FUNDAMENTALS OF ITALIAN LAW

edited by Alessandro Simoni and Alessandra De Luca

MVLTA PAVCIS AG
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CONTENTS

THE ITALIAN LEGAL SYSTEM AND EU LAW

ADELINA ADINOLFI

ITALIAN PRIVATE LAW AND ITS ROMAN LAW ROOTS

PATRIZIA GIUNTI

CODIFICATION OF PRIVATE LAW IN ITALY: A SHORT HISTORICAL SURVEY

IRENE STOLZI

PRIVATE LAW: SOURCES AND PRINCIPLES

SARA LANDINI

LABOUR LAW: AN OVERVIEW

SILVANA SCIARRA and WILLIAM CHIAROMONTE

THE ITALIAN MACHINERY OF JUSTICE

SARA BENVENUTI

BASIC FEATURES OF CIVIL PROCEDURE

Nicolò Trocker and Giacomo Pailli

CRIMINAL LAW: BASIC FEATURES AND PRINCIPLES

Michele Papa

CRIMINAL LAW: SELECTED OFFENCES

Francesco Macrì

CRIMINAL PROCEDURE

PAOLO TONINI and FRANCESCO MACRÌ

ADMINISTRATIVE LAW

DOMENICO SORACE and SIMONE TORRICELLI

BASIC FEATURES OF CIVIL PROCEDURE

Nicolò Trocker and Giacomo Pailli (*)

1. *The Legal Framework*

Civil litigation in Italy is governed by the code of civil procedure (*Codice di procedura civile*), which entered into force on April 21, 1942, and is still in force, albeit in a heavily amended form. The code of civil procedure of 1942 replaced the old French-inspired code of 1865 enacted at the time of Italy's political unification and imbued with *laissez faire* principles.

The code is divided into four books: the first is devoted to general provisions and general principles on topics such as jurisdiction, judge, parties, adversary system, standing; the second book regulates the ordinary proceedings, from the beginning to the decision by the Italian Supreme Court; the third book contains the rules for the execution of judgments; the fourth book is residual, containing everything that could not find place in the previous books, from special proceedings to provisional remedies, to the newly introduced "fast-track procedure".

Beyond the code, there are a number of other laws that introduce or regulate special proceedings, as the Law no. 300 of May 20, 1970 that contains provisions against anti-union activities by the employer on the workplace, or specific aspects of ordinary proceedings, as the Law no. 218 of May 31, 1995, on private international law. The Italian civil code dedicates provisions to civil procedure as well, such as rules on evidence (arts. 2697 ff.), the effects of judgments (arts. 2908 and 2909) or execution (arts. 2910 ff.).

Three other important sources should not be overlooked here: the Italian Constitution, which contains fundamental rules on the entire judiciary (Title IV of the Constitution, arts. 101 ff.) and on individual

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(*) Respectively Professor of European Civil Procedural Law and General Theory of Procedure, University of Florence, and PhD in Comparative Law, University of Florence.

rights (arts. 24 and 111); international law, with many international conventions on jurisdictional rules and other instruments, such as art. 6 of the European Convention on Human Rights, affecting civil procedure; and European law, which, through regulations and directives, is reshaping entire sectors of European civil justice.

2. *Italy's Dual System of Judicial Protection. "Rights" and "Legitimate Interests"*

Art. 24 of the Italian Constitution states: "Anyone may commence legal proceedings before a court of law to protect their rights and legitimate interests". A preliminary distinction has to be made with regard to rights and legitimate interests — a unique feature of Italian law — and to the distribution of jurisdiction among ordinary and administrative courts.

A party who decides to file a case has to make sure not to choose the wrong jurisdiction. This issue relates to the fundamental distinction existing in Italy between the ordinary civil jurisdiction and the special administrative jurisdiction. If the party vindicates a legal situation that may be defined as a "right" in the proper sense of the word, then the case can be heard by an ordinary court of first instance. But if the controversy involves what is considered to be a "legitimate interest" (*interesse legittimo*) that the party has on the basis of a relationship with any body, branch or agency of the State or local administration, then the case has to be filed before a Regional Administrative Tribunal (*Tribunale Amministrativo Regionale* — TAR) as a court of first instance.

Defining and distinguishing rights and legitimate interests in specific cases may prove to be a difficult task. In principle it can be said that a "right" becomes a "legitimate interest" when the administration is vested with a prevailing power to regulate the situation in the public interest (1). A mistake in defining the nature of the legal situation involved in the past used to have significant negative effects on the plaintiff's case. Currently, the party is simply referred to the right jurisdiction to continue the case, in principle without forfeiture of procedural rights.

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(1) On this distinction and present importance see also D. SORACE - S. TORRICELLI, *Administrative Law*, in this volume.

3. *First Instance Proceedings*

The Italian civil procedure system does not provide for a single form of adjudication, which instead depends on the specific remedies sought, the class of rights involved in the suit and the nature of the cause of action.

A party who intends to file a case in court, therefore, has to deal with the problem of choosing the procedure appropriate to the specific case. In order to rationalize the system and to simplify access to the courts, the recently introduced legislative decree no. 150 of September 1, 2011, tries to make sense of over seventy different procedures, channeling them into three basic "routes" to handle civil cases at the first instance level (2):

a) the ordinary procedure (*processo ordinario di cognizione*), arts. 163 ff. of the code of civil procedure (hereinafter CPC);

b) the labor disputes procedure (arts. 414 ff. CPC);

c) the newly created "fast track" procedure (labeled *processo sommario di cognizione*), arts. 702 *bis* ff. CPC.

3.1. *The Ordinary Procedure*

Designed by the framers of the code as a kind of general model, the ordinary procedure (*processo ordinario di cognizione*, governed by arts. 163 ff. CPC) has been restricted, over the course of time, in its scope of application.

As to its basic structure, the *processo ordinario di cognizione* can be divided into the following stages: 1) the *introductory stage* (which includes commencement of the proceedings and preparation of the case); 2) the *proof-taking* or *evidentiary stage*; 3) the *decision stage* (which regards the final exchange of pleadings between the litigants and the delivery of judgment).

The first and third stages are always necessary. This applies also to cases where the law does not provide any remedy for the claim presented by the plaintiff or the contention seems not to have any legal ground, or in case of lack of jurisdiction or of other procedural prerequisites, inactivity of the parties or abandonment of the proceeding. Instead, there is no second stage when the parties do not present any request for "evidence", the judge rejects all of them, or the claim

(2) In the absence of express provisions to the contrary, the rules governing proceedings before the *Tribunale* are also followed in proceedings before the *Giudice di pace*.

is based only on documents, so that there is no need for a specific hearing.

This is a general conceptual scheme. The structure of the ordinary proceedings of first instance can actually be more complex, because it can, and in the great majority of the cases it does, unfold in several hearings, the number of which is not regulated in advance by the law, but depends on the complexity of the case, the issues to be tried (on the merits or procedural), the evidence to be taken (where requested and admitted by the judge) and even more dramatically (or importantly) on the space left on the docket of the judge. This may easily lead to delays and, as we will see, it is not uncommon that, in practice, the time between the hearings can run up to several months or even years (3).

The introductory stage begins with a *citazione*, which is the first pleading and should state in detail the basis of the claim and the facts that, if duly proved, should grant the plaintiff a favorable judgment. The *citazione* must contain certain information (art. 163 CPC): the name of the court addressed, data on the parties and their lawyers, definition of the subject of the claim, statements of facts and law sustaining the case, with conclusions, documents produced, a first hearing return date for appearance, invitation to the defendant to duly file a statement of defense to avoid forfeiture of rights. In choosing the date of the first hearing, the plaintiff must ensure that the defendant has at least 90 days to prepare his defense. The date of the first hearing is chosen by the plaintiff and his lawyer but may be postponed by the court to the first available date for the judge to whom the case is assigned and which can be several months later. The *citazione* further includes the request for relief addressed to the judge, *i.e.* what judgment the judge is being requested to deliver.

The rationale for the requirements listed in art. 163 is twofold: on the one hand they ensure that the claim is clearly and completely identified by the plaintiff from the outset of the case in order to avoid uncertainties, prevent wasting time, and allow a quick assessment by the judge of the logical relevance of evidence. On the other hand, they provide the defendant with a detailed information not only about the

(3) A. Colvin - V. Vigoriti, *Italy*, in A. Layton - H. Mercer (eds.), *European Civil Practice*, 2nd ed., London, Thompson, 2008, 304 ff., at pp. 321-322. For statistical data on caseload and dockets crowding of Italian courts, see S. Benvenuti, *The Italian Machinery of Justice*, in this volume.

subject matter of the claim, but also about the specific facts at issue, the legal arguments proposed, and the evidence offered by the plaintiff (4).

The *citazione*, together with a copy, is then taken to an *ufficiale giudiziario* (court process server) for service on the defendant by the court. When service is made on the defendant, proceedings are deemed to have been instituted.

The plaintiff must then file the *citazione*, together with a file (*fascicolo di parte*) containing any relevant document, a document of registration of the suit (*nota d'iscrizione a ruolo*) and the payment of the applicable fees, with the appropriate office of the court, for its registration. At that moment, the President of the Court assigns the case to the appropriate section of the court and to a specific judge's docket. The assignment is made automatically on the basis of set criteria, with a limited margin of discretion by the President of the *Tribunale*.

Within a period of time fixed by the law (twenty days before the hearing indicated by the plaintiff for the first appearance of the parties in court), the defendant may file an answer (*comparsa di costituzione e risposta*, arts. 165-167 CPC). The answer is a written pleading that is roughly symmetrical to the plaintiff's complaint, containing all of the defendant's defenses. The defendant have different choices, depending on the strategy she wishes to follow: he or she may simply deny plaintiff's statements of facts and law or alternatively might develop affirmative defenses, by (analytically) stating new facts, presenting legal arguments and offering evidence supporting his vision of the case; finally, being the case, the defendant may also decide to file a counterclaim against the plaintiff (5).

Theoretically the initial pleadings of the parties, taken together, should present the judge and the parties with a complete view of the case, including opposing versions of the factual and legal issues. While this may be true in very simple disputes, usually the definition of facts (*thema decidendum*) and evidence (*thema probandum*) takes place both at the first hearing and in a written appendix, which may be (and quite often is) requested 'as of right' by each of the parties. During the written phase, which is composed of up to three written submission, the parties specify their defenses and statements of facts, take position

(4) M. Taruffo, *Civil Procedure and the Path of a Civil Case*, in J. Lena - U. Mattei (eds.), *Introduction to Italian Law*, The Hague *et al.*, Kluwer Law International, 2002, 159 ff., at p. 168.

(5) M. Taruffo, cit., at p. 167.

on the other party's claims and point all the evidence that they wish to bring to the proceedings (6).

If the defendant, though properly served, fails to file a defense and enter an appearance at the first hearing, she will be declared to be 'in default' (*in contumacia*). Under Italian rules, which differ from other European systems, the defaulting party does not automatically "lose" the case. In fact, the only consequence is that she will not be able to properly defend her case or present evidence. In other words, even in case of default, the plaintiff still has to prove her case, and the judge will decide the merits on the basis of the evidence presented and after due application of the law to the facts as established. The defaulting party can, at any time before closing of the proceedings, decide to enter an appearance and perform any act that is not barred by the stage in which appearance takes place.

At the first hearing, or at a special hearing after the written submissions have been filed, the judge issues an order, which in fact ends the introductory stage, giving instructions for the evidentiary stage (art. 183 CPC), unless, of course, the case involves purely legal issues and consequently can be disposed of immediately. In the order, the judge will decide whether to admit or not the evidence offered or requested by the parties and will set the calendar for the actual taking of testimonies, performance of inspections and all other evidentiary activities (art. 81-*bis* final provisions of the CPC).

It is worth emphasizing that evidence must be, in principle, offered by the parties: the Italian procedural system is, in fact, largely based on the adversary notion of party-presentation of evidence. To be sure, there are some types of evidence that can be ordered by the judge on its own motion. These are, for instance, expert evidence, some types of sworn statements, inspections of places or persons and requests of information from public bodies (see, *e.g.*, arts. 118, 191, and 240 CPC). However, in practice, these *ex officio* powers have little importance. From this point of view the Italian system "belies" its *inquisitorial* reputation (7).

When the subject matter of the case is defined and decision on admission of evidence has been rendered, one or more hearings will be devoted to the presentation of evidence. This stage can take months or

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(6) V. Varano, *Civil Procedure Reform in Italy*, in *American Journal of Comparative Law*, vol. 45, 1997, p. 657 ff., at p. 668.

(7) M. Taruffo, cit., at p. 168.

even years, unfolding in several hearings, depending upon several elements, such as the judge's ability to manage the evidentiary stage, its docket's crowding, the complexity of the case and the number of witnesses called by the parties and admitted by the judge.

The last stage (decision) takes place when the case is ripe to be decided. As a rule, the decision should be delivered by the same judge that held the evidentiary hearings. In some matters, as provided by the CPC, however, a panel of three judges (one of which would be that single judge) will deliver the decision by a majority vote.

Before the decision is issued, the judge calls upon the parties to submit their final statements in a brief (*comparsa conclusionale*), summing up their version of the case from a factual and legal point of view, writing their conclusions on the basis of the evidence gathered. This is, perhaps, the most important single written submission of the whole proceedings. After the exchange of these briefs, one additional reply is allowed (*memoria di replica*) and then the case is ready to be decided by the judge. While the judgment is usually delivered in written form, and then filed by the judge with its own office, there are instances in which the decision is declared orally in court by the judge, after an oral discussion with the parties' lawyers (art. 281-*sexties* CPC).

In practice from the last reply of the parties to the actual issuing of a written decision, it can take months or even years, depending on the workload of the judge. Once delivered, the judgment is immediately enforceable: this principle, aimed at avoiding excessive delays, was extended to the ordinary proceedings in 1990 from the rules governing labor disputes, where it was first established with a law of 1973 (8).

The enforceability can be stayed by the Court of Appeal (if the decision is appealed) upon motion by the interested party, if there are serious reasons, including the risk of bankruptcy of the judgment-creditor (art. 283 CPC).

With the decision, the judge also rules on the expenses of the proceedings. Italy follows the costs and fees shifting rule, which means that, in principle, the losing party must also pay the other party's attorney's fees, in the measure determined by the judge in the decision. In certain occasions, *e.g.* when both parties can be considered as partially losing, or in particularly complex disputes, the judge can decide for a different allocation.

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(8) V. VARANO, cit., at p. 670.

3.2. *Shortcuts in the Ordinary Procedure*

To avoid the length of ordinary proceedings and the several months or even years that can take to get a final decisions, various kinds of provisional remedies have been introduced since 1990 (usually taken from labor procedure). The aim is to provide party with some (provisional) protection of her rights and interests, without having to wait until the final decision is issued. These remedies can be requested during the normal course of the proceedings, if some conditions apply: (a) when the defendant does not deny that the plaintiff is entitled to a certain sum of money (art. 186-*bis*, order of payment of non contested sums); (b) when the party can offer written evidence that she is owed a certain sum of money or specified goods (art. 186-*ter*); (c) after the evidentiary stage is concluded, if the judge is persuaded that one of the parties has an established right to a certain sum of money or to specified goods (art. 186-*quater*) (9). All these measures, being provisional, can be repealed or amended in the final decision.

3.3. *The Procedure in Labor Related Matters and Its Extended Application to New Areas*

According to the 2011 "rationalization" of civil proceedings, the second main "route" to handle a large group of civil cases is provided by the procedure in labor disputes. This procedure has been extended in the course of time to other areas of social significance.

Aimed at reducing the delay and at improving efficiency of procedures, as well as re-shaping the balance in employer-employee litigation, the Law no. 533 of August 11, 1973 introduced a new type of procedure (arts. 414-447 CPC) for labor-related disputes and for disputes regarding social security benefits. In order to pursue these goals, the Law no. 533 of 1973 vested mandatory jurisdiction in the single judge courts, imposed strict statutory deadlines for key procedural steps, obliged the parties to reveal, in their first pleadings, the facts on which their claims are based, expanded the court's power to control the flow of proof, and required the parties to appear in person (to facilitate conciliation). Rather than contemplating the series of hearings and submission typical of the ordinary proceedings, the labor

(9) M. Taruffo, cit., at p. 168; V. Varano, cit., p. 671.

procedure is focused on one main hearing at which all evidence will be heard.

Its basic inspiring principles are "immediacy" (*i.e.*, a direct, personal and open relationship between the judge and the parties, witnesses and sources of proofs); "free" or "critical" evaluation of evidence, with a diminished role of *a priori* rules of exclusion or evaluation of evidence; and "concentration" of the case in a single oral hearing or in few closely spaced oral sessions before the court, after a careful preparation of the case. These principles should bring, as a consequence, to a more rapid unfolding of the litigation (10).

The labor proceedings start by filing a *ricorso* with the court by the interested party. As mandated by art. 414 CPC, the *ricorso* must state in detail the facts and the law on which the claim is based, together with the conclusions. It has, further, to specifically indicate "the evidence which the plaintiff intends to exhibit and the documents exhibited". Within five days from the date of filing, the judge should schedule the hearing for the appearance of the parties and discussion of the case.

The *ricorso*, together with the decree, must be then served on the defendant within ten days from the issuance of the decree and, in any case, at least thirty days before the scheduled hearing (art. 415 CPC). The defendant is required to file the defense at least ten days before the hearing in which, he or she may include counter-claims by asking the judge to amend its decree, issuing a new date of hearing (no later than fifty days after the original date) (art. 418 CPC).

At the hearing scheduled for discussing the case, the judge freely examines the parties attending the hearing and tries to reconcile the dispute. The parties' failure to attend the hearing, without any justified reason, constitutes a conduct that the judge may consider when deciding the case. For serious reasons, the parties may amend their claims, objections and conclusions as already filed, after being so authorized by the judge.

If the case is not settled and the judge deems the case ready to be decided, it invites the parties to discuss the case, and issues a judgment — also a non-final one — reading its holding at the hearing. Otherwise at this very same hearing, or in a hearing no later than ten days after, the judge decides on the admissibility of the evidence offered by the

(10) O.G. Chase, *Civil Litigation Delay in Italy and the United States*, in *American Journal of Comparative Law*, vol. 36, 1988, pp. 41 ff., at p. 75.

parties. The admission of evidence should be, as a principle, completed at the same hearing or, where necessary, at hearings to be held in the days immediately following.

One of the distinguishing features of the labor proceedings is the active role of the judge: the management of the case is mainly in the hands of the judge (art. 421 CPC). At any time of the proceeding, the judge may, on its own motion, order admission of any evidence, also beyond the ordinary limits set by the civil code. Upon a party's motion, the judge may also order access to the work place and examination of witnesses at the same place. The judge may also order witnesses' appearance to freely examine them on the facts of the case, including when witnesses could not otherwise testify pursuant to the exclusionary rules contained in arts. 246 and 247 CPC.

As noted above, the judge in labor disputes has also long been granted powers to issue provisional orders for payment of uncontested claims or of money-debt based on written evidence.

The provisions dealing with labor proceedings offer a model where the various procedural steps — filing of the pleadings, examination of the parties, attempt to settle the dispute, admission and presentation of evidence, decision — are meant to be carried forth without interruption or delay. Although such model is rarely enforced in its pure form, one reason being the lack of adequate support by an increase in manpower and administrative facilities, significant improvements have been achieved by the use of this procedural model in comparison with ordinary civil proceedings. While the average duration of the proceedings has been increasing over the years, labor cases still proceed more quickly than ordinary cases, and judgment is frequently delivered in roughly one year, or even some months, from the beginning of the case.

As noted, the procedural scheme of the Law no. 533 of 1973 has been extended in the course of the following years to cover other areas of social significance, such as the enforcement of laws prohibiting employment discrimination on the basis of sex, controversies in the area of commercial and residential leases and of contracts relating to the use of land (art. 477 CPC). The decree 150/2011 has further extended the labor procedure to eight additional areas of civil litigation, listed in arts. 6-13 of the decree, where the peculiar need for concentration and for a speedy resolution of the disputes deserve adequate consideration.

3.4. *The New Fast Track Procedure* (procedimento sommario di cognizione)

If the goal of civil justice is to effectively guarantee the protection of rights in a reasonable time at a reasonable cost, this goal cannot be pursued through the same model of procedure rigidly conceived as applicable in each and every case. This goal needs rather flexibility, needs different models of procedure to be adopted (and adapted) depending on the peculiarities of each individual case.

Such is the lesson of recent reforms introduced in European countries like England where the 1998 Civil Procedure Rules provide for three different tracks (the small claim track, the fast track and the multi-track) and France where a similar path has been followed by the *Nouveau Code de Procédure Civile*.

The *procedimento sommario di cognizione* of art. 702-*bis*, *ter* and *quater* of the CPC, introduced by the Law no. 69 of June 18, 2009, is the Italian way of providing a fast track for disputes that fall within the competence of the *Tribunale* sitting with a single judge and, because of their characteristics, can be disposed of by way of a "summary evidentiary" phase (11). The inspiring idea of the reforms was to provide a flexible procedural model adaptable to the peculiarities of individual controversies. On the one hand, the purpose of this new procedural tool is to avoid waste of resources and, in particular, the costs of the ordinary proceedings on the merits; on the other hand, it pursues the goal of assuring the effectiveness of judicial protection which would be endangered rather seriously if it were to be carried out exclusively by means of the ordinary procedure.

The *introductory phase* largely resembles the other types of proceedings: the parties must present their claims and defenses and indicate what will be their principal evidence. As regards the indications that the claim form (*ricorso*) must contain, art. 702-*bis* refers explicitly to those listed in art. 163, subsection 3, CPC. The notification scheme largely resembles the labor procedure: the *ricorso* is first filed with the court and then served upon the defendant along with the decree of the judge scheduling the first hearing.

The defendant enters appearance by filing her answer in which she is required to indicate all her defenses and take position with respect to

(11) On the 2009 reform, see R. Caponi, *Italian Civil Justice Reform 2009*, in *Zeitschrift für Zivilprozess International*, vol. 14, 2009, pp. 143 ff.

the facts on which the plaintiff based her *ricorso*, indicate the means of evidence that she intends to offer and the document that she exhibits, and indicate her conclusions. Under penalty of waiver, the defendant must file any counterclaim and raise any procedural objection or objections on the merits of the case that cannot be raised by the judge on its own motion.

At the hearing, the judge determines the appropriateness of the chosen track. If the elements presented by the parties (*i.e.*, the peculiarities of the case) are deemed as not requiring a "non-summary evidentiary phase", the judge orders the conversion of the fast track procedure into the ordinary one and schedules the hearing under art. 183 CPC.

If the case can be disposed of in the fast track procedure, the management of the case is mainly in the hands of the judge, the expectation being that this will greatly increase the efficiency of disposition of the case. Art. 702 *ter*, under the heading "proceedings", provides little more than a general guideline stating that the judge "after hearing the parties, omitted any formality which is not indispensible for complying with the principle of parties' equal opportunity to defense, proceeds in the way deemed more proper to accomplish the evidentiary acts which are relevant in relation" to the object of the requested decision and, by order, grants or denies the claims.

The provision makes clear the main goal of the new type of proceeding, which is that of reaching substantially correct outcomes, but by the use of no more than proportionate resources and within a reasonable time. The decision (*ordinanza*) of the court is immediately enforceable and constitutes title for the registration of judicial mortgage.

Hardly coherent with the procedure's main goals of reducing delay and improving efficiency is the provisions in art. 702-*quater*, whereby new evidence can be introduced on appeal, although only "when the court considers them indispensible to decide the case".

As already mentioned, the recently adopted decree on "simplification" of October 2011, considers the fast track procedure the third main avenue to handle civil disputes. In a partly modified version the procedural model has been extended to a variety of civil matters (listed in arts. 14 to 30 of the mentioned decree).

The most important differences are that the possibility to file an appeal against first instance decisions is excluded in certain matters, and that the assignment to the fast track is made in the abstract by the

legislator, not on a case by case basis by the judge. This is a sign of the reformers' high expectation that the new *procedimento sommario di cognizione*, because of its simplified and flexible structure, might lead to a significant improvement of the quality of Italian civil justice.

While the three main types of procedure that have been illustrated certainly cover the major portion of civil cases, there are also other types of proceedings used in special areas. The most important ones are the procedures related to divorce and family matters and to matters concerning minors and the proceedings dealing with bankruptcy and insolvency.

4. *Appeals*

4.1. *Appeal against First Instance Judgments*

Decisions rendered by the *Tribunale* may be appealed as of right before the *Corte d'Appello*: no leave is required. Although not part of an explicit constitutional guarantee, the right to appeal, just as in other European countries, is deeply rooted in the tradition of the Italian legal system, as is the belief in the error preventing and error correcting role of appeals.

The appeals heard by the *Corte d'Appello* are in the nature of a *de novo* review, involving a review of the case on facts and law and not limited to questions of law. New claims, however, cannot be introduced on appeal. After a recent reform (law decree no. 83 of June 22, 2012) new evidence can be introduced only if the party proves that it could not offer them in the first instance for a cause not referable to her.

Within the limits of an effectively proposed appeal, the court substitutes its own decision for that of the court below, no matter whether the latter is affirmed or reversed.

The appeal is the phase of civil proceedings that is experiencing the longest delays. With the aim of reducing the number of appeals effectively heard by the courts, the legislator introduced in 2012 a so-called filter, allowing the court to quickly dispose by way of a summary order of appeals that do not appear to have "reasonable chances of being successful" (arts. 348-*bis* and *ter* CPC).

4.2. *Appeal to the Supreme Court (*Corte di Cassazione*)*

Appellate judgments, or judgments which may not be brought before the intermediate appellate courts, can be challenged before the

Italian Supreme Court (*Corte di cassazione*). Based on the French model of cassation, the *Corte di cassazione* is a so-called court of "legitimacy". This means that appeal to the last instance is allowed only on points of law, both procedural or substantive. Proceedings before the Court are not a third hearing on the merits, but rather the assessment of various errors allegedly committed by previous courts in reaching their decision. Whilst the evaluation of facts cannot be challenged, the *Corte di cassazione* is entitled to review the application of the law by lower judges. As the supreme organ of justice, the *Corte* is entrusted with the function of "assuring the exact observance and the uniform interpretation of law, the unity of national law".

The main role of this court, thus, is to check whether the lower courts interpreted and correctly and validly applied substantive and procedural rules.

When the Supreme Court finds that the appeal is well-grounded, it usually quashes the judgment and then sends the case back to a lower court (usually at the appellate level) for a new judgment. The Supreme Court states the legal rule that the lower court is required to follow when making its new decision on the case.

The court cannot normally render the judgment on its own, except where the judgment is reversed for violation or misapplication of rules of law, which the *Corte* can then apply correctly to the finding on facts made by the lower court, and render a final decision (art. 384 CPC). Although in Italy there is no formal doctrine of *stare decisis*, the Supreme Court's decisions do enjoy a strong *de facto* persuasive authority among lower judges (12).

It is worth stressing that, unlike the right to file an appeal against first instance judgments, there is a constitutional right to review by the *Corte di cassazione*. According to art. 111, subsection 7, of the Constitution "final appeal shall always be allowed to the *Corte di cassazione* on ground of violation of law, against judgments as well as rulings affecting personal liberty, whether rendered by courts of ordinary or special

(12) As Sergio Chiarloni forcefully notes, "the *Corte di cassazione* is no longer able to guarantee the equal treatment of parties throughout the country, the predictability of its decision and the high prestige of its members as supreme judges. Instead, the Court has become a sort of judicial supermarket, wherein lawyers can often be sure to find any precedent they need to plead the case of their client". S. Chiarloni, *Civil Justice and its Paradoxes: An Italian Perspective*, in A.A.S. Zuckerman (ed.), *Civil Justice in Crisis*, Oxford, Oxford University Press, 1999, pp. 263 ff., at p. 267.

jurisdiction". Due to the expansive use of this guarantee and the broad grounds of review indicated in the code, the Supreme Court is flooded every year by thousands of cases.

Recent attempts to limit the workload of the Supreme Court include the provision of a simplified proceeding in chamber to decide applications that are inadmissible or manifestly unfounded (arts. 375 and 380-*bis* CPC) and (since 2009) the "filtering device" of the newly introduced art. 360 *bis* CPC whereby applications (appeal) are declared inadmissible where "(a) the challenged decision has decided the issues of law consistently with the jurisprudence of the Court, and the exam of the grounds (of the application) does not offer elements to confirm or amend the same opinion" and "(b) when the challenge concerning the breach of principles governing due process is manifestly groundless".

5. *Summary Proceedings and Provisional Remedies*

5.1. *Summary Proceedings*

Summary proceedings cover a wide range of disputes and share the concern to achieve some measure of proportionality between the nature of the dispute and the resources expended for its resolution. They also reflect the awareness that there are demands of particular substantive objectives, which cannot be served except through the purposeful shaping of process to an area of law.

By far the most important, as well as the most frequently resorted to, among the various types of special procedural mechanisms, is the debt collection summary *ex parte* proceeding (*procedimento di ingiunzione*) regulated by arts. 633-656 CPC.

The procedure is accessible to creditors that have written evidence of a right to payment of a specific amount of money or to the delivery of specific movable goods. By means of a judicial decree, the creditor may obtain an order *ex parte* (*i.e.*, without hearing from the debtor) in a few days; the decree can be immediately enforced, upon a specific order by the judge, if the claim is supported by certain documents (*e.g.*, a promissory note); in other cases, the decree can be enforced if the debtor does not oppose the order within forty days.

Insurance contracts, multilateral promises made by private writings and telegrams, as well as computer documents, are suitable written evidence from which the existence of the claimed credit may be

inferred (art. 634 CPC). Certified abstracts of book-keeping entries, where they concerns services performed by businessmen, are also considered written evidence and may be used pursuant to art. 634 to obtain a payment order, allowing the creditor to commence execution proceedings.

In order to understand the practical importance of this peculiar form of special procedure, one should consider that in the great majority of cases, summary payment orders are not opposed by the debtor, *i.e.* they become final and can be executed without being converted into an ordinary proceeding on the merits (which, instead, happens if the debtor challenges the order). This means that for the protection of creditors the system provides a rapid and effective remedy. It should also be noted that every year, in Italy, the system of courts issues more orders for payment (*decreti ingiuntivi*) than judgments after ordinary proceedings.

Resort to summary adjudication has increased in the course of time and has also been encouraged by the legislator who has introduced an extended variety of remedies. Examples are the special summary proceedings for the economic support of children pursuant to art. 148 of the Italian civil code (whereby the judge can order part of the parent's income to be paid directly to the other parent or to the person supporting the child); the one provided in art. 28 of the Law no. 300 of May 20, 1970, which offers rapid judicial protection against anti-union activities performed by the employer; the eviction procedure regulated by arts. 657-669 CPC that helps landlords to obtain a title to evict a tenant at the end of the lease or in case the tenant is defaulting on payment of the lease. Some of these areas have now been transferred to the labor or the new fast track procedure in its modified version.

5.2. *Provisional Remedies*

The Italian legal system offers a sophisticated apparatus of provisional remedies, ranging from traditional measures of attachment, to various specific remedies scattered throughout the code and in special statutes, to intellectual property protection, unfair competition, labor disputes, family matters, to the "catch-all" provision of art. 700 CPC that allows a court to grant "urgent relief" when there is danger of an immediate and irreparable harm and no other specific remedy is available.

Art. 700 provides that "the party who fears that, during the time necessary to enforce his right in an ordinary proceeding, this right may be irreparably damaged, may file a motion pursuant to art. 700, requesting the judge to take the measures which appear more adequate to ensure that the judgment on the merits — that he will be able to obtain at the end of an ordinary proceeding — will be effective".

The judge grants the motion under art. 700 if: (i) there is no other precautionary measure provided by the law, which could be used to avoid the irreparable damage alleged by the party and obtain the relief sought, and protecting such right through an ordinary proceeding would take too long and be incompatible with the urgent needs of the party; (ii) the party has a right that would be enforceable in an ordinary proceeding; (iii) the party's right appears, on the basis of a preliminary analysis, existent (*fumus boni iuris*); (iv) during the time needed for the ordinary proceeding the party's right would be irreparably damaged (*periculum in mora*) (13).

The areas where art. 700 CPC finds the most frequent applications are rights of personality (*e.g.*, right to name, privacy, honor, personal identity); rights of employee against employer (upon dismissal or against discrimination or unlawful transfers); rights to essential public services (*e.g.*, water, gas, and electricity); and fundamental rights in general (*e.g.*, right to assembly, freedom of expression).

All these rights, that cannot be adequately compensated by an *ex post* violation monetary redress, would be deprived of adequate protection if art. 700 CPC did not exist. As an acute foreign observer noted "in expanding on long-held powers to order provisional relief, the Italian courts are finding a way of doing justice in spite of the imprisonment by delay of the traditional process of civil litigation" (14).

Other provisional remedies, requiring a timely commencement of the action on the merits, include (15):

— judicial seizures (art. 670 CPC): for instance, of movables or immovables when their property or their possession is under dispute and it is necessary to take care of their custody or temporary management; or of books, registers, documents, models, samples and any other thing that can serve as evidence in a later proceeding, when the right to

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(13) S. Grossi - M.C. Pagni, *Commentary on the Italian Code of Civil Procedure*, New York, Oxford University Press, 2010, at p. 477.

(14) O.G. Chase, cit., at p. 73.

(15) See S. Grossi - M.C. Pagni, cit., at pp. 466-67.

their exhibition is under dispute and it is proper to have a temporary custody;

— conservative seizures (art. 671 CPC): the judge may authorize, upon motion by the creditor who has justified fear to lose the security of his credit, the (conservative) seizure of debtor's movables or immovables or of the sums due to the debtor. In this way, the creditor should be able to execute any judgment against the debtor over those assets. As a consequence of the seizure, the debtor is deprived of the right to freely dispose of the seized assets; and any disposal of the seized assets which he may accomplish is not effective towards the creditor.

The law also provides in many instances that, once an ordinary proceeding has been commenced, the court may grant an interim and urgent relief, anticipating (part of) the content of the final judgment, as in the case of the provisional order of maintenance for persons in need, pending trial on the existence of such right (art. 446 Italian civil code); the order granting up to four fifth of the final judgment, when a victim of a traffic accident is in need (art. 147, legislative decree no. 209 of September 7, 2005); the order for interim reinstatement of an employee belonging to a trade union, pending trial on the legitimacy of the dismissal; the order restraining a party from continuing a trademark or copyright use pending trial on the violation of such intellectual property right (art. 131, legislative decree no. 30 of February 10, 2005 and art. 163, Law no. 633 of April 22, 1941).

To sum up, depending on their nature and effects, provisional remedies can be divided in two macro-categories: conservatory and anticipatory measures. Conservatory measures, *e.g.* attachments, are mainly aimed at preserving the *status quo*, both in law and fact, to ensure that the trial on the merit is properly carried out and that a final judgment on the merit could be enforced. Anticipatory measures, as art. 700 CPC, have as their purpose to anticipate the temporary and urgent satisfaction of the alleged right, given that the time to reach a final judgment on the merit could, otherwise, irreparably frustrate the applicant's rights.

After the reform of 2006, this distinction has been formalized in that conservatory measures automatically expires if an action on the merit is not commenced within a given term, while anticipatory measures are not conditional upon the institution of a subsequent action. In practice, these orders can often put an end to the dispute, since the claimant's right is satisfied and the addressee could have no interest in disputing the interim relief in long-lasting ordinary proceedings.

6. *Alternative Methods of Dispute Resolution*

While art. 24 of the Italian Constitution grants the right of everyone's to access a judge to defend his or her rights, in Italy there are several (more or less successful) alternative methods of dispute resolution.

One of this is voluntary arbitration. The code of civil procedure devotes specific provisions to domestic arbitration, ruling upon, *e.g.*, the choice of arbitrators, the fundamental principles governing proceedings, and the form, effects and recognition of an arbitral award. These are not all mandatory rules. According to a principle of autonomy, the parties may choose an arbitration that follows the procedural rules stated in the code (*arbitrato rituale*) or an arbitration that is managed by the arbitrators (*arbitrato irrituale*). The parties may also choose whether to bind the arbitrators to decide according to the law or to let them decide the case according to equitable standards (16). Italy is also part of the 1958 New York Convention on international arbitration, whose rules supersede domestic rules on arbitration.

In recent years, Italy, as part of a European trend, has witnessed an increase in out-of-court mechanisms of dispute resolution, based on the growing awareness that the machinery of State justice is unable to meet an ever growing demand of justice. In a number of specific areas — labor, telecommunication, bank, family — there are conciliatory procedures that aim at favoring settlements. In some areas the possibility to resort to the judge is made conditional upon the completion (with a negative outcome) of the conciliatory procedure.

The legislative decree no. 28 of March 4, 2010, (implementing Directive 2008/52/EC of the European Parliament and the Council of May 21, 2008), started a new era regarding mediation. All aspects covered by the Directive were introduced in the national system: out-of-court mediation, court annexed mediation, enforceability of mediation agreements, confidentiality, the regulation of the effects of mediation on limitation and prescription periods. The decree also provided for a mandatory mediation attempt for a large number of matters as a requisite to institute judicial proceedings. This part of the law was quashed by the Constitutional Court on a technical profile in

(16) M. Taruffo, cit., at p. 162.

2012 (17), but was reinstated by art. 84 of the Law decree of June 21, 2013, no. 69, as converted by Law of August 9, 2013, no. 98.

While mediation could be, in the long term, an useful addition to the measures aimed at lowering the pressure on an over-burdened judiciary, one should not underestimate that the development of a true ADR culture still faces in Italy, as it does in much of Europe, significant restraining factors: above all, the widespread perception of the intervention by the judge as the normal way of disposing of civil controversies.

7. *Class Actions*

One cannot end this brief overview of Italian civil procedure without mentioning the recent development represented by the introduction of the "Italian class action" with the Law no. 99 of July 23, 2009. Such new procedure features an *opt-in* class action, intended to be used by consumers or users (including through associations) against companies and corporations, to vindicate serial injuries to certain contractual rights or certain wrongs.

The first element that should be underlined is that the Law of 2009, breaking with past experiences, does not provide for a "collective" action allowing grouping of individuals, but a true "class" action, whereby an individual takes the initiative and act for a whole class of persons similarly situated.

The goal pursued by the legislator is, thus, to allow a more effective handling of complex litigation and enable protection of consumers against serial harms that might have a low individual economic value, but represent a considerable loss for the society at large.

The weakest point of the new procedure is, perhaps, the *opt-in* participation system, which requires members of the class to expressly manifest their desire to be included in the class, leading to much smaller classes if compared to the *opt-out* American model.

In any case, the mechanism is relatively new and its success will depend on the way judges and lawyers will handle this new tool, and how they will correct some of its legislative weaknesses.

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(17) The basic argument was that the legislative decree exceeded the boundaries set by the law of the Parliament delegating the Government to develop and adopt a legislative decree on mediation.

Further reading

M. CAPPELLETTI - J.M. PERILLO, *Civil Procedure in Italy*, The Hague, Martinus Nijhoff, 1965.
S. CHIARLONI, *Civil Justice and its Paradoxes: An Italian Perspective*, in A.A.S. ZUCKERMAN (ed.), *Civil Justice in Crisis*, Oxford, Oxford University Press, 1999, pp. 263 ff.
A. COLVIN - V. VIGORITI, *Italy*, in A. LAYTON - H. MERCER (eds.), *European Civil Practice*, 2nd ed., London, Thompson, 2008, pp. 304 ff.
S. GROSSI - M.C. PAGNI, *Commentary on the Italian Code of Civil Procedure*, New York, Oxford University Press, 2010.
M. TARUFFO, *Civil Procedure and the Path of a Civil Case*, in J. LENA-U. MATTEI (eds.), *Introduction to Italian Law*, The Hague *et al.*, Kluwer Law International, 2002, pp. 159 ff.
N. TROCKER - M. DE CRISTOFARO (eds.), *Civil Justice in Italy*, Tokio, Jigakusha, 2010.
V. VARANO, *Civil Procedure Reform in Italy*, in *American Journal of Comparative Law*, vol. 45, 1997, pp. 657 ff.

For sake of brevity, we did not deal in this brief overview with procedures for enforcing final judgments. Suffice to say that enforcement proceedings see an increased involvement of court offices, and largely vary depending on their goal (monetize the judgment-debtor's assets or ensure her compliance with an order to do or to refrain from doing something).
Unfortunately, also enforcement proceedings experience inefficiencies and long delays. For further information, see M. LUPOI, *Italy*, Alphen aan der Rijin, Kluwer Law International, 2008, pp. 192 ff. (International Encyclopaedia of Laws), pp. 219 ff.