supreme Court Decision No. 1887 of 21 January 2022) distinguishes between the following:

> Rights that have accrued (irrespective of whether subject to a judicial assessment): In relation to these rights, courts have found that a voluntary, detrimental change to a right constitutes merely a waiver or settlement; in cases in which these rights are subject to non-waivable provisions, Art. 2113 of the Italian Civil Code applies. Therefore, the waiver/settlement can be annulled but is not null per se.

> Rights that have not yet arisen or accrued (also if disputed): In relation to these rights, any voluntary, detrimental changes are null for lack of legal purpose under Arts. 1325 and 1418(2) of the Italian Civil Code.

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the employee may negotiate an agreement with their employer or former employer that includes mutual waivers and concessions. The most classic examples concern remuneration: Employees may claim unpaid overtime, incorrect payment or non-payment of variable bonuses, non-compliance with payment obligations in relation to the duties performed, and compensation for financial damage, for example, due to harm caused by a demotion and, more generally, non-pecuniary damages (Ciucciovino, 2017, p. 1708). Another case in which the waiver of a right is allowed, irrespective of whether court proceedings were initiated, is the transfer of undertaking under Art. 2112 of the Italian Civil Code. This provision establishes more restrictive rules to protect employees compared to the general private-law rules that apply to creditors (Voza, 2007, p. 117 *et seq.*), insofar as it establishes joint liability between the transferor and the transferee for any receivables due to employees. However, the provision allows employees to waive the joint liability regime, thus releasing the transferor from the obligations arising from the employment relationship, on condition that the waiver is made through an agreement signed in a protected venue (see Art. 2112(4) of the Italian Civil Code).[5]

As mentioned, the third parties responsible for assistance are tasked with explaining in detail to employees what rights they are waiving and to what extent. Consequently, case law excludes that vague and/or general waivers may result in lawful settlements or may constitute a waiver of all possible rights related to an employment relationship and of the actions that may be pursued on the basis of those rights.[6] This is because the essential requirement for a waiver on an employee's part to be valid — i.e., that they received an accurate representation of the rights they intend to waive — is lacking.

Indeed, in Italy, the assistance process is not merely a formalised procedure but serves as a genuine opportunity for dialogue between the parties involved, facilitated by a neutral third party. This process is designed to ensure that employees are adequately informed and aware of the implications of any settlement agreement they may sign. Research indicates that the efficacy of this assistance lies in its capacity to foster meaningful communication, allowing employees to articulate their concerns and preferences in a structured environment (Lamberti, 2024). By engaging in this dialogue, workers can better understand the potential consequences of their decisions, thereby enhancing their agency in the negotiation

5. Some scholars note that this waiver is broader in scope than those under Art. 2113 of the Italian Civil Code, as it concerns all amounts due to the employee when the transfer occurs (see Voza, 2007, p. 122 *et seq.*).
6. See, among many, Italian Supreme Court Decision No. 9160 of 21 March 2022.

process. Furthermore, the assistance process aims to create a balanced atmosphere where both parties can explore options collaboratively, rather than allowing the employer to unilaterally impose its choices. This approach not only mitigates the power imbalance traditionally present in employer-employee relationships but also contributes to a more equitable resolution of disputes, ultimately reinforcing the employee's capacity to undertake a decision.

IV. CAN "ASSISTED WAIVERS" PROMOTE ORGANISATIONAL FLEXIBILITY THROUGH ENHANCED INDIVIDUAL AUTONOMY?

The enhancement of individual bargaining, albeit in a "controlled" form, is not aimed solely at preventing in-court disputes or at providing certainty to an employee's consent. In some cases, the law grants parties to an employment relationship the power to: (a) regulate certain matters that are not envisaged by law or by collective bargaining agreements, and (b) derogate from the law or collective bargaining agreements if the related agreement is signed in the protected venue determined by law.

The concept of "assisted waivability" in employment contracts introduces a framework where the parties can pre-emptively agree to clauses that deviate from established legal standards or collective bargaining agreements. "Assisted waivability" is used to indicate assistance provided *ex ante* to employees as individual bargaining parties upon signing of an employment contract, to allow for flexibility in the individual employment relationship. It is not a matter of waiving rights previously ascribed to workers but rather of preventing the very acquisition of rights otherwise recognised by law (Cester, 2016). Third parties that operate in protected venues are thus called on to assist employees in their individual bargaining to regulate their employment relationship or aspects thereof. This is "suitable to tailor non-waivable rules [to the employment relationship concerned] without falling into the trap of one-sided flexibility in favour of employers" (Novella, 2009, pp. 433–434, my translation).

This practice reflects a growing trend towards non-standard employment relationships, where traditional constraints are relaxed, allowing for more flexibility in contractual arrangements. By analysing these cases, we can uncover how such deviations can empower employers and employees to tailor agreements that better fit their specific needs and circumstances. This flexibility often leads to arrangements that might enhance job satisfaction or productivity, but it

also raises questions about the protection of workers' rights and the potential for exploitation.

It signifies a shift towards a more individualised approach to employment, where the balance of power can change depending on the negotiation dynamics. Understanding this concept is crucial, as it sets the stage for a broader discussion on the implications of non-standard employment relationships, particularly in terms of regulatory oversight and the safeguarding of fundamental labour rights. Therefore, it is essential to highlight the significance of assisted waivability, as it serves as a foundational element in understanding the evolving landscape of employment law and the varied degrees of freedom allowed in contractual negotiations.

V. ASSISTED WAIVABILITY AS A REPLACEMENT FOR THE LACK OF COLLECTIVE REGULATION: "ELASTIC" CLAUSES IN PART-TIME EMPLOYMENT CONTRACTS

With reference to the regulation governing part-time contracts, parties to an employment contract may introduce "elastic clauses" (which allow the employer to unilaterally change the timing of work in a part-time contract) if the related stipulations are not specifically regulated by the applicable collective bargaining agreement. In this case, the law envisages that elastic clauses introduced by parties to an employment contract are to be agreed upon in writing before a certification commission under Art. 76 of Legislative Decree No. 276 of 10 September 2003. This body thus takes on the role of a protected venue under law, as it does not merely fulfil a function and instead provides employees with genuine assistance (Ciucciovino, 2015; Verzaro, 2024, p. 392). Elastic clauses are aimed at granting employers greater organisational flexibility and at recognising employees' need for tailored and more flexible working conditions; as well, employees might benefit financially in exchange for their consent. As to limits on increases of the agreed-upon working time and the related notices to employees, the law requires, on pain of nullity, an increase in remuneration if working time increases by 15% or more. Elastic clauses agreed on before certification commissions must comply with Art. 6(6) of Legislative Decree No. 81 of 15 June 2015, and the certification commission, as the protected venue, must ensure that the parties specify the conditions and methods by which the employer may modify the timing of work, also by increasing working hours. In other words, although the law grants individual bargaining some leeway, it does not neglect the intrinsic imbalance in employment relationships. This is evidenced by minimum non-waivable

content and mandatory third-party assistance to employees (Verzaro, 2024, p. 392), without which the related agreements are null for non-compliance with mandatory and non-waivable provisions (Voza, 2015, p. 1115).[7]

A. FIXED-TERM CONTRACTS ENTERED INTO THROUGH THE ASSISTED PROCEDURE IN DEROGATION FROM THE TIME LIMITS ESTABLISHED BY LAW

The evolution of the rules on fixed-term contracts is particularly emblematic of the intrinsic connection between the non-waivability principle and the need for greater flexibility in employment relationships (Lamberti, 2020, p. 191).

The law currently establishes a maximum of 24 months for fixed-term contracts to encourage the parties to enter into permanent employment contracts, which afford employees more protection. The law stipulates that these rules can be derogated from by collective bargaining and by individual bargaining in an assisted procedure ("assisted fixed-term contract").

More specifically, employers and employees who previously entered into one or more fixed-term contracts for a total of 24 months (the maximum under Art. 19(2) of Legislative Decree No. 81 of 15 June 2015) may enter into new fixed-term contracts of up to 12 months before the competent local labour office, in accordance with Art. 19(3) of Legislative Decree No. 81 of 15 June 2015. This assisted procedure is the subject matter of a circular issued by the Italian Labour Inspectorate,[8] which clarifies that this procedure does not eliminate the need for certain substantive conditions under Art. 19(1) of Legislative Decree No. 81 of 15 June 2015 to be met: (a) temporary and objective needs unrelated to ordinary activities or replacement of other workers; and/or (b) needs relating to temporary, significant, and unforeseeable increases in ordinary activities.

Therefore, the local labour office (i.e., the "protected venue") must verify that employees' consent is genuine, and must ensure that the parties specify the legal reasons to proceed with an exceptional fixed-term contract. This means that there is a check on the completeness and formal correctness of the contracts' content, without any certification effect as to whether the conditions are met, given that protected venues cannot conduct investigations.

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7. One scholar holds that, in addition to enhancing individual bargaining and subjective needs, the law seeks to prevent "possible generalised opposition from trade-union representatives, sometimes relating to general union policy" (Bellomo, 2016, p. 510, my translation).
8. See Italian Labour Inspectorate Circular No. 8120 of 17 September 2019.

B. ASSISTANCE IN PROTECTED VENUES WITH DEMOTION AGREEMENTS AND SALARY DECREASES UNDER LEGISLATIVE DECREE NO. 81 OF 15 JUNE 2015

The gradual expansion of the assisted procedure for regulatory purposes has also taken root in the regulation of employees' duties under Art. 2103 of the Italian Civil Code, which establishes limits on employers' organisational power to assign employees tasks. More specifically, this provision states that employees must be assigned the duties for which they were hired, or higher-level duties, or duties corresponding to the same level and legal classification as the last duties performed (para. 1). In the event of changes to the business' organisation that affect employees' duties, employers may assign lower-level duties, on condition that they fall under the same legal category (para. 2). Except for the cases expressly regulated by Art. 2103, the duties originally assigned by employers may be modified only through assisted procedures. More specifically, Legislative Decree No. 81 of 15 June 2015 amended Art. 2103 to expressly allow the parties to an employment contract to resort to: (a) the protected venues under Art. 2113(4) of the Italian Civil Code; or (b) the certification commissions under Art. 76 of Legislative Decree No. 276 of 10 September 2003. Before these bodies, the parties may stipulate agreements that modify duties, legal classifications, and remuneration, solely in employees' interests in preserving employment, acquiring different skills, and/or improving their living conditions. Employees, as the weaker party, may also seek assistance from a trade-union representative, a lawyer, or a labour consultant.

New Art. 2103 formalises the legal-policy shift towards assisted individual bargaining as originally developed by scholars in the early 1990s (Biagi, 2001, p. 262; Ichino, 1996) in the hope of a paradigm shift from labour law being centred around dogmatic non-waivability (De Luca Tamajo, 1976, pp. 7–16).

The provision also tackles lawful demotions, which are left to agreements between employers and employees, the validity of which is conditional on a series of formal and substantive requirements (Gramano, 2024).

More specifically, Art. 2103(6) of the Italian Civil Code sets forth two types of limits on demotion agreements: (a) a formal-procedural limit whereby these agreements must be entered into in protected venues; and (b) a substantive-purpose limit whereby these agreements must be in employees' interests, i.e., for the preservation of employment, the acquisition of a different skillset, or the improvement of living conditions. The latter is to be understood as consisting of alternative requirements, at least one of which must be met for demotion agreements to be valid; it follows that such agreements are null if they do not pursue employees' interests as expressly and exhaustively indicated by law.

As to preservation of employment, this requirement formalises well-established case law that found demotion agreements permissible in this case. However, the other two interests — i.e., the acquisition of a different skillset and the improvement of living conditions — generate interpretation issues, as they tend to be very vague or difficult to apply in practice (Caldarera, 2023, p. 79; Gramano, 2024). More specifically, a demotion agreement (in derogation of Art. 2103(1) of the Italian Civil Code) to improve living conditions appears to reflect the Italian legislator's intention to achieve a better work-life balance by making it possible, for example, for an employee who suffers because of the duties assigned to find decisive and tangible relief in performing different, albeit lower-level, duties (Bologna, 2018; Caldarera, 2023, p. 79). As to a demotion agreement that is justified by an employee's pursuit of a different skillset, it could reflect the employee's interest in acquiring different skills with a view to changing employment (and employer). In an individual "assisted" agreement, it is possible, for example, to modify an employee's legal classification from executive to middle manager or from executive to simple employee, with a corresponding decrease in remuneration.

For those demotion agreements that contain a reduction in the level of remuneration, the only limit that the parties encounter is Art. 36(1) of the Italian Constitution, which ties employee remuneration to the sufficiency and proportionality principles (Bellomo, 2002; Zilio Grandi, 1996). This means that any changes to remuneration that an employee agrees to in an assisted procedure are not exempt from proportionality and sufficiency of remuneration (Pantano, 2016, p. 92), which according to well-established case law consists of the minimum wages envisaged under the relevant national collective bargaining agreements.[9]

As to decreases in remuneration, some scholars believe that they are also possible if no assisted procedure is resorted to, because they constitute neither a settlement (thus a waiver of rights) nor an agreement in derogation from legal provisions. This is because employees are merely agreeing to a different remuneration that must in any case at least correspond to the minimum remuneration level and is thus compliant with the Italian Constitution.

Furthermore, given that the interests that demotion agreements must pursue are pre-determined by law and cannot be disregarded, on pain of nullity, it is particularly difficult to assess impartial third parties' roles when assisting employees with these agreements (Novella, 2014, p. 462). In this respect, it has

9. See, among many, Italian Supreme Court Decision No. 27138 of 4 December 2013; Italian Supreme Court Decision No. 896 of 17 January 2011; and Italian Supreme Court Decision No. 3235 of 3 April 1999.

been noted that "protected venues" within the meaning of Art. 2103(4) of the Italian Civil Code are primarily tasked with ensuring that employees are fully informed and aware of these agreements' terms and economic-legal consequences (Brollo, 2015, p. 1179).

The verification of the objectives pursued by a demotion agreement should thus be considered limited to its theoretical compatibility with the stated objective, given that protected venues cannot conduct investigations into the circumstances that justify the agreement. In this regard, scholars have questioned the very nature of demotion agreements entered into through assisted procedures and have ruled out that they are settlement agreements, because they do not affect employees' non-waivable rights but rather the future performance of an employment relationship (Balletti, 2018, p. 63; Brollo, 2015, p. 1179; Zoli, 2015, p. 349). A demotion agreement is thus to be considered "an exceptional agreement, or a new regulation of an employment relationship, stipulated in an assisted procedure for the benefit of the weaker party in the relationship" (Gargiulo, 2015, p. 631, my translation). This has led some scholars to argue that the agreements in question might be subject to the risk of a subsequent request for annulment concerning the actual existence of the interests envisaged by law (Ferrante, 2016, p. 43; Zoli, 2015, p. 349).

VI. THE RECENT PUSH TOWARDS "LIBERALISED" INDIVIDUAL ARRANGEMENTS: THE CASE OF REMOTE WORK

The expansion of individual bargaining in regulating employment relationships has recently peaked with the introduction of a number of provisions that allows employees to negotiate, in certain cases, crucial aspects relating to the main terms of their employment relationships, even outside of the assisted procedures described above. This provision concerns the regulation of "remote work," defined by the law as follows (see Art. 18(1) of Law No. 81 of 22 May 2017):

> [Remote work is] a mode of execution of the subordinate employment relationship established through agreement between the parties, including forms of organisation by phases, cycles, objectives, and without precise time or place constraints, with the possible use of technological tools for performing work [our translation].

Remote work thus requires an agreement between employers and employees, which in turn makes some degree of individual bargaining necessary, with the aim of changing work culture on the basis of productivity and mutual trust (Boscati, 2020, p. 49; Del Conte, 2021, p. 560; Gramano, 2025). This is

ultimately to foster a conscious and responsible involvement of employees in their employers' businesses.

Remote work is the fullest expression of an employee's "result-oriented logic and self-determination" as part of work that is "deconstructed" in its spatial-temporal aspects (Gramano, 2025). Indeed, employees are called on to share with their employers the organisational aspects of their work, with a strong emphasis on collaboration in the organisation of work. Remote work has broadened regulatory pluralism through a rampant de-standardisation of the applicable regulations, which defers remote work's fundamental aspects to individual bargaining, without considering collective bargaining or — and this is the real cultural shift — assisted procedures in protected venues (Lamberti, 2020, p. 251).

The absence of any support (even from trade-union representatives) in negotiating the rules applicable to remote work is perplexing, especially considering that the content of the related agreements should guarantee a balance between employees' interests (e.g., work-life balance) and those of their employers (e.g., directing employees and maximising productivity), which the weaker party in the relationship will find difficult to achieve given their informational deficit and the inherent imbalance in contractual power. Additionally, remote work agreements must specify the methods through which employers monitor employees (Ambra, 2018; Bellavista, 2018, p. 627) and the measures aimed at safeguarding their health and safety during the working activities. It has been increasingly emphasised that remote work inherently entails specific health and safety risks associated with its mode of execution — among them, isolation, time porosity, overwork, and the pervasive "always-on" culture (Krause, 2018, p. 223; see also EUROFOUND, 2020; EUROFOUND & ILO, 2017; Genin, 2016, p. 280). It is therefore no coincidence that the legislator has explicitly recognised employees' right to disconnect. As part of the individual remote work agreement, the employer and the employee are required to define rest periods and establish the technical and organisational measures necessary to ensure effective disconnection from work-related digital tools (Art. 19(1) of Law No. 81 of 22 May 2017).

While this shows clear awareness of the risks linked to the dematerialisation of the workplace and the increased burden placed on employees, it also reveals an overestimation of the worker individual autonomy and capacity to define the content of such a fundamental right on its own. The lack of minimum standards imposed on employers — whether by law or through collective bargaining — is concerning, particularly given how complex it is to give practical effect to the right to disconnect. This right includes a range of tools designed to guarantee a space of

freedom from work — one that is increasingly threatened by the widespread use of digital technologies and the accelerating pace of work (Biasi, 2022, p. 400).

Recognising workers' ability to self-organise and manage their rights is commendable. However, this recognition must not overlook the persistent informational and contractual imbalance that continues to characterise the worker's position, nor the fact that remote work is still relatively new in the Italian legal framework. In the case of remote work, it seems that legislators have abdicated their protective role, forgetting that remote work presents organisational challenges that only social partners are properly equipped to address. If remote work truly marks a significant evolution in how subordinate work is performed — based on autonomy, trust, and responsibility — then this shift must not come at the cost of fundamental employee protections. The debate around remote work — especially when centred on individual autonomy — offers a timely opportunity to revisit the meaning of the principle of non-waivability in labour law.

In particular, the experience of remote work shows that softening the principle of non-waivability should not be equated with deregulation. Rather, it should be understood as an attempt to adapt labour law to emerging forms of subordinate work, where autonomy and subordination exist in constant tension (Gramano, 2025).

In this sense, remote work could serve as a testing ground for striking a normative balance between contractual freedom and non-waivable protections. It may also be a proving ground for reimagining labour law in light of the technological, organisational, and cultural changes shaping the modern workplace. Promoting individual autonomy, even regarding core rights such as the right to disconnect, cannot happen without basic safeguards. These must be developed through renewed dialogue between individual and collective bargaining — this last as the only one capable of addressing the structural imbalances that persist in today's employment relationships (Armaroli & Dagnino, 2019, p. 173; Peruzzi, 2020, p. 1213; Rota, 2020, p. 25; Senatori, 2020, p. 159).[10]

VII. CONCLUSION

The evolution of the non-waivability principle in Italian labour law reflects an ongoing dialogue between tradition and modernity in the employment landscape.

10. See on this matter the European Social Partners Framework Agreement on Digitalisation, 22 June 2020, that states that the obligation not to contact employees outside of working hours is accompanied by the collective obligation to jointly define the modalities and, above all, workload.

Historically, the principle has served as a robust protective mechanism for employees, ensuring that their rights are safeguarded against the inherent power imbalances in employer-employee relationships. This paternalistic framework, characterised by stringent regulations and a strong emphasis on collective bargaining, was designed to empower the weaker party in these relationships (Davidov, 2020). However, as outlined above, there is a clear trend towards a more "liberalised" approach that seeks to foster individual bargaining while maintaining essential labour law protection (Ratti, 2025).

Organisational transformations, the enhancement of employees' autonomy in the performance of their work, and technological developments have contributed (and continue to contribute) to the debate on the so-called "subjectivity" of labour law (Ciucciovino, 2023, p. 89; D'Antona, 1991, p. 455; D'Antona, 1992, p. 86; Mazzotta, 1991, p. 489; Perulli, 2019; Simitis, 1990, p. 87; Sonnati, 2015, p. 617; L. Zoppoli, 2008, p. 355). The process that has led to non-waivability being "downsised," as described above, has materialised not only in a major shift, but also in a detrimental sense, to decentralised collective bargaining but also in a parallel "controlled" enhancement of individual bargaining (D'Antona, 1991, p. 455; L. Zoppoli, 2008, p. 355). Indeed, the Italian legislature has gradually recognised, in a broader sense, workers' decision-making capacity, thus accommodating demands from legal scholars to acknowledge that "heteronomous and collectivised labour law" risks hindering "the genuine aspirations and needs of real, flesh-and-blood workers" (D'Antona, 1991, p. 469, our translation). This has mitigated the strict nature of the non-waivability principle and has resulted in a more flexible application of rules governing individual employment relationships, also by allowing — within the limits set by the law — derogations from the same (Lamberti, 2024, p. 97).

Furthermore, the progressive retreat of the principle of non-waivability, which influences the balance between autonomy and heteronomy, can be traced to various factors, not all reducible to mere flexibilisation logic in the labour market. It is important to take into consideration the profound transformations that have characterised the performance of work today, with inevitable reflections on the employment contract, which is becoming increasingly less standardised. The technological and cultural transformations characterising subordinate work enable to a certain extent a "collaborative engagement" between the parties to an employment contract (Caruso et al., 2020, p. 22). This inevitably reflects on the identification and selection of interests to be protected by regulators, as well as on the techniques available for regulation.

The fluidity of economic and productive contexts makes it difficult to establish stable substantive rules that can adequately respond to the evolving needs of individual workers. This leads to the consideration of the opportunity for rules that are eminently procedural, which, through the involvement of various actors — both trade union and institutional — contribute to the adoption of good practices for consensual and collaborative management of the regulation applied to employment relationships (Caruso et al., 2020, p. 27). The (partial) flexibilisation of labour law, associated with a concession of the principle of non-waivability, allows for a convergence of the contracting parties' objectives, ensuring a negotiating interest structure characterised by less conflictual dynamics (A. Zoppoli, 1991, p. 53).

In this sense, the Italian labour law framework has transitioned from uniform non-waivability, aimed at egalitarian levelling through heteronomous sources, to "adaptive" non-waivability (Caruso & Zappalà, 2021), allowed in certain matters and in "controlled" forms (Ciucciovino, 2023). At the level of individual agreements, non-waivable rules may thus be set aside to yield to concrete flexibility needs, on condition that employees are adequately supported in making choices by an impartial third party capable of ensuring a fair balance of interests for employees, despite the non-application of non-waivable rules.

This shift towards individual bargaining is particularly evident in assisted procedures, through which employees negotiate the terms of their employment with the support of impartial third parties in protected venues. This approach is not merely a departure from the strict nature of non-waivable provisions; it actively encourages flexibility in employment relationships. This flexibility is crucial in an era when the labour market is increasingly characterised by rapid changes to technologies, work organisation, and employee expectations (Giuliani, 2024, p. 3). For instance, the rise of remote work has made it necessary to re-assess traditional regulatory approaches, emphasising the need for a labour law framework that can adapt to fast-changing work environments.

However, this "liberalisation" comes with significant risks. As this article has illustrated, the increase in individual bargaining raises concerns about the adequacy of legal protection for the weaker party in employment relationships. Reliance on individual bargaining in negotiations introduces a layer of complexity that might disadvantage workers, particularly those who lack the necessary resources or information to effectively advocate for their rights. The absence of collective bargaining support in negotiating individual contracts, particularly in the context of remote work arrangements, underscores the potential for exploitation and unequal power dynamics to persist and be strengthened.

In this context, renouncing non-waivability in certain respects does not mean abdicating the protection of the weaker party. It is imperative to recognise that although the flexibility offered by assisted procedures can lead to innovative and tailored employment contracts, it must not come at the cost of fundamental employee protection. Indeed, the non-waivability principle remains a means for strengthening employee protection on the basis of a solid constitutional foundation (Cester, 2008; Lamberti, 2020, p. 10).

Ultimately, the future of labour law hinges on the legal framework's ability to strike a delicate balance between promoting individual bargaining and preserving legal and collective protection. Policymakers, legal practitioners, and trade-union representatives must engage in a constructive dialogue to navigate the complexities of this evolving landscape. It is vital to ensure that, as labour law adapts to the demands of a changing workforce, it remains rooted in the principles of fairness, equality, and social justice.

This is why collective bargaining agreements remain crucial as a necessary counterbalance to individual negotiations, providing a framework that standardises protection across the workforce (Del Punta, 2008, p. 307). Collective bargaining agreements play a vital role in the labour market by serving as a necessary counterbalance to individual negotiations. While individual bargaining can offer flexibility and the ability to tailor employment terms to specific worker needs, it also carries the risk of unequal power dynamics. Individual workers, particularly those in less favourable positions, may lack the leverage or resources to negotiate effectively, which can lead to agreements that compromise their rights or standards. However, collective bargaining agreements ensure that a collective voice is heard in the negotiation process. By providing this standardised framework, collective bargaining agreements help mitigate the risks associated with individual negotiations. They set baseline standards that protect workers from exploitation and prevent a downward spiral in labour conditions, often referred to as a "race to the bottom." In summary, collective bargaining agreements not only enhance the bargaining power of individual workers but also create an environment where fair and equitable treatment is prioritised. They ensure that flexibility in individual negotiations does not come at the expense of essential worker protections, fostering a more balanced and just labour market. These agreements ensure that individual flexibility does not result in a race to the bottom in labour standards.

In conclusion, although the ever-increasing "liberalised" approach to labour law represents an opportunity for individual empowerment and organisational flexibility, it would benefit from a cautious approach. The challenge will be to

cultivate a labour market that embraces innovation and flexibility while steadfastly protecting the rights and interests of all workers. This dual focus will help create employment that is truly reflective of the diverse needs and aspirations of the modern workforce.

The evolution of non-waivability should not follow a path of mere reduction. Instead, it calls for selective and functional rethinking — distinguishing between essential, non-negotiable protections and areas where individual autonomy may grow responsibly and safely. The idea that individuals alone can bear the weight of organisational, preventive, and contractual self-protection risks exposing workers to new forms of vulnerability in a world where the spatial and temporal boundaries of work are increasingly blurred. It is therefore urgent for legislators to reclaim their regulatory role, while strengthening the role of collective bargaining. To that end, ensuring that the non-waivability principle evolves in a manner that is both progressive and protective is crucial.

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