BANCA D'ITALIA
EUROSISTEMA

# Quaderni di Ricerca Giuridica

(Legal Research Papers)

Legal Services and Law Studies Department

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by Cristina Giorgiantonio

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*The economic and technical analysis that forms the basis of the Bank of Italy's central banking and supervisory activity is accompanied, with increasing attention, by legal research into credit and monetary phenomena and, more generally, into the institutional aspects of economic activity.*

*Within the Bank, in addition to handling disputes and providing advice, the Legal Department is entrusted with the task of carrying out research into legal matters concerning banking.*

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*The "Papers" give the opinions of the individual authors and therefore do not represent the official positions adopted by the Bank of Italy.*

## Abstract

The paper provides a review of the major reforms that have affected the Italian civil procedure at first instance, from the early 90s until those introduced by law 69/2009, of June 18, and questions – in the light of theoretical analysis and international comparison – their consistency with the main goal of a substantial reduction of the excessive length of civil proceedings.

We examined two different procedural models: the first attributes significant powers to the parties in conducting the case (so-called "adversarial"); the other enhances the role of the judge in the use of case management (so-called "non-adversarial"). Theoretical analysis shows that both have limitations: the former is effective only if the parties are in a position of substantial equality; the latter requires a system of incentives (both procedural and organizational) ensuring that the judge exercises his prerogatives in a consistent manner.

The international comparison – focused on the main reforms enacted in other countries (England, United States, France, Germany and Spain) – shows some convergence between the systems towards the second model.

On the other hand, the Italian reforms of civil procedure lack a general reform project; in particular they do not show a clear choice between an adversarial or non-adversarial model. Specifically, the 1990 reform strengthened the role of the judge; in the special procedure for corporate lawsuits (*rito societario*) whereas previously the case was essentially conducted by the parties; the competitiveness law (*legge competitività*) further strengthened the powers of the judge, and gave the possibility to the parties to choose the *rito societario* (such a possibility was eliminated by the recent law 69/2009, which has abrogated this procedure).

However also the reforms that have emphasized the role of the judge, have at the same time maintained rigidities in the management of the lawsuit (for example, a series of compulsory hearings) and in the presentation of evidence (which remains fragmented into a number of separate hearings over a possibly very long period of time). These factors limit the possibility for the judge to identify the correct procedure according to each case's complexity.

Finally, to ensure the proper functioning of the system, it is necessary to support further measures. On one hand, there must be an effective system of sanctions – both procedural and disciplinary –aimed at identifying possible abuses. On the other hand, there is a need for supported intervention in the organization of the courts, that balances the workload of judges, encourages specialization, monitors compliance with the objectives of efficiency and productivity, and that is aimed to improve efficiency in the management of facilities and to introduce appropriate information technology.

# INDEX

## Introduction [*]

In the last 19 years Italian civil procedure has been reformed several times, [1] with the aim of reducing civil court delays and streamlining the process. The reforms have completely changed the Civil Procedure Code 1940. However, Italian reforms have failed to achieve their primary objective: a substantial reduction in the excessive length of civil proceedings, [2] which in itself constitutes a denial of justice. The question is: why haven't the reforms work?

Theoretical analysis and international comparison show that powers assigned to the judge and to the parties in the conduct of a civil case play a decisive role in the efficiency and the length of the process. [3]

Also in Italy these aspects were amended, however there was not a clear choice made between an "adversarial" model – where the case is presented at the discretion of the parties – and a "non-adversarial" model – where the judge plays an active role in the conduct of the case.

This research, focused on the ordinary proceedings of first instance, aims to evaluate the Italian reforms, taking into account the different roles that the judge and the parties can play in a civil procedure.

The paper is organized as follows. The first part describes the two principal procedural systems – adversarial and non-adversarial – and seeks to focus on the weakpoints of both models from both a legal and economic perspective. The second part, briefly describes reforms enacted in other countries (i.e England, United States, France, Germany and Spain), and the principle initiatives that have been undertaken for the harmonization of the civil procedure. The third part describes and evaluates the principal reforms enacted in Italy. The last paragraph concludes.

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[1] The principal reforms have been: *a*) the law 353/1990, of November 26, for simplification and acceleration of court proceedings; *b*) the law 51/1998, of March 31, that substituted the panel of judges with the single judge in most cases; *c*) the law 5/2003, of January 17, so-called *rito societario*; *d*) the law 80/2005, of May 14, so-called *legge competitività*; *e*) the recent law 69/2009, June 18. See Bianco – Giacomelli – Giorgiantonio – Palumbo – Szëgo (2007, p. 39); Costantino (2005, p. 19-23); Proto Pisani (2001, p. 89-93); Carpi (2000, p. 111-125); AA. VV., *I tempi della giustizia – Un progetto per la riduzione della durata dei processi civili e penali* (2006, p. 42).

[2] According to the Doing Business 2010 Report, in Italy the average time required to enforce a contract is 1.210 days, while it is 399 days in the United Kingdom, 300 days in United States, 331 days in France, 394 days in Germany and 515 days in Spain.

[3] See Chase (2005, p. 172-175); Ferrand (2005, p. 30); Corsini (2002, p. 1278-1285); Taruffo (2001, p. 359).

## 1. Legal and economics literature

In Western legal systems we traditionally find one of two, fundamentally opposed, principal procedural models – "adversarial" or "non-adversarial" [4]. They are profoundly different due to the division of the powers in the conduct of the case between the parties and the judge.

In economic literature we can retrace several analyses that explain the objectives underlying the two models, identify the main features and evaluate the conditions that ensure proper functioning.

### a) The adversarial system

The economic and legal literature [5] has stressed how the structure of the adversarial process, typical of the common law systems [6] has been greatly influenced by ideological considerations. Indeed, the model of economic liberalism, based upon the idea of the individual and on the principle of *lasseiz faire*, has also affected the development of the adversarial process – which is ideally seen as a form of free competition between the parties.

The fundamental purpose of judgment becomes not to implement the rules or principles of justice, but to resolve conflicts of interest between private individuals – a so-called "conflict-solving" type of proceeding.

The allocation of this function, and not others, in the process, determines the basic structure and basic values: its management is entrusted entirely to the initiatives of the parties – the so-called "party control" – and their autonomy becomes the primary value; they also have total control over the conduct of the case, both in terms of the procedural steps and preparation and presentation of evidence. Judges have no power to initiate a legal action: the basic principle is that they have powers of control insofar as the enforcing of the correct etiquette of the dispute (adjudicating the match) that takes place between the parties, but have no power to influence and direct the course of the proceedings, nor to determine the outcome, in particular, therefore they do not have powers to order inquiries *ex officio*.

This concept is based in turn on the assumption that the parties are in a position of substantial equality [7]. Only in this case, the process meets requirements

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[4] In an overly simplistic generalization, the common law tradition, derived from England, features adversarial litigation culminating in a trial, whereas the civil law tradition, derived from Rome, features an inquisitorial litigation with a series of hearings (see generally Merryman – Pérez-Perdomo (2007, *passim*)). But the term inquisitorial, created for the criminal proceedings, suggests a too pervasive role of the judge in the conduct of the case (without significant powers for the parties) and cannot correctly identify the characteristics of the existing model in the civil proceedings (see Chase – Hershkoff – Silberman – Taniguchi – Varano – Zuckerman (2007, p. 3-4)). Thus, in order to prevent improper overlaps, we will refer to it as non-adversarial system: see Taruffo (2001, p. 348-349)).

[5] See Corsini (2002, p. 1276); Damaška (2000, p. 229-234); Taruffo (1990, p. 339-340).

[6] But see par. 2, for the recent reforms of the civil procedure in England and in United States.

[7] See Jolowicz (2002, p. 1266); Taruffo (1990, p. 343).

of fairness, and the competition between the parties can cause the physiological "clashes" that – according to the theory – are capable of producing the right decision.

However the mere existence of this assumption is problematic. The process ensures the parties absolute theoretical equality, but fails to take into account that the dispute takes place physiologically in reality, and that it is necessary that the parties are effectively on equal terms. A variety of social, economic and cultural rights can operate so as to cause discrimination between the parties, that translates into significant inequalities in the conduct of the case.

The adversarial process cannot have, of itself, the tools required to rebalance the situation of the parties [8]. Such remedies, in fact, would be in contrast with the mechanism of "pure clash" and with the formal equality between the parties.

The literature [9] has also noted that the adversarial model acts as a "multiplier of inequalities". On the one hand, a complex and expensive procedural model, which operates solely upon the initiative of the parties, and prejudices the weaker party, who can struggle to bear the costs and/or the excessive length of the process. Consequently, parties that are institutionally and/or economically weak have little chance of victory, relatively independently of the merits of their positions.

On the other hand, the solution given to resolve the inherent problem of the adversarial model, does not resolve it, but makes it worse [10]. This solution seeks to render the inequality of the parties irrelevant by the presence of defenders and the fact that they are guided by the desire to pursue exclusively and in the best possible way the interests of the client. However in practice this has not always been demonstrated to be true.

Lawyers can be uneven in their preparation, skills and energy in conducting the defense. Moreover, the legal profession is highly stratified with regard to specialization and level of services provided. As the lawyer-client relationship is dominated by the rules of the market, the obvious result is that the strongest party on an economic basis can ensure himself the most skillful defenders, while the weakest must settle for a potentially lower professional level. Thus, the presence of the defenders not only does not necessarily rebalance the inequality of the parties, but in practice serves to increase it [11].

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[8] It should be noted that in the common law systems the situation of the "weak" party is partially rebalanced by the class action, which permits to obtain the compensation for damages for more parties in the same trial; for the recent amendments of class action in the United States see Burbank (2008, p. 1439-1551)). Recently, also many civil law countries have adopted class action (see, for example, the Spanish *Ley de enjuiciamento civil* of 2000; the German *Capital Market Model Case Act* (*KapMaG*) of 2005; the Dutch *Wet Collectiere Afwikkeling Massaschade* of 2005). In Italy such type of action (see the new article 140-*bis* of the law 206/2005, of October 6 – so-called *Codice del consumo*) should come into effect in January 2010. See Carriero (2009, p. 1-15).

[9] See Taruffo (1990, p. 344).

[10] See Cloud (2001, p. 55-57); Taruffo (1990, p. 344); Zuckerman (1999, p. 152).

[11] See Marcus (1999, p. 5-8); Taruffo (1990, p. 344).

These phenomena can be further amplified depending on the system of economic incentives to which lawyers are subject [12]. The English and American experience has shown that, in a process run by lawyers remunerated on the basis of hourly rates, adversarial mechanisms, such as "discovery" [13], allow those who are wealthier to raise the costs of the dispute, lengthening the process, and potentially forcing the weaker party to accept an unfair settlement - that in effect corresponds to a denial of justice.

### b) The non-adversarial system

Procedural systems based on a non-adversarial logic, dominant in the tradition of civil law, appear more responsive to the criteria of substantial justice and to the general and public purposes of distribution [14].

This model is influenced, at an institutional level, by a concept of a State whose task is not only to provide private institutional support which can assist the interests of the parties, but which aims to regulate and assess their situations.

In terms of the administration of justice, it seeks to define the function of the civil process in terms of achieving goals unrelated to the logic of pure competition, but related to the establishment of conditions of substantial equality in the legal proceedings and to the redistribution of wealth.

These requirements will reverberate into the structure and principles of the civil procedure. The judge, who presides and assists in the entire process – the preliminary phase, trial etc. – has the power to determine and to influence the conduct of the case and has the power to order inquiries *ex officio* [15]. He can deal with the case in accordance with different procedures, on the basis of its complexity and other variables, and can program the procedural *iter ex ante*. The parties, whom retain significant powers in relation to the delimitation of *thema decidendum*, can ask the court to intervene.

The non-adversarial system has the advantage of being able to ensure, if necessary, and through the intervention of the judge, a rebalancing of the position of the parties and their equality, not only on a purely formal basis, but also on a substantial basis. Where, in fact, there are gaps in the defenses of a party and/or opportunistic conduct implemented for delaying purposes, the relief *ex officio* of some issues and investigatory powers of the court can ensure higher margins of effectiveness in judicial protection.

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[12] See Corsini (2002, p. 1278-1280); Shore (2000, p. 95 and 184-185); Marcus (1999, p. 5-8). See, also, *Access to Justice – Interim Report to the Lord Chancellor on the civil justice in England and Wales* (1995, *passim*).

[13] The word "discovery" usually indicates that part of the pre-trial process dedicated to acquiring information about the evidence and evidence that the parties have in their possession. Its function is essentially to allow the parties to prepare in the best possible way in view of the hearing, thus avoiding any uncomfortable surprises due to evidence not known. More specifically see Damaška (2003, p. 109-179).

[14] See Taruffo (1990, p. 339-343); Damaška (2000, p. 242-249).

[15] See Langbein (1985, p. 826-835).

However, this procedural model presents limits and drawbacks in cases where the judge does not exercise the powers that are granted him by law in an expeditious manner. For example, excessive workloads and a system of career progression not tied to the "productivity" of the court [16], together with the existence of so-called "pathological demand" phenomena [17] and lawyers' remuneration systems based on hourly rates and/or related to the number of pleadings drafted, may align the incentives of the judge, the parties and their defenders to extend the duration of the proceedings, rather than to reach a prompt conclusion.

To ensure the proper functioning of the system, it is therefore necessary to support further measures [18]. On one hand, there must be an effective system of sanctions – both procedural and disciplinary –aimed at identifying possible abuses. On the other hand, there is a need for supported intervention in the organization of the courts, that balances the workload of judges, encourages specialization, monitors compliance with the objectives of efficiency and productivity, and that is aimed to improve efficiency in the management of facilities and to introduce appropriate information technology.

## 2. International comparison

International comparison [19] suggests that several procedural systems are gradually converging towards a similar model. In many cases the problem of an efficient and speedy development of the ordinary civil procedure has been solved by vesting the judge with more effective power to manage the case to increase flexibility: *a*) he plays an active role (especially) in the preparatory phase of the proceedings; *b*) generally, he can order inquiries *ex officio* [20].

### a) England

The English civil procedure was greatly modified by the Civil Procedure Rules 1998 (CPR), which came into force in April 1999. They established a true code of civil procedure: an exceptional instrument for a common law country [21].

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[16] See Palumbo – Sette (2008).

[17] Some parties choose deliberately to be dragged into a legal proceeding even though they know that they are on the wrong side, because – due to the length of the court decision – it can become a successful strategy to avoid payments or to arrive at a favourable settlement. See Franzoni – Marchesi (2006, p. 277-283); Marchesi (2003, *passim*).

[18] See Chase (2005, p. 172-177); Taruffo (2005, p. 218-231); Proto Pisani (2006, p. 384-386); Tobias (2000, p. 246-249).

[19] According to particular features of each country.

[20] See Trocker – Varano (2005, p. 244-245); Taruffo (2001, p. 355-358).

[21] See CPR, Part 1, r. 1.1: "These rules are a new procedural code […]". The rules concerning service have been amended by the Civil Procedure (Amendment) Rules 2008, and came into effect on October 1, 2008: see Zuckerman (2008, p. 1-11). Recently, the Civil Procedure (Amendment) Rules 2009 (effective October 2009) have amended the CPR, in particular rationalising the rules concerning experts.

This reform, a general and organic reform project, has introduced several principles quite different from those of the traditional adversarial system. In his "Access to Justice Report" Lord Woolf concluded that to avoid the excesses of the past "there is now no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts". Accordingly, the CPR entrusts the control of litigation to the judge [22].

In order to exercise its case management powers effectively, coherently and fairly, the judge needs workable criteria for decision-making. For the first time, the rules themselves articulate general principles for the exercise of court discretion. The primary principle is the overriding objective, which consists in "enabling the judge to deal with cases justly" [23]. Doing justice has always been the goal of the civil process. However whereas in the past "doing justice" normally referred to the goal of obtaining outcomes that reflect the correct application of the law to the true facts, today this means much more.

The new strategy consists of a more sophisticated and comprehensive set of guidelines for the exercise of discretion. Doing justice on the merits remains a major goal, but it is supplemented by a concept of proportionality that consists of two goals: reasonable expedition, and, reasonable use of the resources. The overriding objective of dealing with a case justly represents, therefore, a three-dimensional strategy of justice: the judge must aim to achieve not just a correct outcome, but must do so within a reasonable time and through a reasonable and proportionate use of procedural resources. Unlike the old strategy, the new one is not exclusively concerned with the individual dispute that happens to be before the court, but it also concerned with the more general consequences that the management of an individual case could have for the system as a whole.

With the purpose of achieving these goals, the judge: *a*) can choose the right proceeding for each case according to its complexity and value [24]; *b*) can make summary orders [25]; *c*) has great discretion to sanction opportunistic conduct and delaying tactics utilized by the parties [26]; *d*) has the power to stay the case to allow the parties time to settle, using, for example, alternative dispute resolution procedures [27].

In relation to the evidence, even if the judge can not order inquiries *ex officio*, he has a comprehensive power of control over the presentation of the evidence. In particular, the judge can require the parties to clarify any matter or to give further information in relation to any matter in dispute [28].

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[22] See CPR, Part 1, r. 1.4. See Zuckerman (2005, p. 148-149).

[23] See CPR, Part 1, r. 1.1(1).

[24] The court will allocate a claim to one of three procedural tracks once a defense has been filed. Broadly, a claim worth less than 5,000 pounds will be allocated to the small claims track; between 5,000 and 15,000 pounds to the fast track; above 15,000 pounds to the multi-track. See Zuckerman (1999, p. 153-155); Passananante (2000, p. 1378).

[25] See CPR r. 3.1 (2).

[26] See CPR r. 1.1 (1).

[27] See CPR r. 26.4 (2)). See J. A. Jolowicz (2002, p. 1272).

[28] See CPR r. 32.1 (1) from (a) to (c). See Barreca (2006, p. 8).

The English court only admits opinion evidence if it is provided by a qualified, independent expert upon an issue on which the judge requires assistance. The number of experts permitted in a case is strictly controlled and the judge may impose a single expert in each field, to be instructed by the parties jointly.

It is clear that on the basis of the 1999 reform the adversarial features of the English civil procedure are now more understated [29].

### b) United States

Also in the United States, another country dominated by the principles of the traditional adversarial system, there have been similar changes made since 1970. Though to a lesser extent in comparison with the English system, the judge (so-called managerial judge) now plays an active role in the conduct of the case, especially in the preparatory phase and in alternative dispute resolution.

The reason for this transformation has not been a specific reform – as in England – but the long and complex evolution of the US civil litigation [30]. In order to facilitate a more adequate and time-efficient management of the lawsuit, in fact, some federal courts have started to use pre-trial conferences to explore settlement, identify disputed issues of fact and law, schedule discovery, and set deadlines for motions.

In November 1990, the introduction of the *Civil Justice Reform Act* (CJRA) generalized and expanded these practices, enhancing the role of the judge in the conduct of the case [31]. In particular, the CJRA required each federal district to develop a plan for civil case management, which required ten "pilot" district courts to adopt plans containing certain case management principles.

These principles included: *a*) differential case management, i.e. the practice of assigning cases to different "tracks", each with its own particularized processes, based on the complexity of the case and other variables; *b*) early

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[29] In fact, legal literature questions if the reformed English civil process can still be considered an adversarial model or not. See Passanante (2000, p. 1354); Crifò (2000, p. 525).

[30] See Taruffo (2001, p. 350); Passanante (2000, p. 1364, fn. 65); Schwartzer (1996, p. 141-149); Resnick (1982, p. 377-380); Tobias (1994, p. 1594).

[31] The CJRA represented a striking departure from the decades-old rule making process in the federal Courts. Under the Rules Enabling Act, adopted in 1934, the Supreme Court of the United States was granted the authority to promulgate rules of "pleading and practice". The Court appointed an Advisory Committee that recommended a set of rules that, in general, were the basis for the Federal Rules of Civil Procedure of 1938. Since then, the Court, acting on recommendations of an Advisory Committee that are filtered through additional levels of review before reaching the Court, has adopted amendments to the Rules. Although Congress has the authority to veto proposed amendments, it has not done so. With the passage of CJRA, Congress intruded into the process as it had not previously done (see Chase (2005, p. 168)). The professed motivation for the Congressional initiative was public dissatisfaction with federal litigation. Hoping to address what he called "the systemic problems affecting congestion, delay and costs in the Courts" (see Biden (1994, p. 1285)), Senator Joseph Biden (who chaired the Senate Judiciary Committee) helped organize a task force in 1988 to study the civil justice system and develop recommendations for improvement. The CJRA embodied several of the Biden task force recommendations. See Tobias (1994, p. 1601-1602).

judicial management, to assure an early and ongoing judicial control of the case through pre-trial conferences especially for imposing time limits on discovery; *c*) monitoring and control of complex cases by the court; *d*) encouragement of cost-effective discovery through voluntary exchanges and cooperative discovery devices; *e*) good-faith efforts to resolve discovery disputes before filing motions; *f*) referral of appropriate cases to alternative dispute resolution (ADR) programs.

The CJRA also enhanced the disclosure of information as to the causes of delays in civil proceedings. In particular, the CJRA imposed new reporting requirements on the federal judiciary: court administrators were required to report to Congress semi-annually, stating the number of motions pending more than six months, the decisions that have been pending for more than six months after the completion of the trial, and the number of cases that have been pending more than three years [32]. The Act introduced a regulatory impact analysis to observe the effects of the enacted reform on the basis of empirical data [33].

In addition, the reforms of the *Federal Rules of Civil Procedure* (FRCP) [34] have facilitated an engaged and proactive role of the judge in the proceedings, giving him more discretion, for example, to sanction delaying tactics of the parties [35].

Finally, insofar as the evidence presented during a case, the *Federal Rules of Evidence* (FRE – enacted in 1975 and amended in 1994) have given more powers to the judge, especially with regard to witnesses of facts and the expert evidence [36].

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[32] The reports were required to identify the judges to whom such long-pending matters were assigned. According to Chase (2005, p. 176), from 1990 (when the CJRA became effective) and 1995, the number of cases pending for more than three years dropped from 10.6 per cent of all pending cases to 5.6 per cent.

[33] See Kakalik – Dunworth – Hill – Mccaffrey – Oshiro – Pace – Vaiana (1996, *passim*), that assess the impact of CJRA on US civil justice and emphasize the importance of new reporting requirements and the package of early management techniques – including the early setting of a trial date and shorter time allowed for discovery. Despite these advantages the report also signals weak points of the reform, according to its findings the adoption of these techniques has reduced time to disposition, on average, by 30 per cent. These statistics seem to reaffirm the view of the Biden task force that, where it is implemented, active judicial management can work to alleviate congestion in the civil justice system.

[34] Although federal courts are required to apply the substantive law of the states as rules of decision in cases where state law is in question, the federal courts almost always use the FRCP as their rules of procedure (States determine their own rules which apply in state courts, though most States have adopted rules that are based on the FRCP). Significant revisions have been made to the FRCP in 1948, 1963, 1966, 1970, 1980, 1983, 1987, 1993, 2000, and 2006. The revisions that took effect in December 2006, made practical changes to discovery rules, to make it easier for courts and litigating parties to manage electronic records. The FRCP were completely rewritten, effective December 1, 2007, under the leadership of a committee headed by law professor Bryan A. Gamer, for the avowed purpose of making them easier to understand. The style amendments were not intended to make substantive changes in the rules.

[35] See, e.g., *Rule* 16 (allowing the court to schedule and compel – under threat of sanctions – good faith participation at pretrial conferences and setting forth a range of matters the court can consider at them); *Rule* 26(f) (allowing the court to require a discovery plan).

[36] See *Rule* 614 (a) (allowing the court to call witness, on its own motion or at the suggestion of a party); *Rule* 614 (b) (allowing the court to interrogate witnesses, whether called by itself or by any party); *Rule* 706 (allowing the court to appoint expert witness, on its own motion or on the motion of any party).

### c) France

In France the judge has always played a significant role in the conduct of the civil case, and that has been strengthened by the reforms of the last years [37].

In the *conference du president* [38] the President of the court section confers with the lawyers about the state of the case in order to clarify the necessities of the preparation of the case and therefore the track which should be selected [39]. This is decided with regard to all written elements and evidence of the case. The president decides then whether the case shall be brought to the judge assigned to assist in the preparation of the case for hearing, a prepatory judge, or if it can be directly referred to a final hearing.

In particular, the preparatory judge conducts a leading role in the direction of the proceedings: his orders should give the proceedings a case flow management timetable. First of all, the judge and the parties decide together upon the time-schedule, the time-limits for the pleadings, exchange of documents, etc. [40]. During the procedural *iter* the judge can put pressure on the parties and their lawyers through sanctions in the case of negligence or a failure to respect the time-limits that have been set. He seeks to obtain an understanding of each case and its complexity and to find the right proceedings for each (*personnalisation du rythme des affaires*).

Apart from conducting case-flow management, the preparatory judge can also intervene in the dispute itself. He can, for example, invite the parties to answer to grounds that they have not mentioned in their pleadings, to provide explanations in fact and law if they are necessary to resolve the dispute [41].

The preparatory judge (or another judge if no preparatory stage takes place) can also order an inquiry (*enquête*) at the request of one party or *ex officio* [42]. The order states the facts to be proved. The judge is charged to hear the witnesses who give evidence under oath [43].

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[37] For example, the *décret n. 75-1123 du 5 décembre 1975* (that has enacted the New Code of Civil Procedure: *Nouveau Code de procedure civile*, NCPC) and the *décret n. 2005-1678 du 28 décembre 2005* (that has modified several articles of the NCPC). See Taruffo (2006, p. 459).

[38] The meeting between the President of the Court section in charge of the case (NCPC, art. 759, § 1) and the parties' lawyers.

[39] There are three different possible tracks: *a*) the *circuit court*, that is usually used for simple cases which are ready for judgment; *b*) the *circuit moyen*, that is used when after the first meeting with the parties' lawyers, the President is of the view that new statements of claim and defense or new evidence could be useful, so he sets a date for a second meeting; *c*) the *circuit long*, that consists of a preparatory stage directed by the judge of the preparation. All tracks are closed by the closing order (*ordonnance de clôture*), after that the case is decided.

[40] See NCPC, art. 764 (*contract de procédure*). French law does not set anymore uniform time-limits: they are set for each case depending on its nature, its urgency and its complexity. See Ferrand (2005, p. 19).

[41] See NCPC, art. 765.

[42] See NCPC, art. 10.

[43] The powers of the judge are expansive: he can interrogate the witnesses, examine them in relation to the evidence of another witness or party. The examination is led by the judge. The parties' lawyers can only pose questions to the judge who decides whether they are relevant. There is no cross-examination. The court clerk draws up a record of all the stages of the inquiry and of the evidence from the judge's dictation.

But most of the time, witnesses are not directly heard by the judge. French practice often uses *affidavits*, written testimony. In order to assure the probative value of *affidavits*, French law requires that it is entirely hand-written by the author, dated and signed, with the proof of his identity [44]. Written testimony is more flexible and saves time, but does not guarantee the truth and spontaneity of the witness. The judge is free (*pouvoir souverain*) to accept or to refuse hearing as a witness a person who has written an *affidavit*.

The judge can also ask a specialist his opinion on a point of fact which requires specialized knowledge (findings, consultation or expertise). Expert advice can only concern a point of fact raising a technical problem.

### d) Germany

The most recent and important reforms of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO) were enacted in 1976 and in 2002 [45]. The ZPO of 1877 was still based on the idea that an active role in the proceedings is to be taken by the parties fighting for their rights; accordingly, judges should seek to minimize interventions in the course of the proceedings. In sharp contrast, the recent reforms – especially those of 2002 – sought to strengthen the active role of the judge, his *materielle Prozessleitung* i.e. control over the merits of the case and powers to manage the procedure [46].

The German civil process is divided into two principal stages: *a*) the preliminary hearing (*Haupttermin*), where the *thema decidendum* and the *thema probandum* have to be adequately clarified according to the concentration principle [47], and the further steps in the proceeding are defined in relation to the complexity of each case [48]; *b*) the central hearing, where the evidence is examined and the parties make their final submission based on the factual and legal issues raised by the case [49]. Finally the court retires for to deliberate and reach a decision.

Thus, in the preliminary stage the judge has significant powers both to manage the case and to order inquiries *ex officio*. He shall steer the process of litigation

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[44] Most often a photocopy of the identity card. Also French law requires that the author's civil status appears with his relationship, if any, with the parties (family links, subordination, co-operation or community of interests). False *affidavit* exposes to penal sanctions. See Barreca (2006, p. 11); Ferrand (2005, p. 28).

[45] See the "act for simplification and acceleration of court proceedings" of December 3, 1976 and the "civil procedure reform act" of July 27, 2002.

[46] The legal literature has observed that the English CPR have been influenced by the structure of German civil procedure: see Barreca (2006, p. 6).

[47] See ZPO, § 1.

[48] See Caponi (2006, p. 526), who highlights the importance of the ZPO, § 273. In fact, such disposition confers to the judge a general power to order any preliminary activity, necessary for the preparation of the case, to the parties.

[49] According to Caponi (2006, p. 527), this second stage does not seem so common, because in the majority of cases the main activities are developed in the preliminary hearing.

towards decisive questions and concentrate the focus of the dispute on them. This new focus is to be brought about by increasing the duty of the parties to make explanations and by the duty of the court to give proper directions for pleading [50].

Also, the judge can generally order inquiries *ex officio* [51], except in the case of sworn testimony. For example, he can order personal comparison of the parties and ask the expert's opinion [52]. Upon request of the court, the parties are obliged to produce documents and objects. The reformed ZPO allows the use of videoconferences for the presentation of evidence [53].

Finally, the 2002 reform reinforced the idea of conciliation, introducing a conciliation hearing [54].

### e) Spain

The most significant reform of Spanish civil procedure was the *Ley de Enjuiciamento Civil* (LEC), which entered into force on January 8, 2001 and introduced a new Civil Procedure Code [55]. This reform, influenced by German civil procedure, is an historic event for the administration of justice in Spain, because it replaced the flawed and archaic LEC of 1881, that lacked a systematic structure.

The new Spanish code sets up a model of ordinary procedure centered on the oral hearings and resolving the matter in an expeditious manner. In contrast to the traditional predominance of the written procedure with its reliance placed primarily on the attorney's briefs and documentary evidence, the LEC aims to conduct civil proceedings in Spain on a largely oral basis [56].

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[50] See ZPO, § 139, that obliges the court – as it already did before – to discuss questions of fact and of law of the case with the parties and to make clear if his own position is diverging from those of the parties'. New, however, is the duty of the court to alert the parties as soon as possible (sub-par. 4). The most important innovation in this context is constituted by the obligation of the court to make sure its position in this matter becomes part of the record. However mere indication in the record that its position has been made clear to the parties does not suffice. Rather, a record of the content of the court's expression in necessary. Thus, the relevance of this information for the purposes of an appeal is acknowledged: if, for example, a party failed to plead certain means of attack or defense in the first instance because it was not alerted to its relevance by the court, this represent an *error in procedendo*, as a result of which – as an exception – the admission of corresponding new pleading in the second instance is allowed (ZPO, § 531, sub-par. 2). See Walter (2005, p. 75).

[51] See ZPO, §§ 142 and 144. Kötz (2003, p. 66); Walter (2005, p. 75).

[52] See Piekenbrock (2006, p. 473).

[53] See ZPO, § 128a.

[54] If there has not been a conciliation proceeding of the parties with a conciliation office, the court itself now has to carry out a conciliation hearing (ZPO, § 278, sub-par. 2). The judge may only waive this hearing, when the conciliation hearing seems to be clearly without prospects of settlement, for example, when intensive conciliation efforts of the parties out of court and before the court proceedings have already failed. Based on the personal appearance of the parties and based on a discussion of the case by the judge and the parties, the court shall then give to the parties a well-founded proposal for a settlement or suggest an out-of-court settlement proceedings (especially in the form of mediation). See Piekenbrock (2006, p. 470).

[55] See law 1/2000, of January 7, of civil procedure.

[56] In compliance with the mandate established in the art. 120, par. 2, of the Constitution

The structure of the ordinary trial procedure, *juicio ordinario* [57], is – in synthesis – the following: after the filing and service of the complaint that initiates the case, states the legal and factual grounds upon which the prayer for relief is based and after the answer of the defendant stating the defendant's denials, defenses and counterclaims are presented, the case will be prepared for a final hearing or submissions by a discussion at a preliminary hearing (*audencia previa al juicio*) [58]. After that, a new hearing is set up (unless the case is settled or dismissed for lack of a procedural prerequisite that cannot be corrected) and the case moves from the pleading and preparatory phase to the evidentiary and "trial" phase, the *juicio*. At the *juicio*, the evidence is examined and the parties make their final statements on the factual and legal issues raised by the case [59]. Then the court retires for deliberation and decision.

The aim of the LEC is to concentrate the *juicio* (the plenary arguments and evidentiary part of the proceedings) to a single main hearing. This presupposes that there has been an adequate clarification and narrowing of the issues in the preliminary stage, that – as in German civil procedure – plays a central role, so that the remaining issues can be dealt with in a single court session [60].

For these purposes, especially in the *audencia previa al juicio* the judge has the following relevant powers: *a*) to check if the proceeding has been validly instituted and to establish the lack of legal prerequisites therewith, such as proper jurisdiction, venue, capacity to sue and to be sued; *b*) to determine if the dispute can be settled; *c*) to separate contested matters from those that can be decided forthwith; *d*) to discuss and clarify the issues raised by the complaint and answer; *e*) to indicate the evidence that the parties wish to be considered. Also, in this phase the judge has discretion to order any appropriate measure for the preparation of the case [61].

Finally, the reform particularly stressed flexible methods of presenting evidence through reproductions of words, sounds and images [62].

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[57] Effectively, the ordinary proceedings are two (instead of the four before the reform): *a*) the *juicio verbal* (LEC, artt. 437-447), used to hear cases of lesser amounts (up to 3,000 Euros: LEC, art. 250); *b*) the *juicio ordinario* (LEC, artt. 399-436), is designed to deal in addition to certain commercial matters (such as the challenge of corporate agreements, unfair competition, industrial and intellectual property), with claims in which the amount in dispute cannot be determined: LEC, art. 249). The *juicio verbal* – differently from the *juicio ordinario* (see *infra*, in the text) – has a simplified structure designed to assure a rapid disposition of these claims. The plaintiff initiates the process with a short complaint (LEC, art. 437), in which it is not necessary to set forth a complete statement of the legal and factual grounds upon which the complaint is based, but rather it is enough to identify the parties and to offer a brief description of the claim. The judge then summons the parties to a hearing where the allegations are discussed and relevant evidence is admitted. See Segovia (2000, p. 378).

[58] See LEC, artt. 414-430.

[59] See LEC, artt. 431-433.

[60] This structure is an attempt to avoid the development of legal contentions, the definition of relevant issues and the securing of evidence taking place gradually over an extended period of time, and to make sure that the decision of the case is the result of the immediate impact of (oral) evidence and argument. See Giménez (2005, p. 43).

[61] See LEC, art. 429 (*iniciativa probatoria* of the judge). See Junoy (2003, p. 75-77); Dondi – Ansanelli (2007, p. 629-630).

[62] Like in Germany and in England. On the contrary, in Italian civil procedure these methods of presenting evidence are admitted only in specific cases. See Barreca (2006, p. 12-13).

## f) Initiatives of Transnational Civil Procedure

The human community of the world lives in closer quarters today than in earlier times. International trade is at an all-time high and is increasing steadily; international investment and monetary flows have increased accordingly; businesses from the developed countries establish themselves all over the globe directly or through subsidiaries. As a consequence, there are positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy, and litigation.

In dealing with these negative consequences, the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems – so-called "harmonization" – so that the same or similar "rules of the game" apply no matter where the participants may find themselves.

In last years there were initiatives aimed at achieving "harmonization" - also in the civil procedure [63]. The most important was realized by the Governing Council of UNIDROIT in 2004, adopting the Principles of Transnational Civil Procedure prepared by a joint American Law Institute/UNIDROIT Study Group [64].

These Principles, consisting of 31 provisions, aim at reconciling differences amongst various national rules of civil procedure, taking into account the peculiarities of transnational disputes as opposed to purely domestic ones. They may not only serve as guidelines for code projects in countries without longer procedural traditions, but may initiate law reforms even in countries with long and high quality procedural traditions [65].

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[63] Most endeavors at harmonization have addressed substantive law, particularly the law governing commercial and financial transactions (see, for example, the numerous European directives for the harmonization of corporate law, starting from 1968). There is now in place a profusion of treaties and conventions governing these subjects as well as similar arrangements addressing personal rights such as those of employees, children, and married women: for example, the Convention on the Rights of the Child of November 20, 1989; the United States-Egypt Treaty Concerning the Reciprocal Encouragement and Protection of Investments of September 29, 1982; the Convention on the Elimination of All Forms of Discrimination Against Women of December 18, 1979. Harmonization of procedural law has made much less progress. It has been impeded by the assumption that national procedural systems are too different from each other and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences among legal systems. There are some international initiatives dealing with procedural law are, such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970; the Regulation (EC) n. 44/2001 of the European Parliament and of the Council of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), which replaced the Brussels Convention of 1968. See Chase – Hershkoff – Silberman – Taniguchi – Varano – Zuckerman (2007, p. 562-598); Carpi (2001, p. 295).

[64] The Principles and the report of the American Law Institute and the UNIDROIT Study Group are available at http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

[65] See Gidi – Taruffo (2007, p. 769-784); Parker (2008, p. 1-34).

One of their main features is to enhance powers of judges in the conduct of the case, stating the responsibility of the court in directing the proceeding[66] and the possibility for the Judge to order inquiries *ex officio*[67]. Case management becomes a means of reaching expeditiousness and effectiveness of civil justice - also in the case of transnational lawsuits.

Recently, the European Union enacted the European Small Claim Procedure (ESCP – available from January 1, 2009)[68], the major step in the harmonization of European civil procedure[69]. It is intended to improve access to justice by simplifying cross-border small claims litigation in civil and commercial matters and reducing costs. "Small claims" are cases concerning sums under EUR 2,000, excluding interest, expenses and disbursements (at the time when the claim form is received by the competent court). Judgments delivered under this procedure are recognized and enforceable in the other Member States without the need for a declaration of enforceability.

Also this procedure, which is optional, offered as an alternative to the possibilities existing under the national laws of the Member States, gives discretion to the judge in the conduct of the case and powers to order inquiries *ex officio*, and stresses the use of information technology.

## 3. The Italian civil procedure

The Italian reforms of civil procedure have lacked a systematic structure and have seemingly gone against the trend when viewed in light of the reforms that have been recently enacted in several other developed countries.

### a) The context before the reforms

Before the reforms, there were two principal types of proceedings[70]: *a*) the ordinary procedure (called *rito ordinario di cognizione*)[71]; *b*) a special procedure

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[66] See Principle 14: "14.1 Commencing as early as practicable, the court should actively manage the proceeding, exercising judicious discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. 14.2 To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties. 14.3 The court should determine the order in which issues are to be resolved, and fix a timetable for all stages of the proceeding, including dates and deadlines. The court may revise such directions". See also Ferrand (2005, p. 30).

[67] See Principle 22.2: "The court may, while affording the parties opportunity to respond: 22.2.1 Permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly; 22.2.2 Order the taking of evidence not previously suggested by a party; or 22.2.3 Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party".

[68] See Regulation (EC) n. 861/2007 of the European Parliament and of the Council of July 11, 2007, establishing a European Small Claims Procedure. It will be applicable from January 1, 2009 in all EU Member States except Denmark. See Kramer (2008, p. 1); Assonime (2009, p. 4-6).

[69] See also Regulation (EC) n. 1896/2006 of the European Parliament and of the Council of July 12, 2006, establishing a European Order for Payment Procedure.

[70] There were also some special procedures, the most important of which were the so called *procedimento per decreto ingiuntivo* and *procedimento per convalida di sfratto*.

[71] See Code of Civil Procedure of 1940 (CPC), modified by law 581/1950, of July 14 (so-called *Novella del 1950*). Before such a reform, the Italian Code of Civil Procedure attributed significant powers to the judge in the conduct of the case. See Codice di Procedura Civile (1940, p. 29 and 40); Taruffo (1980, p. 289-301); Cipriani (1993, p. 330 and 333); Biavati (2005, p. 1317).

for the labor disputes (called *rito del lavoro*) [72]. These proceedings had very different features.

In the first procedure the judge – a panel of judges – had no significant powers to manage the case and no discretion. He played a significant role in relation to considerations of relevance and admissibility of evidence and, of course, in arriving at the decision. The parties had the possibility to introduce new defenses and new evidence, and to some extent even new claims, and also to vary their claims and defenses, during the whole course of the process. This caused confusion and delay in civil proceedings.

The *rito del lavoro* (currently in force) is a special process characterized by the high concentration of the various procedural steps, brought about by the numerous powers of the judge to manage the case and the lesser degree of formalism.

The main characteristics of this special procedure can be summarized as follows: *a*) the responsibility of a single and specialized judge; *b*) the concentration of the process in a few hearings – one or two [73]; *c*) the possibility for a party to obtain interim monetary orders during the course of the process. The parties have no opportunity to vary their claims and defenses: the plaintiff has just the possibility to respond to the defenses of the defendant and to articulate opposing evidence. The court, on the on the other hand, has a general power to order inquiries *ex officio* [74].

At first, the *rito del lavoro* was a big success: not only because of powers of the judge to manage the case, but also for the presence of sanctions for negligent conduct and delaying tactics, the reorganization of the courts and the specialization of the judges [75].

Therefore, given the crisis surrounding the *rito ordinario di cognizione*, it was decided to extend – at least some – of the procedural innovations introduced by the special procedure to the ordinary procedure.

### b) The 1990 reform

The 1990 reform [76], at least in its original structure, moved along the lines of the successes of the *rito del lavoro*, based on oral discussion and focusing on a streamling of the process (so-called *principi di oralità e concentrazione*). The main points of this reform may be summarized as follows: *a*) a single judge – rather than a panel of judges – in most cases, with more effective powers in the conduct of the case; *b*) a simplified and concentrated form of preparation of the case in a preliminary hearing; *c*) the possibility for a party to obtain interim

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[72] It was introduced by the law 533/1973, of July 11 and then extended also to landlord-tenant cases.

[73] See CPC, artt. 414, 416 and 420. See Arrigoni (2006, p. 338-341).

[74] See CPC, art. 421.

[75] See Proto Pisani (2006b, p. 381).

[76] See law 353/1990, of November 26, so-called *Novella del 1990*.

monetary orders during the course of the proceedings [77]. Differently from the *rito del lavoro*, the judge did not have a general power to order inquiries *ex officio*.

However, the strategy of the reform was also flawed by some relevant defects, such as the following: *a*) a certain rigidity in the conduct of the case; *b*) a notable silence with regard to the presentation of evidence (which remained fragmented into a number of separate hearings over a potentially very long period of time); *c*) no relevant comment about the reorganization of the judiciary [78] and the specialization of the judges.

Notwithstanding such objective limits, many aspects of the 1990 reform appeared relatively reasonable. In particular, a positive and significant change was the attempt to simplify and rationalize the preparatory phase of the procedure by inducing the parties to come to a final definition of their claims, defenses and conclusive arguments in only one concentrated hearing, preventing them from amending indefinitely their positions in the course of the process (as was permitted under the pre-existing rules). A clear distinction between the preparatory hearing and the presentation of evidence, with the prohibition of further variations in the parties' positions after the hearing, was an important improvement, although it did not transform the whole basic structure of the procedure.

However, this change alone provoked strong negative reactions by the bar, that protested against what was perceived as an excessive restriction upon the lawyers' discretion and freedom in performing their function. A system in which, after the first pleadings, only one hearing had to be devoted to the final definition of claims and defenses, with a substantial preclusion to further amendments, there was considered to be an infringement of defense rights.

Due to the abovementioned oppositions, the 1990 reform was enacted only in 1995, after several modifications [79]. In particular, a further preparatory hearing, the *udienza di prima comparizione ex* article 180 CPC was introduced, and was devoted only to checking that the formal conditions required for the regular introduction of the case were met; at the end of this hearing the judge fixed a time limit in which the defendant was still allowed to submit his defenses. Then the judge fixed another hearing, the *udienza di trattazione ex* article 183 CPC, in which the parties finally amended their claim and defenses, but further amendments were still allowed by means of written briefs that could be submitted by the parties after this hearing. Moreover, a third hearing could be used by the parties to make further evidentiary offers and requests, and by the judge to decide about the relevance and admissibility of the evidence offered by the parties. If in this hearing the judge ordered on his own motion the presentation of some

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[77] Also, the reform introduced a simplified and unified regulation of provisional remedies and provided the immediate enforceability of the first instance judgment, even if appealed, and the exclusion of new evidence and new defenses in the appellate proceedings (so-called *nova* prohibition). See Szëgo (2008, p. 14-15).

[78] In 1991 a judge of the peace was created, but such a judge deals almost only with small claims.

[79] See law 534/1995, of December 20. See Taruffo (2005, p. 218-222); Consolo (2001, p. 1070).

evidence, the parties could still offer new evidence, and another hearing could be needed in order to decide issues of admissibility.

The length of the procedure was also amplified by the conduct of many lawyers, whose prevailing interests were to delay the proceedings, and of many judges, who did not use their powers in a manner consistent with a timely resolution of the case, largely due to the bad organization of the judiciary and the irrational distribution of the civil workload [80].

Therefore: the preparation of the case always required at least three hearings, but such preliminary hearings could be five or more, given that each of them could be adjourned. These hearings were separated by time intervals – the length of which was not regulated by the law: each interval could last many months, or even a year or more. In a few words: a long time, ranging from several months to some years, was required just for the parties to arrive at a final definition of the issues representing the subject matter of the case, and of the evidence that would be presented in the following phase of the procedure. In this second phase no further amendments were allowed, but the system of the presentation of evidence was not touched by the reform, so that the presentation of evidence was still slow, long and fragmented into several hearings separated by long intervals, as it used to be in the past.

### c) The special procedure for corporate disputes

After the failure of the 1990 reform, the Italian lawmaker opted for a procedural model similar to the adversarial system, in contrast with the reforms that have been recently enacted in several countries [81].

The first application of this model was the *rito societario* [82], a special procedure for commercial lawsuits. It was considered by the political power as a sort of experimental anticipation of a general reform of the Italian Code of Civil Procedure [83].

The key word of this reform was the so-called "privatization" of civil justice. It means that the preparatory stage of the proceedings is taken away from the hands of the judge and entrusted exclusively to those of the parties' lawyers. No more "managerial judges", therefore, but only "managerial lawyers".

Going into further detail: the *rito societario* consisted of essentially two phases. The first phase began with the notice of the statement of claim: the notice

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[80] See Graziosi (2006, p. 943-944); Proto Pisani (2006b, p. 383); Taruffo (2005, p. 224); Consolo (2001, p. 1070-1075).

[81] See par. 2.

[82] See law 5/2003, of January 17, that was enacted in January 2004. See Consolo (2005, p. 1707-1715); Dondi (2004, *passim*). Recently, the law 69/2009 has abrogated this procedure and it will continue to be applied only to cases already pending at the date of the enactment of the law: see art. 54, sections 5 and 6, of the law 69/2009. See paragraph *sub e*).

[83] This project, known as *Progetto Vaccarella* from the name of the lawyer who chaired the drafting committee, has not received any formal approval by the Parliament.

was served by the plaintiff directly on the defendant, without submitting the case to the judge. This phase ended when one of the parties filed a request to the judge for the fixation of a hearing before the court; the judge made a decree that concluded the preparation of the case and fixed the date of a hearing that would be devoted to the discussion of the case. The second phase consisted of this hearing, in which the case was discussed, the evidence was presented, the case was conclusively argued by the lawyers, and eventually the final judgment was delivered by the judge [84].

The most important part of this reform was the "new" procedural model that was adopted for the preparation of the case. The core of this model was that this phase consisted only and exclusively of the exchange of a number of written pleadings and briefs between the parties' lawyers, without having any contact with the judge.

This drawbacks of this procedure became quickly evident [85] – its adversarial features. The preparatory stage allowed the exchange of a virtually unlimited number of written pleadings, creating more possibilities for delaying tactics and opportunistic conduct. The judge did not have significant powers to mitigate disparities between the parties and to sanction such negligent behavior. Finally, the difficulties increased when more than two parties were involved [86].

As to the second phase, it has to be emphasized that nothing new was provided with regard to the laws of evidence and the techniques used for the presentation of oral evidence. Therefore, the second stage of the procedure still functioned on the basis of the old rules: thus, with the same rigidities and the same fragmentation into several hearings separated by long intervals.

### d) The competitiveness law

After the failure of the *rito societario* (as well), the Italian lawmaker opted for a mixed solution. The competitiveness law (*legge competitività*) [87] opts for a procedural model in which the judge plays a central role, but the law gave the possibility to the parties to choose the *rito societario* for every type of case [88].

In comparison with the 1990 reform, the *legge competitività*: *a*) simplifies the preparatory phase of the procedure, in that it correctly, unifies *udienza di*

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[84] See law 5/2003, article 16, text *a*).

[85] In the 2006, only 1.481 cases (14 per cent on a total of 10.825 commercial lawsuits) were concluded by a court decision. While, in the ordinary procedure 41 per cent of the disputes were concluded by a court decision.

[86] See law 5/2003, art. 4. See Chiarlone (2006, p. 869-872).

[87] See law 80/2005, of May 14, modified by law 263/2005, of December 28 and enacted in March 2006. See De Cristofaro (2006, p. 171-192); AA. VV., *Le modifiche al codice di procedura civile previste dalla l. 80 del 2005* (2005, *passim*).

[88] See CPC, art. 70-*ter*, abrogated by the recent law 69/2009: see next paragraph.

*prima comparizione* and *udienza di trattazione*) [89]; *b*) introduces more procedural sanctions such as strict preclusions for negligent conduct of the parties.

Notwithstanding there were relevant gaps: *a*) there are still several rigidities in the various phases of the procedure; *b*) the introduced procedural sanctions are not enough to substantially reduce the delaying tactics (both of the judge and the parties); *c*) nothing was said about the presentation of evidence for example, flexible methods of presenting evidence [90]; *d*) nothing relevant was said about the reorganization of the courts and the specialization of the judges.

Also, from a solely procedural perspective, the reformed article 183 of the Italian Code of Civil Procedure determines a very articulated preparatory phase of the proceedings [91], whose length is about eight months or one year: the timeframe of a whole civil process in other countries. This strongly limits the positive innovation of the unification of the two initial hearings provided by the 1990 reform.

Finally, it was difficult to understand why the Italian lawmaker gave the possibility to the parties to choose the special procedure for corporate lawsuits (*rito societario*), even if this procedure had already been characterized by its excessive length and distortions.

### e) The law 69/2009, of June 18

Recently the Italian Parliament approved a new law, 69/2009, of June 18, providing regulation governing the economic development, simplification, and competitiveness of the civil procedure [92] in addition to other modifications.

This supposedly final reform seems more clearly oriented towards a non-adversarial model, in line with the experience of other countries, granting greater powers to the judge in the conduct of the case. For example, the law 69/2009 has abrogated the controversial *rito societario* [93]; and has given the possibility to the judge to convict *ex officio*, in the case of a frivolous or vexatious suit, the loosing party to pay a sum determined according to the circumstances of the case, without proof of negligence. Whereas, under the previous wording of article 96 of Italian CPC, it was necessary to establish negligence, an extremely high burden of proof [94].

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[89] See CPC, art. 183.

[90] See Dondi – Anselli (2007, p. 629-630); Barreca (2006, p. 11-14).

[91] See Graziosi (2006, p. 954); Carpi (2006, p. 852-854).

[92] In this way, the recent amendments have introduced another model of standard procedure, that is bound to co-exist for many years with the model adopted by the competitiveness law for cases filed before July 4, 2009; with the model adopted by the *Novella del 1990*, for cases filed before February 28, 2006; with the model adopted by the Code of Civil Procedure of 1942, as amended in 1950, for cases filed before April 29, 1995. See Table 1.

[93] As mentioned above it will continue to be applied only to cases already pending at the date of the enactment of the law: see art. 54, sections 5 and 6, of the law 69/2009.

[94] See article 45, sections 11 and 12, of the law 69/2009, that modified the articles 92 and 96 of the Italian Code of Civil Procedure.

The new law, on the one hand, enhances the possibility to use Alternative Dispute Resolution Systems [95]; yet on the other hand, provides a rationalization of the types of procedures. In fact, the increasing number of procedures [96] – due to the absence of judges specialized either by subject or by type of procedure, and due to the large number of cases for each type of procedure – have reduced the flexibility in the management and the concluding of the cases. In addition, many procedural issues have arisen, the resolution of which – necessarily undertaken prior to the examination of the merits – has been another cause of delay [97]. In the mind of the Legislator, the majority of cases should be dealt with by three main procedural models [98]: *a*) the standard model of civil procedure; *b*) the *rito del lavoro*; *c*) the new *rito sommario di cognizione* [99].

However, there are many problematic aspects of the reform, that risk compromising the objectives of streamlining the system. In fact, the very articulated preparatory phase remains (article 183 CPC was not modified); while the provision of the time-schedule for the presentation of evidence, the *calendario del processo* [100], does not provide any sanctions against the violation of the terms.

The application of the new *rito sommario di cognizione*, that should, at least in theory, constitute a sort of "fast track" for those cases considered to be suitable for such a path, or in any event referred there by the Applicant (who must initiate the case with an application). Whereas the sole responsibility of the Judge is to rule in relation to the admissibility of the procedure: notably different from the English "fast track" or the French *circuits*, from which the system seems to have been inspired.

It raises, however, more than a little perplexity in relation to the provision of the possibility for the judge to admit – albeit upon the agreement of parties – written testimonies [101], introduced, once again, in the absence of an organic review of the Laws of Evidence. In fact, although this form of giving evidence is in any case subject to the agreement of the parties, its goal of simplification could be compromised by the emergence of disputes with regard to the correspondence between the declarations of the witnesses to the questions posed, or in relation to the necessity to hear directly the evidence of the witnesses, or for the purposes of

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[95] See article 60 of the law 69/2009, that delegates the power to the Government to establish an expansive system of Alternative Dispute Resolution in the fields of civil and corporate law.

[96] See, for example, the law 392/1978, of July 27 and article 447-*bis* CPC, for leasing disputes; law 203/1982, of May 3, for agricultural disputes; law 689/1981, of November 24, for administrative sanctions; law 206/2004, of August 3, for compensation for damages to victims of terrorism; law 196/2003, of June 30, for disputes in the field of privacy; law 5/2006, of January 9, for bankruptcy disputes.

[97] See Proto Pisani (2006b, p. 87-88); Carpi (2006, p. 856-859).

[98] See article 54, section 4, letter *b*), of the law 69/2009.

[99] A simplified procedure for cases which do not need an articulated preparatory phase. See article 51 of the law 69/2009, which has introduced the articles 702-*bis* and 702-*ter* in the Italian CPC.

[100] See article 52, section 2, of the law 69/2009.

[101] With the insertion of a new article 257-*bis* in the CPC, enacted by the article 46, section 8, of law 6/2009.

clarification, or resolution of contrasts – all with negative effects upon the length of the case [102].

Once again, finally, the modification of procedural rules is not accompanied by measures to establish an organizational and regulatory system which would allow the specialization of judges, accountable for the monitoring of the compliance with the objectives of efficiency and productivity and for the improvement in the efficiency in the management of the process [103].

## 4. Conclusions

In the modern context, civil procedure, which also serves as a mechanism of social and economic conflict resolution, and of redistribution of wealth [104], must be able to assure adequacy, expeditiousness and effectiveness of judicial protection.

The English and American experience [105] has demonstrated the limits of the adversarial system in achieving these goals [106]. In fact, this model falls down when parties are from different social and economic backgrounds. Also, it provides an incentive for lawyers to behave abusively due to, for example, reward systems in the English case. In these cases the judge has no power to reduce abuses. These factors limit the effectiveness of the adversarial model as on the one hand it does not offer sufficient countermeasures to avoid delaying tactics by the parties and on the other hand, it does not assure adequate protection in disputes between, for example big companies and consumers, typical of modern society.

On the contrary, as shown by the international comparison, the non-adversarial model seems more efficient in reaching expeditiousness and effectiveness of civil justice [107]. The active role of the judge can reduce potential disparities between the

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[102] Without taking into account the risks of interruptions due to potential accusations of false testimony, as has been evidenced by the French experience of the *affidavit* (cfr. back, par. 2) Nor it is to signal a resort to those more modern technical methods of assumption of proof advocated by the Council of Europe. For precise references, cfr. Dondi – Ansanelli (2007, p. 629-630); Barreca (2006, p. 12-13). Moreover, the period of time required for the decisive phase and the possible models for concluding the case remain as yet completely unresolved.

[103] In this sense the intervention enacted with the law 111/2007, of July 30, does not seem to have been effective, bringing about modifications to the rules of Judicature (c.d. *Mastella* reform), that have introduced appreciable improvements especially in relation to the training of magistrates – it seems to have simply touched the surface of the career progression of the judges. (cfr. Consiglio Superiore delle magistura (2007, p. 281-300); Bianco – Giacomelli – Giorgiantonio – Palumbo – Szëgo (2007, p. 31)). In relation to the organizational plan, the regulations relative to communications and notifications service effected electronically in the civil process relates to art. 51 of law 133/2008, August 6, even if it is inline with the requirements of simplification and rationalization of civil procedure, and with the introduction of the so-called electronic civil process, they are, as yet, mere programmed, requiring, for their more formal approval, one or more Ministerial decrees, without a few terms for their adoption. Without considering deplorable (but existing) praxis of the lacking legislative disposition on the part from secondary norm.

[104] See Corsini (2002, p. 1276); Taruffo (2001, p. 359); Damaška (2000, p. 257-260).

[105] And (more recently) the Italian special procedure for corporate cases (*rito societario*).

[106] See Corsini (2002, p. 1278-1280); Shore (2000, p. 95); Taruffo (1990, p. 343-346).

[107] See Trocker – Varano (2005, p. 247-248); Ferrand (2005, p. 30).

parties and facilitate a more adequate and streamlined management of the lawsuit, giving the Judge the possibility to appropriately analyse each case according to its complexity with the aim finding the best possible outcome. However, it is necessary to provide an appropriate organization of the courts and sanctions, both procedural and disciplinary, in order to avoid delaying tactics being adopted by both by the judge and/or the parties, and to stimulate correct conduct.

The Italian reforms of civil procedure have seemingly failed to take into account these evaluations. At first, they lack a general reform project [108]. Also, they have gone against the prevailing trend in comparison with the reforms that have been recently enacted in several other developed countries. In fact, in Italy there has not been a clear choice made between an adversarial or non-adversarial model. The 1990 reform emphasized the role of the judge; in the special procedure for corporate lawsuits (*rito societario*) the case is essentially organized by the parties; the competitiveness law (*legge competitività*) reinforced the powers of the judge, but gave the possibility to the parties to choose the *rito societario* (such a possibility has been recently eliminated by law 69/2009, which has abrogated this procedure) [109].

In addition, the reforms that have emphasized the role of the judge, have in any case maintained rigidities in the management of the lawsuit for example a series of pre-determined hearings, and the presentation of evidence which remains fragmented into a number of separate hearings over a potentially very long period of time. These factors limit the possibility for the judge to find the right procedural path according to each case's complexity.

Last but not least, the critical problem has been the lack of mechanisms to assure that the judge effectively and correctly uses his powers in the conduct of the case. The special procedure for labour disputes (*rito del lavoro*) has shown that to guarantee the efficiency of a non-adversarial model it is necessary to have specialized judges and to provide an appropriate structuring of the courts and sanctions, both procedural and disciplinary, against delaying tactics being adopted by both the judge and the parties. When some of these mechanisms have been lacking, also the *rito del lavoro* has failed to function correctly [110].

History, when correctly interpreted, should help us to understand which errors of the past should not be repeated, given *perseverare diabolicum est*. The law 69/2009 is commendable because it gives more powers to the judge in the conduct of the lawsuit and shows a partial convergence with respect to the other European reforms. However, it is not sufficient. It is necessary to introduce more flexibility and to provide incentives for the judge to use correctly his powers and

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[108] See Vandelli (2006, p. 57). On the contrary, reforms enacted in other countries such as France or England have been based on public consultations, experts' analyses and empirical data: see *Access to Justice – Interim Report to the Lord Chancellor on the civil justice in England and Wales* (1995, *passim*); Mission Magendie (2004, *passim*). See, also, Lamorgese (2003, p. 35-38); Ranieri (2003, p. 1185-1199); Consolo (2002, p. 1541-1542).

[109] See Table 1.

[110] See Proto Pisani (2006a, p. 381).

sanctions for negligent and/or opportunistic conduct of the parties. Also, it is important to introduce an appropriate court structure, encourage the specialization of the judges and to assure that the administration of justice has the resources it needs in terms of physical facilities, personnel and electronic equipment, so that judges can concentrate exclusively on their job [111].

Finally, it is very important to introduce an appropriate regulatory impact analysis (RIA) also in the sector of civil procedure to observe the effects of the enacted reforms on the basis of the empirical data [112]. Only in this way will it be possible to understand real inefficiencies and to draft reforms capable of achieving success.

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[111] See Rordorf (2009, p. 25-27); Carriero (2008, p. 173-174); Proto Pisani (2008, p. 12-13); Zan (2003, *passim*); Braccialini (2004, p. 1273-1281); Cipriani – Civinini – Proto Pisani (2001, p. 81-82); Costantino (1999, p. 77-79).

[112] Article 42 of the law 5/2003 moved in the right direction, providing that the Minister of Justice monitors the running of the *rito societario* on the basis of empirical data. But this provision has ever been put into effect. For the importance of empirical work see Heise (1999, p. 813-849); Chase (2005, p. 184); Trocker – Varano (2005, p. 247).

## Appendix

### Table 1 – Types of Italian ordinary civil procedure

| Model | Disputes | Features |
|---|---|---|
| 1940 Code of Civil Procedure | Disputes before April 30th, 1995 | This is the procedure arising from the 1950 reform. The judge has no significant powers to manage the case. The parties have the possibility to introduce new defenses and new evidence, and to some extent even new claims, and also to vary their claims and defenses, during the whole course of the process. |
| 1990 Reform | Disputes from April 30th, 1995 until February 28th, 2006 | This is the procedure arising from the 1990 reform. The judge plays a central role. Several rigidities remain in the procedure (a series of predetermined hearings; length in the presentation of evidence). No measures to ensure that the judge uses his powers to accelerate the case. |
| Special Procedure for Corporate Cases (*rito societario)* | Corporate disputes from January 1st, 2004. Eventually, disputes from March 1st, 2006 until July 3rd, 2009, according to the choice of the parties | The preparatory stage of the procedure is entrusted exclusively to the hands of the parties' lawyers (no more "managerial judges", but only "managerial lawyers"). This stage allows the exchange of a virtually unlimited number of briefs; the judge has no powers to limit abuses and delaying tactics. |
| Competitiveness law (*legge competitività*) | Disputes from March 1st, 2006 until July 3rd, 2009 | The judge plays again an important role in the procedure. Correctly, the two initial hearings, provided by 1990 reform, were unified. Several rigidities remain in the procedure, especially, in the presentation of evidence. Few sanctions for delaying tactics and no measures to ensure that the judge uses his powers to accelerate the case. |
| Law 69/2009, June 18 | Disputes from July 4th, 2009 | The law 69/2009 more clearly chooses a procedural model where the judge plays an important role: he has more possibilities to sanction frivolous suits, can fix a time-schedule for the presentation of evidence; also, the *rito societario* has been abrogated. However, there are still several rigidities in the various phases of the procedure and no measures to ensure that the judge uses his powers to accelerate the case. |

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