

# A COMPARATIVE ANALYSIS BETWEEN ITALIAN CIVIL PROCEEDINGS AND AMERICAN CIVIL PROCEEDINGS BEFORE FEDERAL COURTS

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## I. INTRODUCTION

Comparative analysis of civil proceedings requires an in-depth study of the structure and most distinguishing elements of each country involved. It has the goal of identifying the rationales and features that make each country unique.

It is commonly misconceived that common law systems rely solely on the authority of precedent and civil law systems rely only on the authority of statutes and codes.<sup>2</sup> This article demonstrates that the Italian and the U.S. legal systems are not purely inquisitorial nor purely adversarial, but that they share similarities and can learn from each other.<sup>3</sup>

In the adversarial system in the United States, the judge plays a relatively passive role in the proceeding. Facts and evidence are gathered by the parties and finally judged by a jury, a body of ordinary citizens instructed as to the applicable law by the judge, who will eventually render a judgment on the basis of the jury's decision - the *verdict*.

In the United States, not all cases are tried through a jury trial. Some cases are decided by judges without a jury, either because the case is in an area where there is no right to a jury trial, or because the parties have waived their right to a jury trial. In such cases, the judge's role is still much more passive than it would be under the inquisitorial system. Some common law countries other than the United States have gone much further in eliminating jury trials in civil cases.

On the contrary, in inquisitorial systems like the Italian one, the judge plays a more active role in the proceeding. The jurist instructs the parties on how to proceed, grants or denies their requests for time limits and admission of evidence, and eventually decides upon facts and evidence, without any jury.

However, the Italian and the U.S. civil proceedings share many more

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2. See CHARLES F. ABERNATHY, *LAW IN THE UNITED STATES, THE MIXED SYSTEM OF CODE-BASED AND COMMON LAW IN THE UNITED STATES* 3 (2006).

3. The present analysis shows how the Italian legal system is not purely *inquisitorial* and the U.S. legal system is not purely *adversarial*.

commonalities than one could expect. This may be because the U.S. legal system is not purely adversarial and the Italian legal system is not purely inquisitorial. There are many similar, if not identical, mechanisms and techniques for identifying the relevant facts and evidence and applying the substantive law to facts.

Some mechanisms are more efficient than others, but the many similarities between the two systems suggest that a hybrid model could be proposed for adoption.<sup>4</sup> The presence or absence of a jury and the differences in discovery procedures are not incongruous enough to preclude adoption of common procedural rules and models.<sup>5</sup>

### *1.1 A brief description of the adversarial and inquisitorial systems*

As a general rule, the adversarial system of common law countries is lawyer-centered. Lawyers are the protagonists of lawsuits; by their continuous confrontation and “fight,” lawsuits get resolved. In theory, the judge plays a passive role by enforcing procedural rules (including rules of evidence) and leaving the initiative to investigate and present the case to the parties through their lawyers.<sup>6</sup>

In other words:

Civil litigation in the United States is presented and defended primarily by advocates for the parties, with the judge serving in a relatively passive role. Theoretically, the parties bear the entire responsibility for presenting the law and the facts; the judge is obliged merely to affirm or reject the parties' contentions. For this reason the American system is called the adversary system. Most other modern legal systems employ what is usually called the inquisitorial system, meaning only that the initiative rests with the judge for developing the facts of a case and the governing legal principles.<sup>7</sup>

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4. For further consideration of the possibility of adopting a unique set of rules of civil procedure, see G. C. Hazard, Jr. et al., Joint American Law Institute/UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure, Int'l Inst. for the Unification of Private Law, Study LXXVI - Doc. 12 (Feb. 2004).

5. In this respect, see also Rolf Stürmer, Transnational Rules of Civil Procedure Feasibility Study, Int'l Inst. for the Unification of Private Law, Study LXXVI - Doc. 1, at 10 (Feb. 1999).

6. In the U.S. system, in jury trials, the role played by the Italian judge is split between the judge and the jury. The jury, of course, plays an even more passive role than the judge. Even in cases where the U.S. judge acts as a finder of fact, and where it would be theoretically possible for him to play a role similar to that of an Italian judge, the U.S. judge continues to adopt an essentially reactive role, leaving the initiative to the parties' lawyers.

7. Geoffrey C. Hazard, Jr. & Michele Taruffo, AMERICAN CIVIL PROCEDURE: AN

The Federal Rules of Civil Procedure and their changing interpretation by case law, as well as the Italian rules of civil procedure and jurisprudence, make it clear that judges have strong powers in both proceedings.<sup>8</sup> In both cases, lawyers have the power to shape claims, defenses, and evidence to submit to the judge or jury who will eventually evaluate them. Therefore, neither of them can be considered truly adversarial or truly inquisitorial.

Particularly in the American legal process, judges are taking a more active role and discretionary approach to pretrial case management.<sup>9</sup> On some occasions, United States federal judges may have more discretion than Italian judges because their powers are not regulated. For example, in settlement conferences, the “informal” case management tool, a trial judge has “a level of control and a degree of discretion that strain the boundaries” of the traditional role because the customary litigant input or legal criteria are missing.<sup>10</sup>

### *1.2 Efficiency and fairness as terms of the comparative analysis*

Efficiency and fairness are terms used by the present comparative analysis to evaluate the main legal devices adopted by the two legal systems and to identify the best solution which each of them may have adopted. It is therefore necessary to illustrate the concepts and ideas behind the words “efficiency” and “fairness.”

Any expert or practitioner studying a civil procedure rule or mechanism would question whether it is efficient and fair. In other words, the practitioner would ask to what degree the rule was overly time and cost consuming, and whether it is fair considering the position and interests of all the parties in the proceeding.

A proceeding can last for years and is often expensive both for the parties and the state. Therefore, the rules governing the proceeding should frame mechanisms which are the least time and cost consuming. A lengthy and expensive device will not be efficient.

Efficiency is a term that is not difficult to define. Everybody has an idea of what is efficient and what is not. Usually, all the parties in a proceeding, even when they have opposing interests, would likely come to the same conclusion as to what is efficient.

This article adopts the meaning of efficiency as a device that, all else being equal, is the least time and cost consuming. This definition measures efficiency in terms of costs and time; similar procedural devices are judged on the time and costs required to achieve the same result. The less

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INTRODUCTION 86 (1993).

8. On the powers of Italian judges, see CRISANTO MANDRIOLI, *DIRITTO PROCESSUALE CIVILE* 68, Torino, 2007.

9. Johathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *YALE L.J.* 27, 90-91 (2003).

10. *Id.* at 30.

expensive and time consuming they are, the more "efficient" they are considered. The necessity to frame fast and cheap civil procedure devices, however, should not lead a legislature to frame civil procedure rules which prevent reasonable, well grounded, and "fair" solutions.

Compared to the concept of "efficiency," the concept of "fairness" is much more complicated and what is fair is often debatable. Usually, scholars and practitioners have been more concerned about efficiency than fairness. However, while efficiency is undoubtedly an important concern, fairness is paramount not only of litigants, but also of society and for the acceptance of the rule of law.<sup>11</sup> Some have defined "fairness" as meaning "having one's 'day in court,' if desired," and "having rewards and penalties based on actual damages."<sup>12</sup> Whichever definition may be correct, the concept of "fairness" immediately evokes the concept of "due process," as the U.S. Supreme Court has often stated.<sup>13</sup>

There may be different views as to what the due process rule means and what its scope and limits are. The United States and Italy have adopted different provisions concerning "due process" and "fairness." Therefore, it is not possible to adopt "due process" as a term of comparison in the present analysis. Rather, a common nucleus of shared values might be identified and adopted as the definition of "fairness" in order to state whether a specific rule, requirement, mechanism, or proceeding is "fair."

The Fifth Amendment of the U.S. Constitution provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law." Clause one of the Fourteenth Amendment of the U.S. Constitution provides, "No State shall . . . deprive any person of life, liberty, or property without due process of law."<sup>14</sup> These provisions and the required elements of due process have been construed as those that "minimize substantively unfair or mistaken deprivations of property" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.<sup>15</sup> The core of this requirement is notice and a hearing before an impartial tribunal. The concept of due process has been developed through the idea of "fundamental fairness," which has been illustrated by case law.<sup>16</sup>

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11. Robert M. Howard, et. al., *Pre-Trial Bargaining and Litigation: The Search for Fairness and Efficiency*, 34 *LAW & SOC'Y REV.* 431 (2000). See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (noting that, regardless of the outcome, if litigants perceive the process as fair, then there is general acceptance of the outcome, and hence compliance with the law).

12. See Howard, *supra* note 11, at 433.

13. See, e.g., *Schall v. Martin*, 467 U.S. 253, 268 (1984); *S.D. v. Neville*, 459 U.S. 553, 556 (1983). See also Howard, *supra* note 11, at 432.

14. The difference between the Fifth and the Fourteenth Amendment is that the Fifth Amendment applies to the Federal Government only, while the Fourteenth Amendment applies to the states.

15. See *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

16. *Republic of Aus. v. Altmann*, 541 U.S. 677, 717 (2004). See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007).

Unlike the United States version of due process, which is defined in very general terms, the Italian legal system does not contain any guidelines as to its scope and limits which continue to be set by judges. The due process rule under Article 111 of the Italian Constitution defines due process by listing some rights and guarantees which are considered fundamental elements of due process. However, the list of rights and guarantees under Article 111 of the Italian Constitution is not exhaustive,<sup>17</sup> and Italian judges have helped in expanding and better clarifying the list under Article 111.<sup>18</sup>

Article 111 makes it clear that confrontation and parties' rights to defense (the parties' rights to present their case, objections, and answers) are considered essential elements of "fair play," and are essential elements of due process. A reasonable duration of the proceeding is also considered an element of due process. The duration of the proceeding should not be considered in the abstract but with respect to the specific circumstances of the case to ensure that the proceeding be fast, but not superficial.<sup>19</sup>

Pursuant to the sixth paragraph of Article 111, all judicial decisions shall state the rationale for the decision in order to make judges accountable to the public. The rationale for the judgment is considered fundamental for the party intending to challenge the judgment because it gives that party an actual opportunity to identify the weak points of the judgment. The judgments, however, should not contain any possible dissenting opinion.

Considering the foregoing and relevant case law construing the due process provisions in both legal systems, it is possible to identify commonalities among the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 111 of the Italian Constitution in that each serve notions of fairness. Specifically, both legal systems consider the following elements to be part of the concept of fairness: (1) fair notice and fair warning; (2) a hearing before an impartial judge; (3) rationality of the proceeding and of the measures adopted; and (4) fair play.

"Efficiency" (in terms of time and cost) and fairness are interrelated concepts. For instance, a high cost proceeding may be unfair if it forces the

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17. For a more comprehensive description of due process rule under art. 111 of the ITALIAN COST., see Alessandro Andronio, COMMENTARIO ALLA COSTITUZIONE 2099 (R. Bifulco et al. eds., Torino 2006).

18. Art.111 of the ITALIAN COST., in the relevant part dealing with civil proceedings, provides that "(1) Justice must be administered by fair trials defined by law. (2) Trials are based on equal confrontation of the parties before an independent and impartial judge. The law has to define reasonable time limits for the proceedings. . . . 6) Reasons must be stated for all judicial decisions." (in Italian, it reads "(1) La giurisdizione si attua mediante il giusto processo regolato dalla legge. (2) Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata...(6) Tutti i provvedimenti giurisdizionali devono essere motivate . . .").

19. In any event, the way the provision is written, and the use of the adjective "reasonable" does not make the provision a valid instrument to combat the excessive duration of proceeding in Italy.

parties to spend more resources than necessary. The present study treats the two concepts of efficiency and fairness separately and identifies when the one occurs a consequence of the other. For example, unfairness may be a consequence of inefficiency, and vice versa.

## II. GENERAL OVERVIEW OF THE ITALIAN PROCEEDING<sup>20</sup>

### 2.1 *The courts and selection and appointment of judges*

Federal courts analogous to United States federal courts do not exist in Italy. Instead, there are various *tribunali*<sup>21</sup> which are located in various districts, and various *corti d'appello*<sup>22</sup> located in the different Italian provinces. There is only one court of last resort for the territory, *Corte di Cassazione*,<sup>23</sup> which is located in Rome.

Courts are divided according to their specialties; there are civil courts, criminal courts and administrative courts. There is one *Corte Costituzionale*,<sup>24</sup> whose task is to ensure that any law provision complies with the Constitution and is construed accordingly. If a party believes that an existent and applicable law breaches any provision of the Constitution, it can file a motion before *Corte Costituzionale* through the judge of the pending proceeding where the issue has been raised. The party asks whether a conflict exists between the applicable law and the Constitution and, if so, requests repeal of the inconsistent law.

Whether specific litigation should be commenced before a specific court (e.g. civil court) is an issue of jurisdiction that can be solved by applying the relevant law provisions. On the contrary, identifying the proper court within a specific jurisdiction is a question of "venue" ("*competenza*"), which can be decided on the basis of the applicable law provisions concerning venue.<sup>25</sup> The judges of first instance courts are appointed by public examination for which a law degree ("*laurea*") is required.

20. See also *infra* App. A.

21. Tribunale (Trib.) is the court of first instance in Italy. Giudice di Pace (Justice of the Peace) is the first instance judge with jurisdiction over claims not exceeding EUR 2,500.

22. Corte d'Appello (Corte app.) is the appellate court in Italy, which can review the judgments rendered by the court of first instance (Tribunale).

23. Corte di Cassazione (Cass.) does not review the facts, but only the law, that is, the application of the applicable law provisions to facts, as accomplished by the lower courts. Cass. has no discretion on whether to hear a case. Once the motion for review (*ricorso in Cassazione*) has been filed and it complies with the applicable law provision., Cass. will hear and decide the case See ICCP art. 360.

24. Pursuant to art. 134 of the ITALIAN COST., Corte Cost. decides (i) disputes concerning the constitutionality of laws and acts with the force of law adopted by state or regions; (ii) conflicts on the allocation of powers between branches of government within the state, between the state and the regions, and between regions; and (iii) accusations raised against the president in accordance with the constitution. *Id.*

25. Art. 7 C.P.C.

After earning a law degree from a university, applicants can take the exam to become judges.<sup>26</sup> Those who become judges usually have not practiced as lawyers and do not consider themselves lawyers. They usually have little, if any, experience lawyering and managing cases and they must learn how to deal with them. However, most of the time, even after many years of experience as judges, they will still be missing this important piece of experience which could lead them to adopt a more practical and efficient approach to cases.

The judges are autonomously represented by the Consiglio Superiore della Magistratura (“CSM”). This body is chaired by the President of the Republic. Its membership consists of the President and the Public Prosecutor of *Corte di Cassazione* and university law professors and attorneys at law with fifteen years of experience.<sup>27</sup>

The judiciary is, therefore, an independent body. Judges are mainly chosen by merit through public exams. They have a law degree and are specifically trained to do their job. And unlike the appointment process in the United States, the Italian executive branch does not take part in the process of selecting judges.

### *2.2 Personal and subject-matter jurisdiction and venue: detailed provisions with no ambiguity as to their scope*

In domestic litigation, there are no particular problems in identifying the personal and subject-matter jurisdiction of courts since the relevant provisions of the Italian Code of Civil Procedure (“ICCP”) set the jurisdictional criteria with great specificity. On the contrary, in transnational litigation, Italian International Private Law no. 218/1995 applies. Its provisions on jurisdiction may sometimes be ambiguous and raise issues of interpretation. Once jurisdiction over a case has been established, the ICCP sets the conditions to identify the proper venue of litigation. These provisions are very detailed.

### *2.3 Main structure of the civil proceeding*

The Italian civil proceeding is either directed by a judge or a panel of judges.<sup>28</sup> Parties may exchange pleadings and eventually discuss their case

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26. However, they usually prepare for taking that exam by attending special schools and courses, and this could take a substantial amount of time (two years or more).

27. Two-thirds of CSM’s members are elected by various ordinary judges, and one-third are elected by the Joint Sitting of the Senate and the House of Representatives of the Parliament. In addition, CSM may appoint as judges of Cass. distinguished university law professors and attorneys at law with fifteen years of experience who are registered in the special register of attorneys admitted to represent and defend clients before Cass. *See Cost. Art. 104 (Italy)*.

28. In the few cases under Art. 50 *bis* ICCP, or where the judgment is challenged before

before the judge, who will finally decide the facts alleged and the evidence gathered by the parties under his supervision. The proceeding is not divided into a pretrial and trial phase, but facts and evidence are presented and admitted into the record from the beginning of the proceeding until specific time limits set by the applicable ICCP provisions expire. Once the relevant time limits expire, the party may not introduce new facts and evidence unless specific extenuating circumstances occur justifying the admission of such new facts or evidence.<sup>29</sup>

The whole proceeding takes place before the judge. The proceeding is commenced when the plaintiff serves the complaint upon the defendant. The defendant should file the answer within in a specific time limit before the first hearing if the party intends to raise specific objections to the complaint. Otherwise, those objections are considered waived.<sup>30</sup> There is no specific and mandatory layout for the complaint, the answer, or the following pleadings. But Article 163 of the ICCP does require that the complaint contain certain elements, the lack of which renders the complaint null.

Article 167 of the ICCP does not require a specific layout for the answer. However, the defendant should respond to the plaintiff's pleading and raise all necessary objections. The answer should be filed within twenty days before the first hearing. Otherwise, the relevant objections that should be raised by this time limit will be considered waived by the defendant.

Law suits are easily filed because the threshold requirements needed to commence a lawsuit are easily met. Every pleading that meets the basic requirements under Article 163 of the ICCP and is not barred by one of the main objections (e.g. expiration of the relevant statute of limitation, lack of jurisdiction, etc.) may proceed toward a final judgment.<sup>31</sup> But the complaint and the answer are not brief documents. They contain the facts, evidence, and legal theory the party intends to apply in the case, which may amount to a significant amount of information.

The legislature encourages lawyers to draft the first pleadings with as much detail as possible. The complaint is required to contain more information than a mere "notice" of the pleading to the other party and must include evidence. However, it is the general practice, where possible with

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Corte app. or *Cass.*; Corte Cost. as well is made by a panel of judges.

29. The general principle is set by Art.184 *bis* of the ICCP, according to which "[t]he party showing that he suffered a waiver for reasons non attributable to him, may request the investigating judge to put him back within the applicable time-limits. The judge decides pursuant to article 294, second and third paragraphs." See SIMONA GROSSI & CHRISTINA PAGNI, COMMENTARY TO THE ITALIAN CODE OF CIVIL PROCEDURE (2010).

30. The objections which should be raised before the first hearing are similar to the United States' *affirmative defenses* under FED. R. CIV. P. 8(c), but they are not listed in any specific provision of the C.P.C. The time limit for filing a response that contains affirmative defenses is twenty days before the first hearing. See also art. 166-168 *bis* C.P.C.

31. However, the complaint should contain the elements listed under art. 163 C.P.C. otherwise it will be null. Art. 164 C.P.C.

applicable time limits and waivers, to avoid disclosing too much information to the opposing party until the very end of the case.

Article 24 of the Italian Constitution acknowledges everyone's right to bring cases before courts of law in order to protect their rights under civil or administrative law. In order to bring or defend against a suit, a party should act in good faith which means its claim or defense should be supported by legal grounds. Where, as determined by a judge, a groundless pleading or groundless answer is filed with gross negligence or malice, the defendant or the plaintiff may request the judge to condemn the opposing party to pay damages for serious liability ("*responsabilità aggravata*") pursuant to Article 96 of the ICCP.<sup>32</sup> This sanction, however, is very rarely applied because it puts upon the party requesting its application a heavy burden of proof to show that the opposing party acted with gross negligence or malice when it filed the pleading or the answer.

The current workload for Italian courts is very heavy. The Italian justice system is experiencing a crisis of lengthy litigation. The system is hardly satisfying the requirements of due process under Article 111 of the Italian Constitution regarding "reasonable duration," which threatens the goals of efficiency and fairness.

Once the parties have exchanged the complaint and the answer, they appear before the judge. The judge asks them preliminary information about the case and then grants them time limits to file additional pleadings. They may specify the content of the respective claims and defenses and eventually request that the judge admit evidence. The pleadings are exchanged within the time limits under Article 183, sixth paragraph, nos. 1, 2 and 3 of the ICCP. There is no right to amend a complaint once this time-limit expires.

Once the evidentiary pleadings and the corresponding rebuttals have been filed by the parties, the judge, by order, decides what evidence to admit. The evidence which the judge may decide to admit should be admissible and relevant. In other words, it should meet the requirements for admission set by the ICCP and should help in proving or disproving the facts of the case.

Once the judge decides that the evidence offered by the parties is admissible and relevant, the judge schedules a hearing for evidence admission (e.g., for witnesses' examinations, inspections, etc.). There may be more than one hearing for evidence admission, depending on the type and amount of evidence to admit.

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32. Similarly, in the United States, there is the substantive tort of "abuse of process," which someone commits when he files a frivolous lawsuit against someone else in order to achieve a collateral advantage of some kind. Furthermore, under FED. R. CIV. P. 11 lawyers can be sanctioned for frivolous claims. As under art. 96 C.P.C., it is difficult to show that something is frivolous, especially because notice pleading allows, to a certain extent, for filling in factual gaps in discovery.

Soon after the end of the evidentiary phase, the judge declares the evidentiary phase closed and schedules a hearing where the parties present their conclusions and final arguments. These cannot be different from those already filed,<sup>33</sup> but are simply more specific, as they may have been slightly amended during the proceeding. This hearing also gives them a time limit for filing final pleadings and final pleadings in rebuttal. The judge will render his decision within the following thirty days.<sup>34</sup> The judgment rendered by a first instance judge may be appealed<sup>35</sup> before *Corte d'Appello* which will review the entire decision making process of the first instance judge. Issues of fact, as well as issues of law, may be reviewed by *Corte d'Appello*. This is a *de novo* review, and the whole first instance proceeding is reviewed. However, *Corte d'Appello* cannot address new issues of fact or law which were not previously submitted to the first instance judge. However, in very specific cases where it was impossible to previously file those issues of facts or law, depending on circumstances beyond the party's control, an exception may be granted. These circumstances rarely occur. As a general rule, and except under equally rare circumstances, third parties<sup>36</sup> who did not take part in the first instance proceeding are not allowed to file motions for intervention in the appeal proceeding.

Finally, the judgment rendered by the *Corte d'Appello* may be reviewed<sup>37</sup> by the *Corte di Cassazione* only on the basis of the specific grounds under Article 360 of the ICCP. These deal only with issues of law. The *Corte di Cassazione* is in fact considered the "judge of the laws," and

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33. However, parties may renounce some of their original claims and defenses. See GROSSI & PAGNI, *supra* note 29.

34. In cases which should be decided by a panel of judges, the panel will render the judgment within the following sixty days. However, either the thirty day time limit or the sixty day time limit is not final, and the judge(s) may render judgment long after the expiration of those time-limits. *Id.*

35. The losing party may appeal from the judgment rendered by the first instance judge by filing the appeal (complaint) within one year and forty-six days. See Art. 327 C.P.C. This runs from the publication of the judgment (long time limit for appealing) or by thirty days running from the time of the service of the judgment by the winning party (short time-limit for appealing). If the winning party serves the judgment upon the losing party, this latter party will have only thirty days from the date of the service to appeal; on the contrary, if the winning party does not serve the judgment on the losing party, this latter will have the regular, long, one year and forty-six day term to appeal. The decision as to whether the short or long time-limit to appeal should be triggered eventually rests upon the winning party. *Id.*

36. Art. 344 of the C.P.C. uses the term "third party" to refer to someone who did not take part in the first instance proceeding, that is, a non-party in the first instance proceeding which, only under exceptional circumstances, is allowed to appeal the first instance judgment. *Id.*

37. The losing party may challenge a judgment rendered by the *Corte app.* before the *Corte di Cassazione* (Cass.) by one year and forty-six days. See art. 327 C.P.C. This runs from the publication of the judgment rendered by *Corte app.* (long time-limit for challenging), or by sixty days running from the service of the judgment by the winning party (short time-limit for challenging). See *supra* text accompanying note 35.

not the judge of the facts of the case; the facts are considered established once the *Corte d'Appello* has double checked the assessment made by the first instance court.

The *Corte di Cassazione* has no discretion in deciding whether or not to hear a case submitted to it for review to the extent that the motion for review (*ricorso in Cassazione*) meets the formal requirements set by the ICCP.<sup>38</sup> The *Corte di Cassazione* could just deny the motion for review<sup>39</sup> if, after reviewing the pleadings and the documentation on file, it believes that the motion is groundless.

#### 2.4 *Pro-se litigants*

A private person cannot file *pro se* complaints before a justice of the peace (except in very rare cases where the amount of the claim does not exceed EUR 516) because only counsel has the knowledge and expertise to apply the relevant legal provisions in the view of Italian law. Also, the parties cannot maintain proceeding without the assistance and guidance of trained counsel because this is seen as prejudicial to the party and inefficient.

Considering that Article 24 of the Italian Constitution acknowledges the right of every individual to act and defend himself in a proceeding and that the state undertakes to protect this right, the State grants free counsel to whomever cannot afford to hire their own attorney to file a suit or defend himself in a proceeding. However, free counseling may result in sub-par representation since lawyers who provide free counseling services are paid very poorly by the state. Unfortunately, many good lawyers are not willing to offer free counseling. And there is no provision in the ethical code encouraging them to provide such service.

#### 2.5 *No jury*

There is no jury in civil proceedings. The decision is rendered only by the judge who is typically presiding over the proceeding alone. But on some occasions, the proceeding is decided by a panel of judges.<sup>40</sup>

#### 2.6 *The law of evidence*

Since there is no jury and the decisions on evidence are made by the

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38. In particular and mainly: (i) the judgment appealed should be one which Cass. may review; (ii) the motion for review should be based on one or more grounds under art. 360 C.P.C.; (iii) the power of attorney should meet the requirements set by C.P.C.

39. Motion for review of the judgment is not similar to the *writ of certiorari*, because review by the Cass. is not discretionary. See GROSSI & PAGNI, *supra* note 29.

40. Corte app. and Cass. decides by panel of judges. A case is decided by a panel of judges also if it falls within the scope of art. 50 *bis* C.P.C. *Id.*

judge, the law of evidence is not designed to take into account any danger of improperly influencing a inexperienced fact-finder. Therefore, there is no prohibition against the use of character evidence, no hearsay rule, and no general provision describing the concept of "relevancy" of evidence.

The concept of "relevant" evidence essentially excludes anything that does not prove the essential elements of claim or defense of the case. For example, in a civil proceeding concerning a car accident, the fact that the defendant received a fine for speeding in the past would not be relevant. Similarly, the fact that the defendant received a letter from his employer complaining that he was recently driving negligently would not be relevant. It could not directly prove that the defendant caused the accident at issue.

The rules governing evidence do not give much weight to circumstantial evidence and inferences. They place much more emphasis on direct evidence. Inferential reasoning is allowed, but has limits. As in the example above, the judge would not be allowed to infer from defendant's previous speeding fines that the defendant caused the accident on that specific occasion. The burden of proof is upon the plaintiff to prove that (i) there was an accident; (ii) that he suffered damages as a consequence of that accident; and that (iii) the defendant caused the accident either willfully or negligently.

The necessity to fill any gaps and have enough evidence to build a reasonable story of the accident (what happened, why it happened, how it happened, etc.) would never provide justification for the judge to draw inferences as above described. The judge would find for the defendant only if the plaintiff is not able to prove each element of his claim.

The judge will not grant the plaintiff's claim if the proponent could only claim that it is "more likely than not" that each element of the plaintiff's claim exists. Rather, the proponent must provide "strong evidence" (a substantially higher standard than the "more probable than not" standard).<sup>41</sup> The plaintiff must prove that the accident was caused by the defendant's negligent conduct and that the plaintiff suffered damages in a specific amount as a result.

Pursuant to Article 116 of the ICCP, the judge evaluates the evidence, except conclusive evidence (i.e., the evidence which binds the judge to a specific evaluation) and outcome (e.g. admission, oath)).<sup>42</sup> In particular, the judge is free to decide which exhibits and which witness statements to consider and, in general, which evidence on file is more suitable to support the decision. All of these decisions

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41. For instance, identity could not be proven through an application of the "modus operandi" theory. *Id.*

42. Where conclusive evidence like admissions or oaths is offered by one party, the judge cannot decide whether to believe it or not. The judgment on the probative value of such evidence has already been made by the legislator. If relevant in the case, this evidence should be admitted and be considered by the judge in rendering the judgment. *Id.*

are within the judge's discretion. The judge is free to exercise this discretion provided that he gives reasons for his decisions in the judgment.

There are various types of evidence that parties may offer for the record. The judge rules on these offerings and admits items he or she considers admissible and relevant.<sup>43</sup> This analysis will merely consider lay and expert testimony and exhibits, which are the most common types of evidence in a civil proceeding.

### 2.6.1 *Lay testimony and expert testimony*

The rules governing witness testimony are set forth in Article 244 in the ICCP. Additional provisions concerning testimony are set forth in Article 2721 of the Italian Civil Code ("ICC"). Article 246 ICCP provides that the witness should not have any personal interest in the case where he testifies. There is no express requirement as to the personal, first-hand knowledge of the matters upon which the witness will testify; this is an implied requirement that will be checked by the judge when interviewing the witness. "Having an interest in the case" means that the witness could himself commence the same action in which he will testify, file an intervention in that action, or call a third party to join to that action.<sup>44</sup>

If a witness with a personal interest in the case testified in the same case, his testimony would be null. However, a party's objection is required to exclude the testimony as the court cannot raise the issue *sua sponte*. Counsel is not allowed to directly examine and cross-examine witnesses; only the judge can do that. The parties can, however, submit questions to the judge which they would like him to ask the witnesses. Such questions should be framed separately and specifically and indicate the persons who should be examined and the facts upon which they should testify.

Therefore, a request to the judge to examine the witnesses "on all the circumstances indicated in the complaint" would be improper because it is not divided into separate queries concerning the single facts and circumstances upon which the witness should testify. The requirement for specific queries to pose to the witness is intended to allow the judge to check the admissibility and relevance of the single questions and to allow the opposing party to object as to the relevance and admissibility of each question. Each question answered by the witness will constitute evidence, which will be admitted only if it complies with the applicable rules of evidence on relevance and admissibility. The judge will have to decide whether or not to allow (and ask) such questions to the witness on the basis of those rules.

The credibility of a witness is not a condition for the admissibility of

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43. See *supra* para. 2.3.

44. See Cass., no. 6894/2005.

the testimony, and the judge does not have the power to exclude testimony because he believes the testimony is unreliable. This is a legislative requirement.<sup>45</sup> Provided that a witness has no personal interest in the case, he should be presumed credible and his testimony should be admitted. Once admitted, it will then be up to the judge to disregard this testimony if it is found unreliable when rendering the judgment. Testimony is rendered under oath and the opposing party can challenge it through additional evidence and, eventually, through a charge of false testimony which could result in the judge's referral to the Public Prosecutor for due inquiries.

The testimony should concern facts and not opinions. However, the witness may testify about his ideas and opinions on how the fact occurred when these ideas and opinions are strictly linked to the witness's perception and knowledge of the event.<sup>46</sup> The experts are qualified witnesses who render opinions on specific issues concerning their specific field of expertise. Each party can offer the report of an expert into evidence to support his claim or defense without prior authorization by the judge. The report is admitted into evidence once it is filed.<sup>47</sup>

The judge is also entitled to, and frequently does, appoint his own expert any time he needs the assistance of a qualified expert to solve technical issues. The costs of using an expert are charged to the party requesting the expert or equally to both parties if the judge requested the expert. In this event, the parties are able to appoint their own experts to review and comment upon the work of the judge's expert. The experts – either the judge's or the parties' – will not need to show that they are qualified to offer their testimony as experts in the field in which they claim to be experts. Their expertise is presumed. However, the parties retain the power to challenge this presumption. This process is used to prevent the judge from taking the challenged expert's opinion into account.

Generally, a judge's expert will be appointed to help the judge in evaluating evidence already collected where specific expertise is required.<sup>48</sup> However, under special circumstances where technical expertise is the only possible means to collect evidence, it will be used to this end as well. In any event, the party with the burden of proof will not be able to shift this

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45. As a general rule, as far as the witness has no personal interest in the case and his testimony is relevant, the testimony is admitted. It will be then up to the judge to disregard that testimony if he believes that is not reliable or it is contradictory. However, the judge cannot decide not to examine witnesses because he believes, *a priori*, that their testimony will not be reliable.

46. *See* Cass., 5/2001.

47. The expert's report is basically treated as an exhibit that is admitted once it is filed. In other words, the judge should not make any specific evaluation in order to admit it into evidence, but could decide not to consider it if it is not relevant. *See infra* para. 2.6.2.

48. The appointment of a technical expert falls within the discretionary power of the judge, but when the judge appoints his own technical expert, the parties are entitled to appoint their own experts to work together with the judge's expert and ensure that the parties' rights are not violated.

burden to the judge's expert. Technical expertise is not evidence by itself, but merely a "means of collecting evidence" and is primarily a tool in the hands of the judge and the parties to help them evaluate evidence already collected in the proceeding.

### 2.6.2 Exhibits

Exhibits are moved into evidence by their filing with the court without any prior evaluation by the judge as to their admissibility or relevance in the case. Once admitted, the judge decides whether to take them into account when deciding the case. The party filing an exhibit is not required to "lay the foundation" for its admission, or specifically "identify" it by providing information about the document, or show that it is authentic. Similarly, there is no "best evidence" rule and generally copies and duplicates are admitted instead of originals even when the content of the exhibit must be proven.

However, parties may object to the authenticity of exhibits, claiming that they could have been tampered with. The opposing party could object by claiming that the document is false. For instance, the defendant could object to a letter filed by the plaintiff, who claimed that it was written by the defendant, by counterclaiming that it was not actually written and signed by the defendant. The defendant could then either file a forgery claim<sup>49</sup> within the proceeding, or file an autonomous claim in a separate proceeding. The decision to challenge an exhibit's authenticity is, therefore, left to the parties. However, absent any such challenge, the exhibit is admitted as if there was a stipulation by the parties. Exhibits are usually considered more reliable than witness testimony, which could present memory, perception, narration, or sincerity problems.

### 2.6.3 Burden of proof

As a general rule, Article 2697 ICC provides that, "Whomever wants to claim the existence of a right in a proceeding, should prove the factual grounds of it. Whomever objects as to the existence of the claimed right, should prove the factual grounds of the objection." However, the burden of proof may be upon the plaintiff or upon the defendant, depending on the specific claim or defense. Italian law does not have a graduated set of burdens to apply in civil proceedings.

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49. Here, the forgery claim – filed within the proceeding where the forged document has been exhibited or in a separate proceeding, an action for forgery ("querela di falso") – is a civil claim or civil proceeding, where only the probative value of the document is considered: if the document is forged, it is not "authentic" and should be disregarded as not relevant and inadmissible evidence. Forgery, however, may be also the object of a criminal proceeding, where the conduct of the person committing forgery will be judged.

*2.7 Facts and evidence gathering: no discovery but an evidentiary phase in a single judge-directed proceeding*

Facts and evidence may be presented from the very first pleadings: the complaint, and the answer. Although ideally the parties present all facts and offer evidence by the complaint or by the answer in order to frame the "theme" of the case as soon as possible,<sup>50</sup> they are not obligated to do so. Rather, the parties may describe the facts of the case by (and not later than) the pleadings under Article 183, sixth paragraph, no. 1 of the ICCP.<sup>51</sup> They may also offer evidence by (and not later than) the pleadings under Article 183, sixth paragraph, no. 2 of the ICCP.<sup>52</sup>

Outside of admitting exhibits, the parties must request that evidence be admitted.<sup>53</sup> The offers of evidence are made in writing (in the relevant pleadings), and parties can object to them for two reasons: inadmissibility and irrelevance.<sup>54</sup> There is no discovery, and the fact-finding and offer and collection of evidence phase starts from the very beginning of the proceeding and lasts until the filing of the pleadings pursuant to Article 183, sixth paragraph, no. 3. The Italian proceeding is not designed to be an "ongoing" process where complaints and answers may be amended through the conclusion of the proceeding in light of the evidence offered and admitted during the evidentiary phase. It is not a flexible tool in the hands of the parties primarily intended to satisfy their interests.

There are specific deadlines and many formalities<sup>55</sup> that should be met

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50. The rules governing the content of the complaint (*see* art. 163 C.P.C.) and of the answer (*see* art. 167 C.P.C.) encourage them to do so. *See* GROSSI & PAGNI, *supra* note 29.

51. This is the first pleading exchanged by the parties soon after the first hearing and after the filing of the complaint and answer. By this pleading, parties should specify the content of their respective claims and defenses and, therefore, the facts constituting the grounds of same claims and defenses.

52. Specifically, art. 183 describes the content of the pleadings which the parties may exchange after the complaint and the answer. By these pleadings, the party may amend their claims and defenses (by the time limit set forth in art. 183, sixth para., no.1), offer evidence to support their claims or defenses (by the time limit set forth in art. 183, sixth paragraph no. 2), and offer rebuttal evidence (by the time-limit set forth in article 183, sixth para. no. 3). As a general rule, and unless exceptional circumstances occur, these time limits are final and cannot be extended by the judge. Evidence in rebuttal, however, may be offered in the following brief, pursuant to art. 183, sixth para. no. 3 C.P.C. *See* GROSSI & PAGNI, *supra* note 29.

53. *See supra* para. 2.6.2.

54. As an example, a testimony rendered from a person who has a personal interest in the case, would be "inadmissible." A testimony which does not prove or disprove a "material" fact in the case would be irrelevant. Similarly, a testimony offered to prove the content of a contract, which should have been proved in writing, is inadmissible; if evidence of the contract is not useful to prove or disprove a material fact in the case, then it is not relevant. Therefore, the party could object that this testimony is not relevant and should not be admitted. *See supra* para. 2.6.

55. The rules on service of process and power of attorney offer good examples of such formalities.

for the proceeding to move forward. The claims and defenses cannot be amended after the specific time limits set forth in Article 183 of the ICCP in which time limits expire before the evidentiary phase (where evidence, other than exhibits, is offered and admitted) is even commenced. Therefore, a judgment rendered at the end of such proceeding could lack “rationality.” It could not be logically based on the full record as it developed throughout the whole proceeding on the basis of a logical reasoning,<sup>56</sup> thus, it is unfair.

Soon after, the filing of the pleadings under Article 183 of the ICCP hearings for the admission of evidence is scheduled. During those hearings, the judge hears testimony or admits evidence requests that he previously granted by order. The evidentiary hearings are devoted to the admission of evidence and discussions of the issue of admissibility or relevancy of that evidence. There can be more than one evidentiary hearing if the admission of evidence cannot be completed in one hearing.<sup>57</sup>

The judge is always present during the proceeding and directs and supervises the parties and the whole development of the proceeding. The judge has proven to be very important for counsel, who otherwise might have problems in managing the proceeding and decide by themselves, on the basis of the provisions of the ICCP, which facts and evidence should support their respective claims and defenses.<sup>58</sup>

## 2.8 *No settlement within the proceeding*

Settlement is generally considered an efficient tool in the hands of the parties in order to prevent or solve litigation once a suit has been brought.

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56. For instance, where the evidence offered during the evidentiary phase made it proper to file new claims, that was not possible to file – unless in the extreme and exceptional circumstances under art. 184 *bis* C.P.C. – since the time limits to file and amend claims and defenses would have already expired, under art. 183, sixth para. no. 3.

57. For instance, it may be that many witnesses should be examined and cross-examined and that the examinations cannot be completed in one day. In this event, the judge will schedule another hearing, and maybe other hearings, as many as necessary to complete the admission of evidence (for example, the examination of witnesses). See GROSSI & PAGNI, *supra* note 29.

58. This has also been demonstrated by the discipline of the proceeding for company law matters, set forth in Legisl. Ital. Decree no. 5/2003. That proceeding is divided into two parts: the first part, where parties exchange pleadings without the judge’s intervention; and the second part, where the parties appear before the judge to discuss the case. The provisions governing the phase taking place in the absence of the judge are complex, and sometime counsel are not able to correctly construe them. In these events, they request the judge’s intervention to overcome the impasse and tell them how to proceed. However, such difficulties might be due to the ambiguity in the provisions themselves, which call for a judge’s clarifications. *Id.*

Whatever the answer be, the phase of the proceeding accomplished in the judge’s absence – in the proceeding specifically dealing with company law issues – did not have much success in Italy, and the company law proceeding discipline is going to be repealed by the new reform of the C.P.C.

Settlement procedures are viewed favorably by the judiciary because settlements reduce the judge's caseload. Despite this general understanding and various attempts by the Italian legislature to introduce settlement procedures in civil actions, settlement procedure still remains a "dead" instrument that is rarely used by the parties.

Article 185 of the ICCP provides a provision that allows the parties to petition the judge to settle the dispute in an "ordinary"<sup>59</sup> civil proceeding anytime after the commencement of the action. However, cases are very rarely settled once they go to court, since parties are almost never willing to do so, especially at the beginning of the litigation when, according to the provision set forth in Article 185 ICCP, settlement should happen. This may be due to the lack of a "culture of settlement." The parties to an Italian action are generally not "educated" on the advantages of settling the case, and they prefer to go to court to take their chance on winning there.<sup>60</sup>

Both the lack of a settlement culture and the lack of any real duty of the judge to try to settle the case between the parties,<sup>61</sup> at the beginning or throughout the proceedings, make the Italian proceedings inefficient. Litigating a case where there is no real need to do so generates high costs, which could be easily avoided through settlement. Not only could the case be settled entirely, but there could also be undisputed issues that could easily be disposed of through settlement.

In addition to the lack of a culture of settlement, this general refusal to try to settle civil litigation may also be because at the beginning of a proceeding and until its end, once the evidentiary phase is closed, each party does not know which evidence the opposing party is going to use to support its claims or defenses. In the Italian proceeding, in fact, there is no

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59. "Ordinary proceedings" means proceedings which are not governed by special rules, such as precautionary measures proceedings, labor proceedings, company law proceedings, etc.

60. Mediation is not yet a popular ADR tool in Italy. While there are examples of mandatory mediation in the Italian legal system (e.g. in family law, in labor issues and in disputes concerning specific corporations' subject matters) and of private mediation - held by the ADR Center in Rome and by the Milan Chamber of Arbitration - the tool is not used as a real dispute resolution tool. The number of cases held by private mediation providers is low and mandatory mediation is entered just as a necessary step to access the ordinary justice in court.

61. Before the reform of civil proceedings accomplished by Law no. 80/2005, art.183 C.P.C. provided that, at the first hearing the judge should interview the parties as to the facts of the case and, where possible, try to reconcile them. In other words, differently from what is now provided by art.185, C.P.C., it was not up to the parties to request the judge to try to settle the dispute, but the judge had a duty to do so where the litigation was such that settlement could be attempted. Despite the former provision of art. 183 C.P.C., judges very rarely tried to settle the dispute between the parties appearing before him, considering that the parties had no intention whatsoever to try to settle the dispute just at the beginning of the proceeding. Consequently, and in view of the general practice, the provision for judges' settlement attempt at the beginning of the proceeding was eliminated. See GROSSI & PAGNI, *supra* note 29.

discovery. Therefore, the information which a party decides to “disclose” is only that information that it deems useful to support its own position.<sup>62</sup> Once cases reach the point of litigation, they very rarely settle during the proceeding, and they end by a judgment, usually after two or three years in the first instance, three or four years at the appellate level, or after additional three years at *Corte di Cassazione*’s level.<sup>63</sup>

## 2.9 Judgments

At the end of the proceeding, judgment is rendered within thirty days following the filing of the final pleadings in rebuttal in cases of litigation pending before a single judge. Judgment is rendered within sixty days following the filing of the final pleadings in rebuttal when the case is decided by a panel of judges. This, however, is not a final time limit for the judge who usually issues the judgment much later.

The text of the judgment is mainly divided into three parts: the facts, the applicable law, and the holding. The text of the judgment does not contain any dissenting opinion. Judgments rendered by lower courts and those rendered by the superior courts are not binding. But they usually influence the decisions.<sup>64</sup> This does not mean that precedent is binding upon courts, but that precedent can and usually does influence future decisions by judges, irrespective of the hierarchy among them, if the judgment is well reasoned and well-grounded and contains a good interpretation and application of the law.<sup>65</sup>

Typically, a judge does not grant relief which was not specifically petitioned for by the parties. This is because there has to be a strict correspondence between what relief has been demanded by the parties and what relief is finally granted by the judge.<sup>66</sup> This, on some occasion, might

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62. It is in fact true that in Italy parties are encouraged to set their claims and defenses at the very beginning of the proceeding, in their complaint and answer. However, this is rarely done, because parties prefer to wait until the very end of the proceeding to show their complete “theme.” This, in the absence of discovery, truly affects the possibility of a settlement during the proceeding. *Id.*

63. The median time for disposition in federal courts is not that different – approximately two years. Ordinary cases in federal courts would never go to the Supreme Court.

64. The Trib. or the Corte app.’s decision might also influence the Cass.’s judgments, since hierarchy among courts does not prevent such influence.

65. The same thing is true in the United States, at least to a large degree. For instance, while a district court in New York is bound by the decision of the U.S. Court of Appeals for the Second Circuit, it is free to, and often does, look at opinions of other courts, at any level of the hierarchy, for precedents, whose opinions are influential if well-reasoned; however, they are not binding. See GROSSI & PAGNI, *supra* note 29.

66. Art. 112 C.P.C. provides that “Il giudice deve pronunciare su tutta la domanda e non oltre i limiti di essa; e non puo’ pronunciare d’ufficio su eccezioni, che possono essere proposte soltanto dalle parti.” (The judge shall state over the whole claim and within its limits; he shall not state sua sponte over objections which may be raised only by the parties).

appear very formal and could run contrary to the whole development of the proceeding. It can also result in an outcome that is irrational, illogical, and unfair.

### 2.10 Appeal

Judgments can be appealed before the *Corte d'Appello* after showing grounds for appeal. Usually the grounds for appeal concern the interpretation of the law, the granting or denial of evidence, and the interpretation of facts. The complaint on appeal does not comply with a specific layout but it should indicate and specify the grounds upon which the appeal is sought.

Similarly, no specific layout is required for the motion for review (*ricorso in Cassazione*) before *Corte di Cassazione*. However, the grounds upon which a judgment issued by *Corte d'Appello* is challenged before *Corte di Cassazione* should be specifically indicated and specifically complied with those listed under Article 360 ICCP. The list of grounds for appeal before *Corte di Cassazione* set forth in Article 360 ICCP is exhaustive, and the grounds merely concern errors of law, and not errors of fact. *Corte di Cassazione* will review the appellate court's judgment as to the application of the law to fact. No further review of the facts of the case will be accomplished, and no new claims or evidence will be considered.

### III. GENERAL OVERVIEW OF THE U.S. PROCEEDING BEFORE U.S. FEDERAL COURTS<sup>67</sup>

The U.S. court system consists of fifty state court systems plus a similar system for the District of Columbia and a separate system of federal courts. The federal courts and most state court systems are organized into trial courts (the U.S. district courts in the federal system), intermediate appellate courts, and a Supreme Court. As explained below,<sup>68</sup> federal courts have limited jurisdiction; they may only hear cases raising a federal question or cases based on diversity of citizenship where a substantial sum is at stake.

State courts, in contrast, can hear practically any sort of case, including most cases involving federal claims. With respect to state law, the individual state supreme courts have the final authority. As to federal issues (including constitutional ones), state courts are subject to the oversight of the United States Supreme Court.

The diversity of U.S. court systems poses a problem for a

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*Id.*

67. For a general overview, see Geoffrey C. Hazard, Jr. and Michele Taruffo, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION (1997). See also John B. Oakley, Vikram D. Amar, CIVIL PROCEDURE, IN INTERNATIONAL ENCYCLOPAEDIA OF LAWS, VOL. 5 (2001); Jack H. Friedenthal, Et. Al., CIVIL PROCEDURE (4th ed., 2005). See also *infra* App. A.

68. See *infra* para. 3.2.

comparative analysis. Dealing fully with the variations among the various state courts and between them and the federal courts would unduly expand the length of this Article. At the same time, most judicial systems in the United States are variations of a central theme. Procedurally, for the last seventy years that theme has been played by out in the federal courts. For that reason, this Article will treat the federal courts as typical of the various U.S. court systems. Although it will take note of major variations to the extent they appear important to the overall analysis.

### *3.1 The appointment of judges*

Justices of the Supreme Court, the circuit courts of appeals, and the district courts are appointed by the President of the United States with the advice and consent of the Senate. These are life appointments and can only be removed through impeachment by the Congress for “high crimes and misdemeanors.” There is no statutory qualification for judicial appointment to the Supreme Court or the lower federal courts. The process of appointment of a federal judge starts from a judicial vacancy. A vacancy occurs when a judge dies, resigns, is impeached by Congress, or where a new position is created by Congress.

Congress is involved throughout the process of appointment of federal judges,<sup>69</sup> including both in the selection of candidates and confirmation of nominations. Congress's influence in the selection of potential candidates lies in its capacity to make recommendations.

As a general rule, in the United States judges do not specialize in specific subject matters. American judges are lawyers who have been appointed to the bench. They still think of themselves as lawyers, and they often go back to being lawyers after they resign from the bench. In the United States, lawyers and judges are divisions of a single legal profession and are separated from each other only by a permeable membrane. It is quite natural for judges selected this way to play the relatively passive role that judges play in the U.S. system.

Similarly, United States judges do not have a career ladder that they can climb based on their skill at resolving cases. At best, working one's way up means getting appointed to an appellate court. Such appointments are not the result of meritocratic advancement from the lower court bench. Many appellate judges were never district court judges. The absence of a definite career ladder and responsibility for the job one does at an entry level court supports the U.S. model of a passive judge managing a civil

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69. Specifically, the Senate is involved while the House of Representatives has no formal role in appointment of judges. On the other hand, senators have a very important role, not only collectively, but as to judges in their states, individually as well. This is especially the case when the senator is of the same political party as the president.

litigation process largely driven by the lawyers.<sup>70</sup>

### *3.2 Personal and subject matter jurisdiction and venue of litigation*

When filing a complaint before a court, the plaintiff should check that the court has jurisdiction, specifically, subject matter jurisdiction and venue<sup>71</sup> over that particular dispute brought before it. Furthermore, the court should have personal jurisdiction. That is, the court should have power to enter a judgment which would be binding on the defendants involved. Usually, state or federal constitutional provisions or statutes determine whether specific courts have subject matter jurisdiction over certain categories of controversies.

The federal court system derives from two main documents: Article III of the United States Constitution, and the Judiciary Act of 1789. Article III, Section 1, of the Constitution provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 of Article III defines the permissible scope of federal judicial power, listing the areas in which federal subject matter jurisdiction may be asserted. Congress has no power to extend the subject-matter jurisdiction beyond the limits set forth by Article III of the Constitution, and if it does so the grant is unconstitutional.<sup>72</sup>

On the other hand, the 1789 Judiciary Act establishes the doctrine that the actual scope of the jurisdiction of the federal courts at any given time is governed by the relevant jurisdictional statutes passed by Congress, even if the outer limits of permissible federal judicial power are set forth by the Constitution.

Subject matter jurisdiction of the federal courts is limited by both the Constitution and by statutes. Plaintiffs must show subject matter jurisdiction at the outset of the case. Subject matter jurisdiction cannot be conferred upon the federal courts by agreement of the parties. Absence of subject matter jurisdiction cannot be waived by the parties. Federal courts have subject matter jurisdiction (i) where the plaintiffs' claim is based on federal law or (ii) in diversity cases, that is, where a case is brought by a citizen of a state against a citizen of another and the amount in controversy

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70. However, as political as the selection of federal judges may seem, it is not nearly as political as the process for selecting state judges. In many states, judges are elected, and in many others they are appointed for a limited term initially and then required to run for election within a certain period of time. Few if any state courts grant life tenure to judges. Among other things, this method of selection means that state judges are even less likely to think of themselves as a separate professional cadre and are in even more close affinity to practicing lawyers.

71. Rules concerning venue allocate cases among the same type of courts having jurisdiction over a case, within a given judicial system. See 28 U.S.C. § 1391.

72. *Hodgson v. Bowerbank*, 9 U.S. 303, 304 (1809).

is at least \$75,000.<sup>73</sup> In those cases, by and large, federal courts' jurisdiction is concurrent with state courts' jurisdiction. However, there are some cases where federal courts have exclusive jurisdiction, as in bankruptcy proceedings.

### *3.3 Main structure of the civil proceeding*

Mainly, the procedure before trial courts can be divided into two phases: (i) a pre-trial phase, which takes place between the parties with minor involvement by the judge; and (ii) a trial phase, which takes place in court before the judge and a jury, where the right to jury trial is provided and a jury is timely demanded. This Article considers mainly jury trials. While jury trials are the majority, a very sizable minority of cases are tried before a judge. It makes sense to focus primarily on the jury trial because the rules are determined primarily by the jury trial paradigm.

The proceeding commences by filing a complaint before the appropriate court. Following the filing of the complaint, which must be served upon the defendant(s). Upon receiving the complaint, the defendant(s) must file its answer to the complaint, and then the parties exchange their pleadings provided by Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 7.

The parties may exchange a limited number of pleadings: a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a cross-claim, a third-party complaint, an answer to a third-party complaint, and if the court orders one - a reply to an answer.

Once the parties exchange their pleadings, they go through the discovery process. They exchange information concerning evidence they have or want to obtain from the opposing parties, within the limits of applicable law provisions. After the discovery phase concludes, the parties go to trial. At trial, before the judge and a selected jury, they offer their evidence (including witnesses), present their claims and defenses, and present final arguments. Once the trial is concluded and the jury is properly instructed, the jury renders a verdict and a final judgment is issued by the judge on that verdict.

There are three points at which litigants can try to resolve the case through motions to avoid the necessity of a trial. First, the defendant can move to dismiss the complaint on the basis of one of the defenses listed in Fed. R. Civ. P. 12(b). These defenses include absence of subject matter jurisdiction, absence of personal jurisdiction, or failure to state a claim on which relief can be granted. A motion to dismiss under Fed. R. Civ. P.

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73. Besides these two major instances of federal courts' subject-matter jurisdiction, federal courts have jurisdiction in suits where the United States is a party, in admiralty and maritime cases, in actions between two or more states, and in a few other situations.

12(b)<sup>74</sup> must be made before the defendant answers. Second, at any time after the pleadings are closed, any party can move for judgment on the pleadings. Such a motion would assert that a state of facts shown on the face of the pleadings, including defensive pleadings, entitles one party or the other to judgment, and development of other facts is unnecessary. For example, the plaintiff's complaint might show that the claim is barred by the statute of limitations, or the defendant's answer might contain sufficient admissions to show that the plaintiff is entitled to judgment.

Third, any party may move for summary judgment under Fed. R. Civ. P. 56. A summary judgment motion is different from a motion for judgment on the pleadings in that it may be based on information outside the pleadings, uncovered in discovery or some other way. The moving party will be entitled to summary judgment if he shows that there is no "genuine issue of material fact" and that he is entitled to judgment as a matter of law. Technically motions for summary judgment may be made at any time after twenty days from the date of filing the complaint. In practice judges usually refuse to grant summary judgment until the opposing party has had ample opportunity to develop his case through discovery. Summary judgment may be granted on some issues or claims and not others. So, summary judgment motions are often used immediately prior to trial to simplify the issues to be tried.<sup>75</sup>

A uniform system of pleading for all suits in federal courts was established with the promulgation of the Federal Rules of Civil Procedure in 1938, which also introduced a new simplified approach to pleadings in federal courts. Pleadings merely had to give "fair notice" (the so called "notice pleading" system), an approach considerably simpler than the fact pleading approach then provided in state courts. In the "notice pleading" system, in order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) (a motion to dismiss the case for failure to state a claim upon which a relief can be granted),<sup>76</sup> the pleading only needs to contain a short and plain statement of the claim showing that the pleader is entitled to relief.<sup>77</sup> It is not necessary to plead the operative facts in detail.

Recently, however, the U.S. Supreme Court increased the burden on plaintiffs in *Twombly v. Bell Atlantic*.<sup>78</sup> The Court in *Twombly* held that under the notice pleading standard, the complaint should be not only *cognizable*<sup>79</sup> but also *plausible*,<sup>80</sup> meaning that the pleading should contain

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74. See *infra* para. 3.7.2.1.

75. Pretrial dispositive motions are discussed in more detail below. See *infra* para. 3.7.2.

76. See *infra* para. 3.7.2.1.

77. *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

78. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

79. This was stated in *Conley v. Gibson*, 355 U.S. 41 (1957), where the Court also said that a claim should not be dismissed unless the plaintiff cannot prove any set of facts under which relief can be granted. *Id.*

enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the claim. Once pleadings have been exchanged, parties go through discovery – when they exchange information and evidence – and pretrial conferences.

Under Fed. R. Civ. P. 16 (a), courts have general authority to schedule pretrial conferences that often, lead to the adoption of orders for the management of discovery and other matters and preparation for trial.<sup>81</sup> After pretrial conferences, if the parties have not settled the dispute, a jury is selected through the *voir dire* process,<sup>82</sup> and the trial starts before the jury and the judge. During the trial, evidence gathered during discovery will be offered to the jury under the judge's supervision. At the end of the trial, the jury reaches a verdict upon which the judge will render a judgment.

### 3.4 *Pro se litigants*

No one is required to hire a lawyer. Parties may nearly always represent themselves in court. But it is rare for litigants to represent themselves in ordinary civil litigation. As a practical matter, they would hardly be able to manage the complexity of a case in federal court. This broad permission for *pro se* litigation may be due to the lack of any right to free counseling and legal aid, which would eventually deprive the party of the right to defense and access to justice had the party no right to litigate *pro se*.

However, this system could be highly unfair in terms of a lack of “fair play.” By acting as a plaintiff or by defending himself in court and not knowing the rules and case law construing the same, the *pro se* litigant will not have equal opportunity to file pleadings, respond to opposing counsel's arguments, offer evidence, etc. Thus, his access to justice will be

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80. After *Dioguardi*, Twombly reformed the notice pleading system. See Kevin M. Clermont, *Litigation Realities Redux* (Cornell Legal Studies, Research Paper No. 08-006, 2008), available at <http://ssrn.com/abstract=1112274> (observing that “This move represents the Court's first unmistakable step backward from the modern conception of notice pleading”).

81. FED. R. CIV. P. 16(b) is a *required* conference. It happens near the beginning of the case and results in a scheduling order governing the time for joining any further parties, amending pleadings, filing motions, and completing discovery. In complicated cases, the scheduling order can be much more detailed even than this. The schedule may only be modified for good cause.

FED. R. CIV. P. 16(d) also requires a final pretrial conference, where the judge and parties formulate a plan for the trial, including admission of evidence. After the final pretrial conference, the judge will enter a final pretrial order, which can only be amended to prevent “manifest injustice.” Therefore, there are at least two pretrial conferences in any case, however simple, that is, the FED. R. CIV. P. 16(b) scheduling conference and the FED. R. CIV. P. 16(d) final pretrial conference. In more complicated cases there will be a number of other pretrial conferences that are designed to monitor the progress of the case and make midcourse corrections. Each of these gives rise to a pretrial order that modifies the previous pretrial orders governing the course of the case. *Id.* For further information, see also *infra* para. 3.7.

82. See *infra* para. 3.5.

substantially impaired. Forms of legal aid should be provided and are highly encouraged.

### 3.5 Jury<sup>83</sup>

According to the Seventh Amendment of the U.S. Constitution, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." A similar guarantee can be found nearly in every state constitution.<sup>84</sup>

The right to jury trial, as it existed at common law in 1791, when the Seventh Amendment was ratified by the original states – is not created, but "preserved" by the Amendment in "suits at common law."<sup>85</sup> Historically, a right to jury trials did not exist in suits that sought only equitable relief, such as an injunction or specific performance. After the Seventh Amendment, therefore, cases at law continued to carry the right to trial by jury in federal courts, while suits in equity continued to be decided by judges, the distinction being based primarily on the nature of the relief sought. Therefore, by designating the right to relief sought, the plaintiff is able to control his right to a jury trial. However, such distinction is not so simple and the U.S. Supreme Court has tried to clarify this issue through a series of decisions, the most important of which are *Beacon Theater Inc. v. Westover*,<sup>86</sup> *Dairy Queen Inc. v. Wood*,<sup>87</sup> and *Ross v. Bernhard*.<sup>88</sup> In *Beacon Theater*, the Court held that when a remedy at law is available, a constitutional right to a jury trial exists regardless of whether historically the action would have been tried in equity. In *Dairy Queen*, the Court further specified that only the most imperative circumstances may lead to an exclusion of the right to a jury trial.

Finally, further defining the conditions for the existence of the right to a jury trial, the Court stated, "As our cases indicate, the legal nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."<sup>89</sup> Courts which have adopted

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83. See FRIEDENTHAL *supra* note 67, at 488.

84. However, Colorado, Louisiana and Wyoming have no constitutional guarantee to jury trial in civil cases. See FRIEDENTHAL *supra* note 67, at 507.

85. However, even if the right to jury trial is "preserved" by the VII Amendment to the U.S. Constitution and only upon the most compelling circumstances can "the right to a jury trial of legal issues be lost through prior determination of equitable claims," the litigants may waive such right if they do not make a timely demand for a jury trial. See FED. R. CIV. P. 38.

86. 359 U.S. 500, 510-11 (1959).

87. 369 U.S. 469, 82 (1962).

88. 396 U.S. 531 (1970).

89. *Id.* at 538. The court's reference to pre-merger custom" means the custom that existed before the "merger" of law and equity (formerly, two separate systems with separate

the *Ross* test have, nevertheless, generally refused to apply the third complexity criterion.<sup>90</sup>

The jury is a fundamental institution in the American proceeding and in *Beacon Theatres, Inc. v. Westover*<sup>91</sup> and its progeny, the U.S. Supreme Court stated that trial by jury is “the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>92</sup>

Not only is the jury a constitutional actor in the American legal process, the jury also tremendously shapes and influences that process and the law governing the same. The jury has three tasks to accomplish: (1) determining the facts; (2) “evaluating the facts in terms of the legal consequences as formulated by the trial judge in the jury instructions”; and (3) deciding in the form of a verdict.<sup>93</sup> However, the jury is not composed of legal professionals, and they usually do not know anything about the law governing the case prior to their selection to the jury; therefore, they are instructed as to the applicable law by the judge.

Pursuant to Fed. R. Civ. P. 48, in civil litigation the jury should be composed of at least six members and the verdict should be unanimous, unless otherwise stipulated by the parties.

Parties have an opportunity to shape the jury by challenging jurors. Each party has an unlimited number of challenges “for cause.” They may challenge a potential juror who does not have the statutory qualifications, may be biased, or has a relationship with one of the parties or counsel. Furthermore, each party may challenge three potential jurors for any reason or no reason through the “peremptory challenges.”<sup>94</sup> Parties will use these challenges to avoid jurors who they believe are likely to be hostile, but for whom there is an insufficient basis for a challenge for cause. Parties determine whether a juror is subject to challenge for cause (or ought to be challenged preemptorially) through “voir dire,” a procedure used to gather information about prospective jurors. Sometimes the lawyers for the parties question jurors, and sometimes the judge questions them with substantial

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rules) in 1938. *Id.*

90. See FRIEDENTHAL, *supra* note 67, at 533.

91. 359 U.S. at 500.

92. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

93. See FRIEDENTHAL, *supra* note 67, at 512.

94. FED. R. CIV. P. 47(b) requires the court to allow the number of peremptory challenges provided by statute, 28 U.S.C § 1870. The statute provides: “In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.” All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.”

input from the lawyers.<sup>95</sup> *Voir dire* provides the parties with the information they need in order to persuade the jury. It also provides the factual basis for arguments to the judge that particular jurors should be disqualified for cause.

The idea that the parties actively participate in the process of selecting their jury seems strange when compared to Italian judges, who develop a reputation for impartiality through training in a kind of administrative bureaucracy. Here, "impartiality" of the finder of facts comes from a sort of "scrubbing" by the parties. This process of selecting the trier of facts is consistent with the adversarial nature of the American proceeding: if one side is better at jury selection than the other, it will gain an advantage. The judge does not play an important role in selecting the jury. He may ask the questions that disqualify people who are clearly not qualified for some reason. However, the real jury shaping is done by the parties, and not by the judge. The purpose of the parties' participation is not to check the powers of the judge but to affirmatively influence the composition of the jury.

Once the jury has been impaneled, it hears evidence which is presented by counsel under the judge's supervision. Pursuant to the relevant federal rules of evidence, the judge supervises the process of evidence selection and allows the relevant and admissible evidence to get in and be taken into account by the jury, while precluding the introduction of irrelevant and inadmissible evidence. The jury then has to judge the evidence offered at trial in light of the instruction which will be provided to it by the judge either during (in case of limiting instruction)<sup>96</sup> or after trial and either before or after the parties' closing arguments.<sup>97</sup>

Once all the evidence is presented to the jury, the jury makes its decision by a general or special verdict or by a verdict that is a mixture of the general and special verdict. By the general verdict, the jury simply indicates which party wins the case, without giving further explanation for such decision. In contrast, when adopting the special verdict, the jury responds to a list of factual issues with reference to which the court will ask the jury to make findings. In this case, the judge then applies the substantive law to these findings and enters the appropriate judgment.

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95. Some courts also use questionnaires to explore jurors' attitudes on certain subjects in greater detail than can be done on oral examination.

96. When the judge deems that an offered item of evidence is admissible for a specific use, but would be inadmissible for another use, he will instruct the jury consistently, warning it that it will be able to consider that item only for the instructed permissible use.

97. Parties ordinarily submit requests for jury instructions under FED. R. CIV. P. 51(a)(1). This is done either at the close of the evidence or at an earlier point ordered by the court (in which case the parties may have the opportunity to supplement their requests). The court must inform the parties of its proposed instructions, give them an opportunity to object, and rule on the objection. See FED. R. CIV. P. 51(b)(1)-(2). It is in the debate over jury instructions that the parties set forth their views of the law and the judge makes rulings that may be the basis for an appeal.

The judges make the decision as to which form of verdict the jury should use.<sup>98</sup> They usually prefer general verdict forms because framing the issues to submit to the jury may be difficult and time consuming, especially in complex cases.<sup>99</sup> Special verdicts may be considered an intrusion in the jury's domain and an abuse of control over the jury.

General verdicts may lead to problems because they make it impossible to see whether the jury made its decision after careful consideration of the judge's instructions or whether the decision was based on emotion and bias.<sup>100</sup> At best, the special verdict form would allow a more precise check against a jury totally misunderstanding the case. If the jury rendered a special verdict, the lawyer could look at inconsistent answers in order to create a basis for an appeal, or more likely, a new trial. Still, the underlying reasoning adopted by the jury would not be disclosed to the parties, who then will have no way to check whether that reasoning was "right" or "wrong." The litigants rarely know what actually happened, and no one provides an account for the real basis of the decision, if there is one.

Here, the system seems unfair because it runs contrary to most of the fairness criteria of rationality, predictability, and fair play. It runs against rationality because the judgment thus rendered is not "clearly" based on the records and reached after logical reasoning that can be shared by reasonable people. The reasoning followed by the jury is not shown to anybody and remains in the jury's "black box." It runs against predictability in that the decision rendered on the basis of the verdict cannot be reviewed under the reasoning criteria and schemes, which were adopted by the jury. A system where the grounds for review on appeal are more clear and depend less on discretion and on factors which are not "disclosed" to the parties would be more fair and desirable.

Practical reasons have been offered to keep the jury's reasoning "not public." First, it would be impracticable to have six or twelve jurors to agree on the same reasoning to support their verdict. Second, jurors are lay people who are not used to writing reasoning that supports findings of fact; this would require a level of technicality that they do not possess. Finally, a secretary to the jury would probably be necessary to this end, and such an addition is impractical.

In any event, the jury decision making process is a matter of ideology: the jury represents the democratic community in applying community standards to the matter at hand, regardless of what the law may be. In short, the strong version of jury ideology is a negation of the rule of law. The

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98. *Broad. Satellite Int'l, Inc. v. Nat'l Digital TV Ctr., Inc.*, 323 F.3d 339 (5th Cir. 2003); *Davis v. Ford Motor Co.*, 128 F.3d 631 (8th Cir. 1997).

99. FRIEDENTHAL, *supra* note 67, at 571.

100. *See Skidmore v. Baltimore & O. R.*, 167 F.2d 54 (2d Cir. 1948), *cert. denied*, 335 U.S. 816.

system will not go there, but it stops quite far from subjecting jury decisions to a rational restraint. The main tool the system uses is the power of the judge to order a new trial,<sup>101</sup> which does not substitute for the jury's decision but instead obtains the decision of a new jury.

However, many cases are tried to a judge. These are not the paradigm, but they are the majority.<sup>102</sup> It is not clear whether judges decide cases differently from juries, but the form is certainly different and more transparent. The judge has to make findings of fact and conclusions of law, will have a very thoughtful opinion, and will be subject (so far as findings of fact are concerned) to appellate review in a way that the jury is not. Judge-made decisions are subject to the "clearly erroneous" standard.<sup>103</sup> Specifically, the appellate court will affirm the judgment, unless the finding of fact is clearly erroneous, but that is a lot different from passion or prejudice. There is an element of reasoned decision-making in this kind of case that is missing from jury trials. Trials to the judge also have a big effect on the rules of evidence, since judges resolve any doubts by letting evidence in and then taking its worth into account. Trials to the judge in Italy and in the United States look more similar and seem more "fair" in this respect.

On the contrary, when reviewing jury fact finding, the standard is more strict.<sup>104</sup> To find error at all, the appellate court has to conclude that the trial court's decision was not merely wrong, but something close to an unreasonable decision.<sup>105</sup> In other words, the appellate court should see whether there is evidence in the record on which a reasonable jury could find the required facts to support either the general or special verdict. Only in this event will the appellate court not reverse the prior decision.<sup>106</sup>

This makes it very hard to "review" a jury verdict. Perhaps the only case in which the assessment of facts contained in the jury verdict could be truly reviewed is through a motion for a new trial under Fed. R. Civ. P.

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101. See *infra*.

102. As explained above, trials to a judge happen either because there is no right to a jury trial or because parties waive it.

103. See FRIEDENTHAL, *supra* note 67, at 640. In recognition of the trial judge's special expertise, the clearly-erroneous standard is said to preclude the appellate court from re-determining the weight or credibility of the evidence. *Inwood Labs, Inc. v. Ives Labs, Inc.* 456 U.S. 844 (1982). It also precludes the appellate court from independently assessing the inferences drawn from the facts by the trial judge. *U.S. v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950).

104. "The issue often arises on appeal after the trial judge has denied a motion for new trial on the ground that the evidence was sufficient to support the verdict." See FRIEDENTHAL, *supra* note 67, at 639.

105. See ALLEN, ET AL., *EVIDENCE: TEXT, PROBLEMS AND CASES* 106 (4th ed. Aspen, 2006).

106. If this would come up in connection with a decision concerning a motion for a new trial, then the question would be whether the verdict was against the "great weight of the evidence".

59.<sup>107</sup> In jury trials, through the motion for new trial, which must be made by ten days after the entry of the judgment, the movant may request the trial court to order a new trial if the verdict is excessive, inadequate, or against the clear weight of the evidence. Specifically, the trial court will grant a motion for new trial for excessive verdict when it determines that the amount of the verdict is so unreasonable that it shocks the conscience.<sup>108</sup> This is clearly a high threshold that must be met for the trial court to order a new trial. The amount object of the trial must be so unreasonable as to shock the conscience.

The court will grant a motion for new trial when verdict is against the weight of the evidence so that a new trial is necessary to prevent a miscarriage of justice. The evidence may be such that reasonable people could find as the jury did, but the verdict still may be manifestly against the weight of the evidence.<sup>109</sup> The trial judge may weigh the evidence and grant a new trial under these circumstances.<sup>110</sup> Here, the threshold is high, requiring a strong conflict between the evidence and the verdict itself so that the order for new trial is necessary to avoid a miscarriage of justice.

Here, the question is whether an excessive verdict not so unreasonable as “to shock the conscience” or a verdict in conflict (even if the conflict is not that strong) with the weight of the evidence offered at trial, but not resulting in a “miscarriage of justice” still able to affect the parties’ rights could lead the trial court to grant a new trial. The trial court will likely not grant a new trial because of the great deference to the jury, a fundamental institution in the American proceeding.

Whether the circumstances justify the granting of a new trial is a decision left to the sound discretion of the trial judge.<sup>111</sup> Such discretion is so broad that one court has described it as “virtually unassailable on appeal.”<sup>112</sup> Usually, judges do not like to grant motions for a new trial because new trials are expensive and time consuming. Consequently, the jury’s findings of fact hardly get reviewed through motions for a new trial and hardly get reviewed at the appellate level where the “abuse of discretion” standard applies. Notwithstanding these factors, the jury is indeed a fundamental institution of the American legal process and tremendously affects the process and the law provisions regulating it, especially the laws of evidence.

### 3.6 *Laws of evidence*

As observed:

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107. *See also infra* para. 3.9.

108. *See generally* *Gasperini v. Ctr. for Humanities*, 518 U.S. 415 (1996).

109. *Bevevino v. Saydjari*, 574 F.2d 676 (2d Cir.1978).

110. *See* FRIEDENTHAL, *supra* note 67, at 594.

111. *See generally* *Gasperini*, 518 U.S. at 415.

112. *See* *Children’s Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 867 (8th Cir. 2004).

A more theoretical difference between the American conception of evidence and that in the civil law system stems from the fact that the civil law system regards the judge as an expert in evaluating evidence, while the American system regards the judge as substituting for a lay jury in evaluating evidence. The intellectual tradition of civil law scholarship treats the task of factual analysis as involving a technical rigor no less exacting than legal analysis. The method of legal training in the civil law centers on deductive analysis, which is assumed to be equally applicable to legal reasoning and to factual analysis. In contrast, the American system rests on the premise that assessment of evidence involves no special expertise. By definition, in a jury case the evidence is assessed by minds untrained in law; it would be a contradiction to say that legal training is required to analyze the facts when jurors do so without any such training. Moreover, judges in the American system have no special judicial training before appointment to the bench, nor are they systematically trained within the court system or promoted on the basis of experience. When it comes to factual determination, therefore, the judge in the American system is regarded as having no special insight.<sup>113</sup>

This clearly identifies the main differences between the two systems in terms of evidence and helps to understand the American law of evidence and the rules and exceptions that are discussed below.

Considering that in the American legal process the jury is the fact-finder that should determine the facts on the basis of the evidence offered, it is easy to understand how the rules of evidence are shaped in light of the presence of the jury in most American civil proceedings.<sup>114</sup> While in the pre-trial discovery the parties disclose and exchange evidence and information, evidence will be considered by the jury and the judge only if it is offered at trial and admitted into evidence. This requires the evidence to be relevant and admissible.

Besides the Federal Rules of Civil Procedure, a separate set of rules, the Federal Rules of Evidence ("Fed. R. Evid." or "FRE") governs evidence admissibility and relevance. There is a general presumption under Fed. R. Evid. 401 that relevant evidence is admissible unless there is a good reason under the rules not to admit it. The American concept of relevance in Fed. R. Evid. 401 seems much broader than the Italian concept of relevance. It

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113. See HAZARD, JR. & TARUFFO, *supra* note 7, at 81-82.

114. See also Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999).

allows much more circumstantial evidence as relevant evidence, which in the Italian system would be neither relevant nor admissible.

The Fed. R. Evid. are designed to limit the amount of information available to jury members about the case to only those pieces of evidence that are admitted to the court. This is different from Italian civil proceeding and has a dramatic effect. In Italy, there is no equivalent performance. The judge proceeds through the facts in a highly analytic way, takes evidence more or less as he finds it, gives it the credence it deserves, and then decides the case and records pursuant to his "cautious evaluation."<sup>115</sup> Pursuant to FRE 401, in order to be relevant unless where differently provided, evidence should have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is offered to prove a fact of consequence (materiality). A proposition of fact is of consequence in a legal dispute, if it matters to the legal resolution of that dispute. That is, evidence is admissible if it can be connected through a reasonable, logical, and non-speculative inferential reasoning to one of the essential legal elements of the substantive law governing the case.

In general, the policy behind the Fed R. Evid. is to admit "all evidence which is logically probative"<sup>116</sup> within the limits set forth by the Fed R. Evid.; it is considered fair to require litigants to be able to address and explain or contradict all the evidence jurors will consider.

Consistently with this general view, Fed. R. Evid. 402 provides, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

However, even if all admissible evidence is relevant in the United States, not all relevant evidence is admissible. Fed. R. Evid. 403 sets forth a balance test which the judge uses to decide whether to exclude evidence which, although relevant, is highly prejudicial and therefore, not admissible. Specifically, FRE 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The dangers to which the admission of the item of evidence may lead are those spelled out by Fed. R. Evid. 403. The Advisory Committee Note to Fed. R. Evid. 403 clarifies, "Unfair prejudice within its context means undue tendency to suggest decision on an improper

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115. C.P.C. art. 116 provides "Il giudice deve valutare le prove secondo il suo prudente apprezzamento" ("The judge shall judge the evidence pursuant to his cautious evaluation").

116. James Bradley Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898).

basis, commonly, though not necessarily, an emotional one.”

Thus, the Fed. R. Evid. recognize that the jury’s decision might be influenced by improper elements, such as bias or prejudice. Therefore, Fed. R. Evid. 403 is necessary to keep evidence away from the jury that has a tendency to suggest decision on an improper basis. According to the Advisory Committee, “In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.” In this respect, under Fed. R. Evid. 105, when evidence is admitted that it is admissible as to one party or for one purpose, but not admissible as to another party or for another purpose, the court, upon request, should restrict the evidence to its proper scope and instruct the jury accordingly.

Fed. R. Evid. 403 also calls for exclusion of relevant evidence on efficiency grounds. Where admission of the evidence would lead to undue delay, jury confusion, or unnecessarily cumulative evidence, it is inefficient. This gives the judge the authority to check the inclination of some lawyers to offer everything, even where it may lead to prolonging the trial and confusing the jury.

Similarly, evidence admissible under Fed. R. Evid. 403 may be inadmissible under a different provision of the Fed. R. Evid. or other law provisions. A detailed set of rules within the Fed R. Evid. determines when evidence should be excluded. The rationale behind most of these “exclusionary” rules is to allow the jury’s decision making process to properly function and to protect the parties from the risk of an unfair condemnation or conviction; in a few occasions, the Fed. R. Evid. pursue a broader public policy.<sup>117</sup>

An important and distinguishing exclusionary rule intended to protect the parties from improper inferences which the jury might draw against them is the character evidence rule under Fed. R. Evid. 404, which bans the admission of character evidence to show action in conformity with that character. This rule is clearly aimed at the jury, which would easily draw the wrong inference from the offered evidence of past conduct. However, there are exceptions to such prohibition.<sup>118</sup>

Fed. R. Evid. 404(b) sets a critical exception to the general prohibition under Fed. R. Evid. 404, providing that evidence of past specific facts is admissible for purposes other than proving character. For example, it is admissible to prove motive, identity, plan, lack of accident, or mistake, etc. Under this rule, and under the *modus operandi* theory, evidence of past specific acts could be admitted to prove identity as an essential element of a criminal or civil case when identity is disputed. Specifically, if the past acts share unique characteristics with the litigated event, the jury is allowed to

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117. Like the Fed. R. Evid. concerning sex offenses or child molestation cases, *see generally* FED. R. EVID. 412.

118. *See* FED. R. EVID. 404(a)(1)(2)(3).

consider it to prove identity, provided that the proponent of the evidence will introduce evidence sufficient to support a finding that the party did commit the act under the circumstances which make the past act relevant for non-character use.

This rule, and especially this doctrine, seems to run contrary to the general prohibition of character evidence under Fed. R. Evid. 404. However, it is still consistent with the broad concept of relevancy under Fed. R. Evid. 401, which would allow circumstantial character evidence to be admitted, provided that a judge determined under Fed. R. Evid. 403 that the dangers of unfair prejudice do not substantially outweigh the evidence's probative value. But this rule may lead to unfair situations. If evidence of a parties' past bad acts are admitted to show the identity of the alleged perpetrator in the current proceedings, the fact finder may improperly use that evidence and decide against the party because of past actions, rather than the actions that actually led to the litigation at hand.

Character evidence is excluded for three reasons. First, it often has low probative value. Second, if it is disputed, there is a risk of digressing into a mini-trial on character and diverting the fact finder's attention from the main issue in the case. And third, it may be unfairly prejudicial, particularly if it pertains to the character of a party to the lawsuit.

Other exclusionary rules apply the same rationale behind the character evidence exclusionary rule, which is to avoid improperly influencing the jury. External policies are those under Fed. R. Evid. 407,<sup>119</sup> 408,<sup>120</sup> 409,<sup>121</sup> and 411.<sup>122</sup>

### 3.6.1 *Lay testimony and expert testimony*

Parties to litigation may be witnesses in their own case, and experts are considered witnesses. Therefore, any report or testimony rendered by them is treated as evidence.

A witness must have first hand knowledge of the matter on which he will testify, pursuant to Fed. R. Evid. 602. If there is doubt as to whether the witness has first-hand knowledge, the proponent of the evidence must

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119. FED. R. EVID. 407 states that evidence of subsequent remedial measures is not admissible to prove negligence, fault and defect, but it is admissible for other purposes, such as proving ownership, control, feasibility of precautionary measures and for impeachment. *See infra* para. 3.6.1.1.

120. Evidence of compromise and offer to compromise is not admissible essentially to prove liability; but it is admissible for other purposes such as proving a witness's prejudice or bias. FED. R. EVID. 408.

121. Evidence of payment of medical and similar expenses is not admissible to prove liability for the litigated injury. FED. R. EVID. 409.

122. Evidence that a person was or was not insured against liability is not admissible to prove that the insured acted negligently or otherwise wrongfully, but it is admissible for other purposes such as proving agency, ownership, control or bias or prejudice of a witness. FED. R. EVID. 411.

present "evidence sufficient to support a finding" that he does. This is a relatively low standard of proof, requiring only evidence on the basis of which a jury could reasonably find that it is more probable than not that the witness had personal knowledge. If this modest level of proof is provided, it falls to the jury to decide whether the witness has the knowledge he claims to have and whether his testimony is credible.

The witnesses are interviewed directly by the counsel and the judge.<sup>123</sup> Similar to what happens under the Italian rules of evidence, a lay witness, or non-expert witness, cannot render opinions during his testimony unless his opinions are rationally based on his perception and they are helpful to understanding his testimony or are helpful in the determination of a fact in issue. They cannot be based on scientific, technical, or other specialized knowledge.<sup>124</sup>

On the contrary, experts testify in the form of an opinion if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.<sup>125</sup> By giving opinions and drawing inferences, the witness would do the job of the jury. The expert may not only testify in the form of opinion, but he may also give a dissertation or exposition of scientific data or other principles relevant to the case, leaving the trier of fact to draw the due inferences and apply them to the facts.

Lay witnesses and experts offer different types of testimonies, and in *State v. Brown*<sup>126</sup> the court held that the distinction between lay and expert witnesses is that lay testimony "results from a process of reasoning familiar in everyday life", while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma.<sup>127</sup>

An expert witness must qualify as such in order to give expert testimony. Thus, the proponent of expert testimony should present evidence of the expert's curriculum, publications, and experience in the specific field of interest. In addition, the proponent must show that the expert's opinion would be helpful to the jury under Fed. R. Evid. 702. Fed. R. Evid. 702 incorporates the principles of *Daubert v. Merrell Dow Pharmaceuticals*,

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123. The judge can ask questions to witness, but this is rarely done. Juries cannot ask questions, although there is a growing trend in some jurisdictions toward allowing jurors to propose questions to the judge, who may in his discretion put them to the witness.

124. See FED. R. EVID. 701.

125. See FED. R. EVID. 702.

126. 836 S.W.2d 530, 549 (1992).

127. See also FED. R. EVID. 702 advisory committee's notes.

*Inc*<sup>128</sup> and the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*.<sup>129</sup> In *Daubert*,<sup>130</sup> the Court stated that trial judges are “gatekeepers” in that they have to exclude unreliable expert testimony,<sup>131</sup> and in *Kumho*, the Court stated that this gatekeeper function should apply to all expert testimony, not just testimony based on science.<sup>132</sup> Consistently with *Kumho*, Fed. R. Evid. 702 provides that all types of expert testimony present questions of admissibility for the trial court, which the court should decide pursuant to Fed. R. Evid. 104(a).<sup>133</sup> Therefore, the proponent of the expert testimony should meet the burden of establishing that the pertinent admissibility requirements are met by the preponderance of the evidence. In other words, he should demonstrate to the judge that it is more probable than not that the assessments of his expert are reliable.<sup>134</sup> In *Daubert*, the court set forth a non-exclusive checklist of facts to be applied by trial courts in assessing the reliability of scientific expert testimony.<sup>135</sup>

Judges have the power under Fed. R. Evid. 706 to appoint their own

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128. 509 U.S. 579 (1993).

129. 526 U.S. 138 (1999). See also FED. R. EVID. 703 advisory committee’s note.

130. The Court held “We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes” *Daubert*, 509 U.S. at 597.

131. The Supreme Court held that “The Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Id.* at 580.

132. The Court held “The *Daubert* “gatekeeping” obligation applies not only to “scientific” testimony, but to all expert testimony. Rule 702 does not distinguish between “scientific” knowledge and “technical” or “other specialized” knowledge, but makes clear that any such knowledge might become the subject of expert testimony.” *Kumho Tire*, 526 U.S. at 138.

133. FED. R. EVID. 104(a) provides that “Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provision of subdivision (b). In making its determination, it is not bound by the rules of evidence except those with respect to privileges”.

134. But the proponent is not required to prove that the assessments of his expert are correct. See *In re Paoli R.R. Yard PCB*, 35 F.3d 717, 744, (3d Cir. 1994).

135. These factors are: (i) whether the expert’s technique or theory can be or has been tested, that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusive approach that cannot reasonably be assessed for reliability; (ii) whether the technique or theory has been subject to peer review and publication; (iii) the known or potential rate of error of the technique or theory when applied; (iv) the existence and maintenance of standards and controls; and (v) whether the technique or theory has been generally accepted in the scientific community. These factors are neither exclusive nor dispositive, and other cases have acknowledged that they cannot apply to every type of expert testimony and that, sometime, other factors may apply. To the contrary, they stand as a guide-reference to trial courts, to solve questions of admissibility of the proffered expert-testimony and confirm that such admission is not an automatic process. *In re Paoli R.R. Yard Pcb Litig.*, 35 F.3d 717, 744 (3d Cir. 1994).

experts, but they rarely do so. They and the jury rely on the testimony of the parties' experts and on their confrontation to decide which solution offered is the best one. This seems to be more efficient than having an expert appointed by the judge and is ultimately consistent with the adversarial nature of the American proceeding. However, the parties' experts have reasons to present the case in the way most favorable to their client. Therefore, an expert appointed by the judge to check the analysis and method used by the parties' expert would be advisable because it would favor the adoption of a rational decision consistent with the facts and the evidence offered by the parties. This would still be consistent with the adversarial nature of the American civil proceeding but would avoid any errors that could derive therefrom.

### *3.6.1.1 Impeachment*

The strength and accuracy of any witness testimony depends on the capacity to observe events, to remember them, and to relate them accurately and honestly. This is particularly important especially if you consider that the jury will especially rely on witnesses and their "story" to decide which party should win. To make sure that the witness testifies accurately and honestly, Fed. R. Evid. 602 requires that the witness has first-hand knowledge of the matter on which he testifies. Fed. R. Evid. 603 requires the witness to affirm that he will testify truthfully and to take the oath to that purpose. However, the witness might lie or simply not remember exactly the events on which he testifies. In this case, his testimony should be shown to the jury as unreliable testimony that the jury could disregard. A witness could be impeached through cross examination or through extrinsic evidence, (evidence other than that developed through direct or cross-examination).

Under Fed. R. Evid. 404(a)(3), evidence of a person's character or a trait of character is admissible. A witness's character is significant for truthfulness to infer action in conformity with that character on a particular occasion and to infer whether the witness is lying or telling the truth on the witness stand. To this purpose, Fed. R. Evid. 404(a)(3) refers to Fed. R. Evid. 607, 608, and 609, allowing impeachment through character testimony.

Even absent any specific evidence that the witness is actually lying on the stand, evidence of the witness's character for untruthfulness, or evidence that the witness lied in the past, could be used to discredit his testimony under the "preponderance of the evidence" standard as well as through inferences which could be inaccurate. Thus, there could be a risk of inefficiency and unfairness.<sup>136</sup>

Fed. R. Evid. 609(2) provides that evidence of a prior conviction of a

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136. See FED R. EVID. 609(2).

*crimen falsi*, (a crime of dishonesty) could be admitted to prove that the witness who committed the crime in the past has a propensity to lie and should not be believed. The judge would allow such extrinsic evidence if the dangers of unfair prejudice under Fed. R. Evid. 403 do not substantially outweigh the probative value of this evidence. Assuming the defendant was sued for fraud in a civil case and that the plaintiff would like to prove that the defendant was convicted of fraud nine years ago, he could very well do that under Fed. R. Evid. 609 provided that the dangers of unfair prejudice do not substantially outweigh the probative value of this evidence.<sup>137</sup>

Should evidence of a prior conviction be admitted, it would be highly prejudicial to the defendant because it is very likely that the jury could improperly use this evidence to draw improper inferences about the propensities and identities of the adverse party. A limiting instruction under Fed. R. Evid. 105, is possible to help remedy this problem, but it might not adequately protect the defendant from this risk. If this occurred, the solution would be inefficient and unfair.

The prior conviction impeachment device may have derived from common law. As it was noted, "At common law a person's conviction of treason, any felony, or misdemeanor involving dishonesty (*crimen falsi*), or the obstruction of justice, rendered the convicted person altogether incompetent as a witness." These sorts of crimes that would disqualify someone as a witness at trial were labeled "infamous" crimes. By statutes and common law, the disqualification for conviction of infamous crimes has been universally abrogated. Now, prior convictions for crime are merely grounds for impeaching credibility."<sup>138</sup>

### 3.6.1.2 Hearsay

Under the U.S. law of evidence, hearsay is inadmissible under Fed. R. Evid. 802. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The statement may be oral or written, and it may also be non-verbal assertive conduct that the "declarant" intends to use as a substitute for words.<sup>139</sup>

There are at least two policies furthered by this rule. One is the desire and ability for cross examination and the other is the ability of the fact finder to observe the behavior of the witness while he is testifying. The U.S. system prefers to have live testimony to cross examine under oath. The absent "declarant" cannot be cross-examined, and the jury has little basis

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137. It should be noted that the crime had to have been committed within ten years of the testimony. Also, the probative value of such evidence depends on how probative the prior conviction is of the truthfulness of the witness at the time of the witness's testimony.

138. JOHN W. STRONG ET. AL., MCCORMICK ON EVIDENCE, § 42 (5th ed. 1999).

139. Non-assertive conduct, that is, conduct held by the declarant without any intention to assert a belief, or use it as a substitute for words, are non hearsay. See FED. R. EVID. 801.

for assessing his credibility. Live testimony also gives the fact finder a chance to judge the credibility of the witness by observing behavior and conduct while testifying. Moreover, the rules also discourage second hand testimony under the assumption that it is not as reliable.

The exceptions to the hearsay rule can be divided into two groups. One set of exceptions applies if the declarant is not available to testify.<sup>140</sup> If the declarant is unavailable, previous statements under oath may be admitted if the party against whom they are offered had an opportunity and motive to develop the declarant's testimony by direct, cross-examination, or redirect examination.<sup>141</sup> The rules reflect a judgment that, while it would be better to call the declarant to the witness stand when possible, the out-of-court statement at issue has enough indication of reliability to justify admitting it.

The second set of exceptions applies whether the declarant is available or not. These include present sense impressions (i.e., statements reflecting the sense impressions of the declarant while the defendant was perceiving an event or condition),<sup>142</sup> excited utterances (statements made under stress, caused by a startling event),<sup>143</sup> records of regularly conducted activities like public records,<sup>144</sup> statements in very old documents,<sup>145</sup> and many other things.<sup>146</sup> In each case, there is some reason to believe in the reliability of the relevant out-of-court assertion. There is no special reason to put the declarant on the stand to testify. Finally, there exists a residual category that allows courts to admit hearsay statements where there are guarantees of trustworthiness comparable to those observed in the rules.<sup>147</sup>

The problem with the structure of the hearsay rule is that it contains too many exemptions and exceptions. The intrinsic risk is that some out-of-court statement, relevant for the purpose of the matter asserted, could not come in under any exceptions to the hearsay rule simply because a specific exception has not been exactly drafted for that purpose. Fed. R. Evid. 807 addresses this problem. It allows the trial judge to admit hearsay evidence, provided that the proponent shows: (i) guarantees of trustworthiness equivalent as those under Fed. R. Evid. 803 and 804 exist; (ii) the evidence proves a material fact more than any other item of evidence which the proponent could procure through reasonable efforts; and (iii) the interest of the justice will be furthered by the admission of the evidence. The rule also includes procedural safeguards to give the opposing party fair notice that a party intends to invoke the rule, including the name and address of the

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140. They are the exceptions. *See* FED. R. EVID. 804.

141. FED. R. EVID. 804.

142. *See id.* at 803(1).

143. *See id.* at 803(2).

144. *See id.* at 803(8).

145. *See id.* at 803(16).

146. *See id.* at 801(d), listing the "exemptions" to the hearsay rule; *Id.* at 803; *Id.* at 805.

147. FED. R. EVID. 807.

declarant. Although the exception is residual and is used rarely by courts and litigants to admit evidence excluded under the hearsay exception, it does avoid injustice in situations that fall outside any of the listed hearsay exceptions.

In any event, not all the exceptions to the hearsay rule comply with the rationale of the rule. The rationale is to make sure that out-of-court statements relevant for the truth of the matter asserted are excluded because of the dangers of unreliability. These dangers relate to all four testimonial qualities: sincerity, narration, perception, and memory. A statement which is not reliable for one of these qualities, and which was made out-of-court, not under oath, and where the witness is not available and cannot be cross-examined at trial, should not be admitted.

However, Fed. R. Evid. 803(2) presents some problems in this respect. The rule provides that “a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is admissible. The rationale is that the stress steals the capacity to fabricate. Therefore, the statement is more likely to be sincere. It is true that the statement was made under stress. Thus, if not a sincerity danger, there could be a perception and accuracy danger. The out-of-court statement could come in, and it would be treated as if it was given under oath, at trial, even if there will be a high risk of misperception due to the stress.<sup>148</sup>

### 3.6.2 Exhibits

The other type of evidence most commonly used are exhibits, which are real and demonstrative evidence like written documents, audio, video and photographic recordings, and electronic and digital data compilations. The requirement for exhibits is set forth by Fed. R. Evid. 901, which provides:

- (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: (1) Testimony of witness with knowledge. Testimony that the matter is what it is claimed to be. (2) Non-expert

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148. In Italy, where there is no hearsay rule, such statement will not be admitted into evidence because it would be not relevant (an Italian judge would think that it does not prove any element of the claim or defense through a logical, reasonable and not speculative reasoning). See GROSSI & PAGNI, *supra* note 29.

opinion on handwritings. Non-expert opinion as to genuineness of handwriting, based upon familiarity not acquired for purposes of litigation..." the non-exhaustive list of examples of authentication or identification continues.<sup>149</sup>

Fed. R. Evid. 901 contains under (a), the basic foundation and the evidentiary standard that the proponent of an exhibit must satisfy to have it admitted into evidence; and under (b), illustrations of the kinds of foundations through which the proponent could meet the requirement under Fed. R. Evid. 901 (a), by evidence sufficient to support a finding, which is evidence upon which the judge thinks a jury could reasonably find a fact to be more likely true than not.

The judge should make a rough estimate of underlying probabilities, which is the same kind of estimation and thought process he makes when estimating probative value under Fed. R. Evid. 403. The judge should not decide whether the exhibit is authentic, which is the task of the jury, but simply that the proponent of the exhibit has offered evidence sufficient to support a finding that the exhibit is what the proponent claims it to be. The judge should not submit to the jury an exhibit which the jury could not reasonably believe to be authentic; but it will ultimately rest upon the jury to decide whether the exhibit is authentic. However, once an item of evidence has been authenticated, it could still be excluded pursuant to Fed. R. Evid. 403.

By stating that "the requirement of authentication of identification [is] a condition precedent to admissibility," Fed. R. Evid. 901 makes authentication and identification an aspect of relevancy. As noted by the Advisory Committee Note to Fed. R. Evid. 901, the requirement of showing authenticity or identity falls into the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Fed. R. Evid. 104 (b).<sup>150</sup> The common law approach to authentication of documents has been criticized as an "attitude of agnosticism, which departs sharply from men's customs in ordinary affairs" and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face."<sup>151</sup> According to the Advisory Committee, today there are means – such as requests to admit and pretrial conference – that eliminate much of the need for authentication or identification. Therefore,

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149. FED. R. EVID. 901.

150. "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. FED. R. EVID. 104(b).

151. See also Charles T. McCormick, *CASES AND MATERIALS ON EVIDENCE* 388 (West Pub. Co. 3rd ed. 1956).

the rules for authentication and identification seem inefficient by requiring long, complex, and expensive procedures that could be avoided. The Advisory Committee Note to Fed. R. Evid. 901 says that “the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and case of genuine controversy will still occur.” However, Fed. R. Evid. 901 does seem suited to addressing the “unforeseen circumstances” to which the Advisory Committee refers because it spends a lot of effort addressing the wrong problems.

### 3.6.2.1 *The Best Evidence Rule*

Additional foundation to prove content is required when a writing, recording, or photograph is offered. The original will likely be more trustworthy than a copy. Therefore, the best evidence rule under Fed. R. Evid. 1002 requires that the original of the writing, recording, or photograph be produced instead of a copy of the same, unless the absence of the original is explained or justified or the exceptions set forth by the Fed. R. Evid. or Act of Congress apply.

### 3.6.3 *Burden of Proof*

In the ordinary civil case, the plaintiff’s burden is to prove its case by a preponderance of the evidence.<sup>152</sup> The Supreme Court held that the preponderance of the evidence standard is satisfied when it is more likely than not that the preliminary fact is true, and that “the preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded the consideration.”<sup>153</sup>

Therefore, if at the end of trial, the jury believes that the evidence offered does not show that the plaintiff’s position is not more likely correct than not, the plaintiff loses. This probabilistic thinking<sup>154</sup> is at odds with the way in which the Italian rules of evidence are framed and would be regarded as giving rise to greater risk of error and, therefore, lack of accuracy in the decision-making process.<sup>155</sup>

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152. The defendant must also prove each affirmative defense by the preponderance of the evidence. *Id.*

153. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

154. “In the US [sic] view, it is candid, rational, and desirable to recognize that the truth and hence fact-finding is a matter of probability, and that the system should seek to optimize its probabilistic standards of proof.” Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proofs*, 50 AM. J. COMP. L. 252 (2002); see also Richard Friedman, *Anchor and Flotsam: Is Evidence Law ‘Adrift’?*, 107 YALE L. J. 1921, 1946 (1998) (reviewing MIRIJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* (1997)).

155. See also *infra* para. 4.

It is difficult to analyze, in a comparative perspective, the American and the Italian standard of proof. This comparative analysis is made even more complex by the cultural differences and different approach to the law of evidence adopted by the two systems.<sup>156</sup>

### 3.7 Pretrial process

Pretrial process in the United States has several objectives. First, discovery is intended to give each party equal and full access to relevant evidence. While discovery often is easily manageable, in many large cases it can be extraordinarily expensive and time-consuming. Second, efforts are made throughout the pretrial process, especially as a trial date approaches, to simplify the issues and “package” the case for a convenient trial. Third, as shown *infra* in 3.8, the pre-trial process encourages settlement. Finally, in order to govern all of these objectives, the federal courts use a series of pretrial conferences under Fed. R. Civ. P. 16. After an initial “scheduling” conference the judge will produce a pretrial order setting a schedule for discovery, motions, and other matters. These orders may be modified for cause at subsequent conferences. As trial approaches, the court is required to hold a final pre-trial conference that will plan for the trial. The order resulting from this conference will govern the progress of the trial and will be modified only to prevent manifest injustice. Rule 16 thus provides the framework for judges to manage the pretrial process and avoid unnecessary expense or delay.

#### 3.7.1 Discovery

Discovery has been defined as the constitutional foundation of American civil litigation,<sup>157</sup> and it serves three main purposes. First, it helps preserve relevant information that might not be available at trial. Second, it helps identify the issues truly disputed between the parties. Finally, it helps the parties to obtain information that will lead to admissible evidence on disputed issues, thus limiting surprises at trial.

Within discovery, parties have the right to obtain information and documents as long as they fall within the broad scope of discovery under Fed. R. Civ. P. 26(b).<sup>158</sup> There is some preliminary information the parties

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156. See *infra* para.3.6.

157. Geoffrey C. Hazard, Jr., *From whom no Secrets are kept*, 76 TEX. L. REV. 1665, 1694 (1998).

158. FED. R. CIV. P. 26(b) provides that “Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.

have to provide to each other under the Federal Rules of Civil Procedure without awaiting a discovery request from the opposing party.<sup>159</sup> Besides this basic and mandatory information, Fed. R. Civ. P. 26(a)(2) requires identification of any experts who will testify and provision of a written report signed by each expert.<sup>160</sup>

In addition, other information and documents must be provided upon request.<sup>161</sup> The parties have broad access to each other's basic information, claims, and defenses before appearing in front of the judge, so that they can eventually settle a dispute before trial. The result of settlement is an enormous saving of judicial resources and costs for the parties. The settlement game is in the hands of the parties, but they must play within the strict limits imposed by the rules and by the judge.

There is an invasion of the privacy of the individual litigants and their litigation strategies which cannot be completely shielded by the work-product rule.<sup>162</sup> This could enhance fairness, especially in terms of "fair play," intended as equal opportunity to file pleadings, respond to pleadings, and offer evidence.

The provisions of detailed rules concerning discovery, as well as sanctions for parties who fail to observe them, ensures effective and efficient discovery, which eventually increases the possibilities that the parties will settle the case rather than proceed to trial.

Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable or at least twenty-one days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).<sup>163</sup> In

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Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." *Id.*

159. See FED. R. CIV. P. 26(a)(1)(A). This information includes the contact details of each individual likely to have discoverable information, a copy of all documents and tangible things that the disclosing party possesses that may be used to support its claims or defenses (except for impeachment), a computation of each category of damages claimed by the disclosing party and a copy of documents on which such calculations are based, and any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. *Id.*

160. See FED. R. CIV. P. 26(a)(2).

161. See FED. R. CIV. P. 26(d)(1), according to which a party may not seek discovery from any source before parties have conferred, as required by FED. R. CIV. P. 26(f).

162. The work-product rule is governed by FED. R. CIV. P. 26(b)(3), according to which, ordinarily, "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Equal access to the facts is assured by the discovery system. See FRIEDENTHAL, *supra* note 67, at 629. However, discovery may lead to reveal strategy when evidence is necessary to show the existence or inexistence of an element of a claim, which existence is disputed and might eventually influence the bargaining powers of the parties, and such evidence should be disclosed, upon request by a litigant. *Id.*

163. See FED. R. CIV. P. 26(f).

addition to these conferences between the parties, the court may order the attorneys and any unrepresented parties to appear before it for one or more pretrial conferences pursuant to Fed. R. Civ. P. 16, in order to expedite the disposition of the action, establish early and continuing control so that the case will not be protracted because of lack of management, discourage wasteful pretrial activities, improve the quality of the trial through more thorough preparation, and facilitate settlement.<sup>164</sup> Various methods of discovery devices are available to parties such as oral depositions,<sup>165</sup> interrogatories,<sup>166</sup> the right to compel an opponent to produce documents and other tangible things for inspection and copying under Fed. R. Civ. P. 34,<sup>167</sup> the right to physical or mental examination under Fed. R. Civ. P. 35,<sup>168</sup> and admissions under Fed. R. Civ. P. 36.<sup>169</sup>

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164. See FED. R. CIV. P. 16(a).

165. Oral depositions allow a party to question any person (the deponent), whether a party to the litigation or not, under oath. FED. R. CIV. P. 30(a)(1). The parties designate as officer, the reporter, who records the questions, the answers, and any objections made by the parties or by the witness. *Id.* at 30(b)(5). An attorney schedules a deposition by serving a notice on the opposing attorney; under FED. R. CIV. P. 30(b)(6) an attorney may also notice the deposition of a corporation or association, requiring the latter to produce the person or persons having knowledge of the subject matter upon which the deposition should be taken.

166. See FED. R. CIV. P. 33. By interrogatory, one party sends to another a series of questions to be answered under oath within a specific time; the exchange of questions and answers is accomplished by mail; no court's order is required, and no officer needs to be appointed. If a question is thought to be improper, the responding party may respond so, and avoid answering. Then the proponent may seek a court's order compelling an answer. But, before doing so, the proponent should try to confer with the opposing party and solve the issue. The responding party has a duty to respond to interrogatories not only on the basis of her own knowledge, but also by using the knowledge of other persons, including her lawyers, employees, and other agents, that reasonably can be obtained through investigation.

167. FED. R. EVID. 34 also allows the party entry to land or property in the possession or control of the opponent in order to inspect, measure, survey, photograph, test or sample the property, or to observe an operation taking place on the property; it also allows access to electronically stored information including data, photographs, and sound recordings. A party that intends to inspect documents and things or to enter property must first confer with the other party in accordance with FED. R. CIV. P. 26(d)(1) and (f). Following this conference, a party simply serves a notice on the opponent stating what it wants to see, and when, where, and how the party would like to see it. A request must describe the items to be discovered with "reasonable particularity". The opposing party has at least 30 days to respond to the request. Particularly, the party that receives a request serves a written response on the requesting party, as well as any other parties to the lawsuit, within the time specified by the FED. R. CIV. P. 34. The response states the responding party's objections, if any, but, absent any objections, the responding party must produce the documents as requested or admit counsel to its premises for the scheduled inspection. The procedure under FED. R. CIV. P. 34 is used also to obtain electronically stored information. Interestingly, although FED. R. CIV. P. 34 is limited to parties, amendments to FED. R. CIV. P. 45 provides identical procedure to obtain material from non-parties, by serving a *subpoena* on the non-party.

168. Physical or mental examination under FED. R. CIV. P. 35 is used only if the person's physical or mental condition is in controversy, and the movant shows "good cause" to compel the examination.

169. Admissions under FED. R. CIV. P. 36 are written requests served by a party upon another, to admit the truth of certain matters of fact or of the application of law to fact, or the

There is a presumption that the responding party must bear the expense of complying with discovery requests, but Fed. R. Civ. P. 26(c) gives the district court discretion to grant orders protecting a party from undue burden or expense in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery (protective orders).<sup>170</sup> The court has much discretion in granting protective orders, which could be considered as a reasonable response of the system to the relative broad scope of discovery. Specifically, in *Seattle Times Co. v. Rhinehart*,<sup>171</sup> the Supreme Court held that "liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."<sup>172</sup> Because pretrial discovery permits liberal discovery under Fed. R. Civ. P. 26(b)(1), it was necessary for the trial court to have the authority to issue protective orders conferred by Fed. R. Civ. P. 26(c). Nevertheless, pretrial discovery has a significant potential for abuse through depositions and protective orders, and therefore the decision to grant protective orders because of this suspected abuse is to be made by a managerial judge. Managerial judges were created by through the evolution of the system to better meet the needs of the parties.

The creation of managerial judges shows the system is flexible and capable of meeting the needs of the parties, and demonstrates that procedural devices themselves become adaptable to the changing needs of the system - thus eventually reducing the costs (instead of creating a new mechanism the system adapts to the available mechanisms). Flexibility ultimately enhances efficiency.

### *3.7.2 Shaping cases for trial: dispositive motions and final pretrial conference*

The primary tools that judges have for shaping cases for trial (or avoiding the necessity of trials) are rulings on dispositive motions. Motions under Rule 12 are generally made early in an effort to forestall discovery and obtain an early dismissal of some or all of the case. On the other hand, motions for summary judgment under Fed. R. Civ. P. 56 typically are made after discovery and are often designed to simplify the issues for trial as much as possible in order to achieve a disposition of the case without a trial.

#### *3.7.2.1 Motion to dismiss under Fed. R. Civ. P. 12(b)(6) or for judgment on the pleadings under Fed. R. Civ. P. 12(c)*

Fed. R. Civ. P. 12(b) provides:

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genuineness of a document or other evidence that may be used at trial. Similarly to admissions ("confessioni" in the Italian legal system), admissions under FED. R. CIV. P. 36 are conclusive evidence, unless withdrawn, and cannot be contradicted at trial.

170. See FED. R. CIV. P. 34.

171. 467 U.S. 20, (1984).

172. *Id.*

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.<sup>173</sup>

In other words, a party may request the court to dismiss a complaint for the grounds under Fed. R. Civ. P. 12(b) and, if granted, such motion bars the action to move forward. Pursuant to Fed. R. Civ. P. 12(h)(2), the motion under Fed. R. Civ. P. 12(b)(6), or the motion to dismiss for failure to join a person required by Rule 19(b), or to state a legal defense to a claim, may be raised in any pleading allowed or ordered under Rule 7(a) by a motion under Rule 12(c) or (c) at trial.<sup>174</sup> While a motion to dismiss for lack of subject-matter jurisdiction may be raised at any time during the proceeding, the lack of personal jurisdiction, improper venue, insufficient process, or insufficient service of process should be raised in a pre-answer motion or else they will be considered as waived.

The different types of motions to dismiss a complaint found under Fed. R. Civ. P. 12 (b) represents the various procedural tools available to prevent a proceeding from moving forward where it should not due to incurable irregularities in the complaint. A particularly interesting motion is the motion to dismiss for failure to state a claim upon which relief can be granted, under Fed. R. Civ. P. 12(b)(6).

By filing this motion, the movant requests the judge to dismiss the case because either the plaintiff failed to adequately plead its claim, or because no relief exists at law which could be granted. Therefore, no evidence could be offered to support the complaint as it is framed and a trial would be a "waste" of judicial resources that would inevitably lead to a judgment denying the claim.

Once a motion under Fed. R. Civ. P. 12(b)(6) is filed, in consistency with the idea to favor access to justice instead of formality, the court would most likely allow the plaintiff the possibility to amend the complaint, unless

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173. FED. R. CIV. P. 12(b).

174. FED. R. CIV. P. 12(h)(2).

such possibility could not cure the defects in the complaint itself because no remedy exists at law which the plaintiff could demand.

Another tool which expedites litigation and avoids waste of time and judicial resources is judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), which provides, "After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings."<sup>175</sup>

Under Fed. R. Civ. P. 12 (c), a moving party might request the court to rule on the case based on the pleadings, without the need to commence a discovery phase and to go to trial if no material facts remain at issue and the parties' dispute can be solved on both the pleadings and those facts of which the court can take judicial notice. This device under Fed. R. Civ. P. 12(c) has not been frequently used, and it has been frequently displaced by the pre-answers Fed. R. Civ. P. 12(b) motions or by the post-answer motions for summary judgment under Fed. R. Civ. P. 56. However, Fed. R. Civ. P. 12(c) motion could be used to press Fed. R. Civ. P. 12(b) defenses to the pleading's procedural defects or to seek a substantive disposition of the case on the basis of its underlying merits.<sup>176</sup>

The court accepts all well-pleaded material allegations of the nonmoving party as true and views all facts and inferences in the light most favorable to the pleader. The court will grant a Fed. R. Civ. P. 12(c) motion on the pleading if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law.<sup>177</sup> On the contrary, if a disputed material fact exists, the court must deny the Fed. R. Civ. P.12(c) motion, and judgment on the pleadings will be granted only where it appears beyond doubt that the plaintiff will be unable to prove any facts to support the alleged claims for relief. To this respect, the pleader's choice of theory will not be dispositive because the court would be free to inquire whether relief for the pleader is possible under any set of facts that might be established consistent with the allegation.<sup>178</sup>

The decision to grant a Fed. R. Civ. P. 12(c) motion is usually a "final order" and may be immediately appealed, while a decision denying such a motion is generally considered "interlocutory" and cannot be immediately appealed before a final disposition on the merits.<sup>179</sup>

### 3.7.2.2 *Summary judgment motion under Fed. R. Civ. P. 56*

Another tool to reduce wasting judicial resources, costs, and time is the motion for summary judgment, which the court can grant under Fed. R. Civ. P. 56(c) "if the pleadings, the discovery and disclosure materials on

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175. FED. R. CIV. P. 12(c).

176. *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993).

177. *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214 (3rd Cir. 2005).

178. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

179. *Paskavan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233 (6th Cir. 1991).

file, and any affidavits show that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law." The motion is different from a Fed. R. Civ. P. 12(c) motion because it allows a party to pierce the allegations of the pleadings and requires the opposing party to set forth specific facts showing that there is a genuine issue for trial. Typically, the moving party will support its motion with materials provided in discovery and affidavits, and the opposing party will file counter-affidavits and refer to documents and other evidence from discovery to show that there is a genuine issue of material fact.

A party is entitled to summary judgment if he shows that there is no genuine issue of material fact on a specific, dispositive issue. Thus, for example, if facts as to which there is no genuine dispute show that the plaintiff's claim is barred by the statute of limitations and the defendant is entitled to judgment as a matter of law, it does not matter that there may be genuine dispute about many other facts in the case. Those disputes concern facts that are not material to the dispositive issue.

Summary judgment does not have to dispose of the entire case, and parties frequently move for partial summary judgment. Summary judgment may, for example, resolve liability but not damages. It may also resolve certain issues (such as fraud) without resolving others (such as breach of contract).

Under Fed. R. Civ. P. 56(d), when summary judgment does not dispose of the entire case, the court should, if practicable, ascertain what facts exist without substantial controversy and what material facts are actually and in good faith controverted. The court would then enter an order specifying the facts as to which no real controversy exists, and those facts would not need to be established at trial.

In ruling on a motion for summary judgment, the court will not weigh the evidence or findings of fact, but it will merely assess whether a genuine issue exists as to any material fact. If the court determines that a genuine issue of material fact exists, the motion for summary judgment will be denied. In performing that assessment, the judge will accept the evidence of the nonmoving party as true and will resolve all doubts and draw all reasonable inference in favor of the non-moving party.

The court cannot grant summary judgment motions when there is a genuine issue of material fact which needs to be tried, or where the moving party is not entitled to a judgment on an issue as a matter of law. The court has more discretion in denying motions for summary judgment. It may conclude that a fuller factual development is necessary or that some other reason exists that makes it wiser to go to trial. Since denial of summary judgment is not a final order, the district judge's discretion in denying a motion for summary judgment is usually not subject to effective appellate review.

Summary judgment represents one of the most important methods of pretrial disposition in the U.S. federal courts, which, according to some, has

contributed to the decline of trials to a shift from trial-centered to motion-centered adjudications and, eventually, to a decline in the Seventh Amendment Right to trial by jury.<sup>180</sup> This argument should not be supported, considering the true nature of the summary judgment motion, which is that of requesting the judgment “as a matter of law” and, therefore, not to judge evidence in place of the jury.

### 3.7.2.3 Case Management

Traditionally, judges played a relatively minor role in pretrial proceedings. The process of discovery and motions would be under the control of the parties, and a judge would merely resolve disputes that the parties could not resolve for themselves. Fed. R. Civ. P. 16, however, reflects a much more active philosophy of case management. It involves the judge in scheduling practically at the outset of the case, provides a vehicle for constant monitoring of the progress of the case, and allows for the simplification of issues prior to trial. More generally, judicial involvement allows for trial planning that makes the trial more efficient and more understandable to the jury.

The increased managerial role of federal judges has engendered some resistance. Professor Judith Resnik, for example, has viewed the growth of managerial judges, prompted by “changed initiated by judges themselves in response to work load pressures”<sup>181</sup> with some alarm. According to Prof. Resnik, such changes and the increased managerial role of trial judges is dangerous because these changes are made “privately, informally, off the record, and beyond the reach of appellate review.”<sup>182</sup> Moreover, federal rule-makers fail to articulate the rules by which judicial management should work.<sup>183</sup>

### 3.8 Settlement encouraged

Most cases are settled or dismissed soon after discovery, before trial. This means that, during the pretrial phase and through the discovery process, counsel manage to better understand their respective positions and are ready to settle without going through a long and expensive judicial process. The overall structure seems highly efficient in terms of savings of public (judicial) and private (parties) resources.

This result is undoubtedly affected by the pre-trial devices conceived by the Federal Rules of Civil Procedure and by the Federal Rules of

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180. See, e.g., Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=886363](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886363).

181. Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 391 (2003).

182. *Id.* at 426.

183. *Id.* at 439.

Evidence. An essential purpose of party conferences under Fed. R. Civ. P. 16 is to encourage settlement. Thus, Fed. R. Civ. P. 16 specifically authorizes the judge to address "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." The rule also allows the judge to require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute. Finally, under certain circumstances, a judge can require the parties to participate in good faith in alternative dispute resolution procedures.

Generally, participants in the U.S. judicial system, especially judges and lawyers, highly value settlement. The same is probably true of sophisticated litigants, though it might not be true for individual litigants in some situations. The large-scale use of settlement allows parties to manage the risks of adverse outcomes and to avoid the cost of trials. It also saves public resources that otherwise would be devoted to conducting a trial.

However, settlement is not universally admired. Professor Owen Fiss, for instance, states:

I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.<sup>184</sup>

However, federal procedure in theory and operation strongly promotes settlements. Some critics, while accepting the legitimacy of settlement, believe that judges have too much power to force parties to settle when the parties themselves would prefer to litigate. Professor Molot warns that judicial "efforts to influence outcomes in settlement conferences" can "represent a wild card beyond the control of the litigants or the law."<sup>185</sup> There is a danger that in the pursuit of efficiency judges may effectively deprive the parties of their right to defense and improperly limit their access to justice.

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184. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

185. Molot, *supra* note 9, at 84.

### 3.9 *Judgments*

The court will normally issue a judgment on a verdict shortly after trial pursuant to Fed. R. Civ. P. 58. In most cases, this may be done by the clerk of the court without the intervention of the judge. The losing party can challenge the verdict in two ways: by renewing a motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), or by filing a motion for a new trial under Fed. R. Civ. P. 59. We will briefly analyze both of these options before taking note of what, to Italian observers, is an oddity of U.S. practice: the court's freedom to conform the judgment to the evidence under Fed. R. Civ. P. 54.

#### 3.9.1 *Judgment as a matter of law under Fed. R. Civ. P. 50*

A motion for judgment as a matter of law must be made after the jury has heard the evidence on an issue, but before the case has been submitted to the jury. A party that fails to make a motion for judgment as a matter of law before the case goes to the jury waives the right to make the motion after the verdict is rendered. Under Fed. R. Civ. P. 50(a), if the judge finds that a reasonable jury would not have sufficient evidentiary basis to find for the party opposing the motion on a fact, the judge may resolve the issue against that party and then enter judgment on any claim or defense that requires a favorable finding on that issue.<sup>186</sup> If the judge grants a Fed. R. Civ. P. 50 motion, he effectively takes the case away from the jury, potentially intruding into the jury's domain. Accordingly, such motions are granted only cautiously. In this respect, courts have held that before ruling on a motion for judgment as a matter of law the trial court must advise opposing parties of the deficiencies in their proof and give them the opportunity to present additional evidence on the dispositive facts.<sup>187</sup>

There has been a tendency towards more judicial control and more intrusion into the jury's domain, which is confirmed by the adoption of the "substantial evidence" test by judges. Under this test, the court grants the motion unless there is sufficient or substantial evidence suggesting that the jury might decide for the non-movant.<sup>188</sup> Here, the court exercises discretion in deciding whether or not to take a case away from the jury. However, the "substantial evidence" standard the movant should meet is high, and the motion will likely be granted only in particular circumstances where it is clear that the evidence in the record does not properly support a particular verdict so that a judgment as a matter of law is more appropriate.

If the court does not grant the motion for judgment as a matter of law during trial, the motion may be renewed under Fed. R. Civ. P. 50(b) after

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186. See FED. R. CIV. P. 50(b).

187. See *Waters v. Young*, 100 F.3d 1437, 1441 (9th Cir. 1996).

188. See *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333 (1933).

judgment on the verdict is entered. If the court is convinced that the motion has merit, it may either order judgment as a matter of law for the moving party or order a new trial.

### 3.9.2 *Motion for a new trial under Fed. R. Civ. P. 59*

The court can grant a motion for new trial under Fed. R. Civ. P. 59 when the verdict is against the weight of the evidence or is either excessive or inadequate, where probative evidence is newly discovered, or where conduct by the court, counsel, or the jury improperly influenced the deliberative process.<sup>189</sup>

### 3.9.3 *Judgment under Fed. R. Civ. P. 54(c)*

As a separate issue for purposes of the present analysis, Fed. R. Civ. P. 54(c) presents features which are worthy to analyze. Fed. R. Civ. P. 54(c) provides, "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."

As a general rule, the district court generally grants the relief sought to which the party is entitled, even if such relief was not requested in the pleadings, which serve as mere "guides."

The lawsuit is, in fact, measured by what is pleaded and proven, not merely by what is demanded.<sup>190</sup> In other words, it is the court's duty to grant all appropriate relief.<sup>191</sup> However, in case of default judgments, where the defendant fails to file its appearance, the court may not award relief beyond that sought in the complaint because the non-appearing defendant might be relying on the claims contained in the original complaint. Therefore, Fed. R. Civ. P. 54(c) states that a default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.

This rule, therefore, gives some power to the court to shape and award the relief sought by the parties. However, a party will not be able to recover on issues not presented or litigated before the jury, nor may the party recover relief that was lost due to failures in pleadings or in proof.<sup>192</sup>

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189. See *supra* para. 3.5.

190. *Minyard Enters. v. Southeastern Chem. & Solvent*, 184 F.3d 373 (4th Cir. 1999); *Baker v. John Morrell*, 266 F.Supp.2d 909, 929 (N.D. Iowa 2003).

191. See *Felce v. Fiedler*, 974 F.2d 1484, 1501 (7th Cir. 1992) (holding that the court must grant whatever relief is appropriate, and the provision under FED. R. CIV. P. 54(c) must be construed liberally).

192. See *Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1080 (7th Cir. 1998) (finding that trial courts may not award relief upon theory which was not properly raised at trial).

Furthermore, the court will not force the parties to accept an award or a remedy which none of them desires.

Fed. R. Civ. P. 54(c) allows some flexibility to courts in ruling upon cases.<sup>193</sup> This flexibility favors fairness instead of formality by providing courts with power (and discretion) in the interpretation of claims, defenses, and evidence. In fact, the formal repetition of claims in a specific format will not be required if the pleadings and evidence offered by the parties make the theory advanced by the parties and the relief sought by the parties clear.

Therefore, where the parties were wrong as to the legal remedy sought, the court could still award a different remedy as far as it deems it appropriate. The prayer for the relief sought in the complaint, that is, the demand for the relief to which the pleader believes to be entitled, is not considered part of the substantive claim. Thus, the selection of an improper form of relief will not subject the complaint to dismissal for failure to state a claim or cause, provided that the substantive allegations show that some other form of relief would be appropriate.<sup>194</sup> This provision clearly favors access to justice and flexibility instead of formality, thus ultimately favoring efficiency.

### 3.10 Appeal

As a general rule, in order to appeal a judgment before a court of appeals, the judgment must be final. That is, the judgment must end the litigation on the merits and leaves nothing for the court to do but execute the judgment.<sup>195</sup> The judge may issue an interlocutory order that finally decides an issue before him or an order deciding the case on the merits. The interlocutory order is not subject to immediate appeal, but it may be reviewed only after the case is decided by a final decision on the merits.

There are several exceptions to the final judgment rule. First, the collateral order doctrine, established by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation*,<sup>196</sup> provides that if the object of the order is collateral to the rights underlying the action and is too important to be denied review, than the order is immediately appealable. The purpose of the final-judgment rule will not be frustrated by allowing such an appeal. For this rule to apply, the court should find that there could be no effective review of the order after a final judgment is entered.

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193. Consistent with the idea of “flexibility” and efficiency, is the mechanism of amendment and that of the “relation back” theory under FED. R. CIV. P. 15, which allow courts to grant leave to amend and relation back (an amendment to a pleading relates back to the time of the original pleading). This is consistent with the idea of the American proceeding as an on-going process, where substance often prevails over formality.

194. WRIGHT, MILLER & KANE, CIVIL PROCEDURE § 1255 (3rd edition).

195. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

196. 337 U.S. 541 (1949).

Second, an order should be immediately appealable where immediate harm might occur to the appellant if review is postponed.<sup>197</sup>

Third, various statutes provide for immediate appeals of non-final orders. For example, orders granting, continuing, modifying, or dissolving injunctions, or refusing to do so.<sup>198</sup> In addition to orders involving the appointment or winding up of receiverships,<sup>199</sup> and orders in admiralty cases that determine the rights and liabilities of the parties,<sup>200</sup> are all immediately appealable.

Fourth, Section 1292(b) of Title 28 of the United States Code provides for an appeal where the district judge certifies that its order involves a controlling question of law on which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court of Appeals may exercise discretionary jurisdiction over such cases.

Fifth, sometimes an order will finally resolve the case against one defendant without resolving the case against all defendants. Under Fed. R. Civ. P. 54(b), the district court may enter a judgment on such a claim if it “expressly determines that there is no just reason for delay.” As is true of appeals under section 1292(b), however, the Court of Appeals has discretion over whether to accept the lower court’s judgment in such cases.<sup>201</sup>

The last exception to the final judgment general rule involves applications to the appellate court for writs of mandamus or prohibition to reverse some intermediate trial-court rulings that exceed the discretion of the district court. Courts are extremely reluctant to grant these extraordinary writs, which are available only where the district court has violated a non-discretionary duty. Moreover, the possibility that an appeal might be sought under Section 1292(b) suggests that certification should be sought under that statute before resorting to mandamus.<sup>202</sup>

The scope of the appellate review is limited to certain matters. Most importantly, the courts of appeals cannot receive new evidence concerning the facts. Instead, those courts can merely address legal arguments regarding the law applicable to the facts. The Court of Appeals owes different levels of deference to the district court, depending upon the particular issue. The appellate court will review the trial court’s rulings of law *de novo* – that is, without any deference at all. Similarly, appellate courts will review the district court’s grant of summary judgment motions

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197. FRIEDENTHAL, *supra* note 67, at 629.

198. 28 U.S.C.A. § 1292(a)(1) (2009).

199. *Id.* § 1292(a)(2).

200. *Id.* § 1292(a)(3).

201. FRIEDENTHAL, *supra* note 67, at 623. See also *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270 (2d Cir. 1968).

202. FRIEDENTHAL, *supra* note 67, at 635. See *In re El Paso Elec.*, 77 F.3d 793 (5th Cir. 1996).

*de novo*, since the appellate court is as well situated as the district court to assess whether there are genuine issues of material fact for trial.

Courts of Appeals apply an abuse of discretion standard to the various decisions a district court must make on a discretionary basis. This would include, for example, decisions to include or exclude expert testimony under Fed. R. Evid. 702. The Court of Appeals will give greater deference to a district court's findings of fact where there is no jury trial below. Those findings of fact will be upheld unless the court of appeals thinks they are "clearly erroneous."

The maximum degree of deference is given to findings of fact by a jury, which will not be disturbed unless the Court of Appeals concludes that no rational jury could decide the case as that jury did. This standard is stricter than the standard applied by district courts in ruling on motions for a new trial.<sup>203</sup>

### 3.10.1 Appellate review of evidence

The appellate review of evidence is governed by Fed. R. Evid. 103, an important instantiation of the adversary system of trial. Fed. R. Evid. 103 provides:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground was not apparent from the context; or (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.<sup>204</sup>

This means, in order to be reviewable by the Court of Appeals, the error must be harmful. For an error to be harmful it must affect the substantial rights of the parties, and the nature of the error must have been called to the attention of the judge so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures.

Fed. R. Evid. 103 is perfectly consistent with the provisions under Fed. R. Civ. P. 61:

Unless justice requires otherwise, no error in admitting or

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203. For more details concerning the nature and scope of review, see FRIEDENTHAL, *supra* note 67, at 636.

204. FED. R. EVID. 103.

excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial right.<sup>205</sup>

A “harmless error” is one that does not affect the parties’ substantial rights or does not defeat justice. In construing this requirement, it has been held that the harmless error inquiry examines whether the trial error “affected the outcome of a case to the substantial disadvantage of the losing party.”<sup>206</sup> The court will consider the centrality of the evidence and the prejudicial effect of the inclusion or exclusion of the evidence.<sup>207</sup> The error will be considered harmless only if the court states “with fair assurance” that the judgment was not substantially affected by the wrongfully admitted or excluded evidence.<sup>208</sup> Generally, a court will not consider an error harmless when it is left with a grave doubt as to whether the error had a substantial influence in the ultimate verdict.<sup>209</sup> In making this evaluation, the court considers the entire record and applies the harmless standard on a case-by-case basis.<sup>210</sup>

This approach to review seems to be efficient because it avoids the use of judicial resources where the error made in reaching the decision to challenge was not a harmful one. However, the line between what is a “substantial influence” and a mere influence, and a “substantial disadvantage” to the losing party and a mere disadvantage to that party might lead to results unfair to that party. The losing party could probably be refused the right to appeal because it does not seem that the error he would challenge substantially affected the trial court’s decision.

#### IV. CONCLUSIONS: MAIN DIFFERENCES AND SIMILARITIES, FURTHER ANALYSIS

Considering the foregoing and in addition to the points which have already been raised and analyzed through this work and the separate brief analysis of the Italian civil proceeding and the U.S. civil proceeding (before federal courts), many efficiency and fairness issues come to consideration for further in-depth analysis.

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205. FED. R. CIV. P. 61.

206. *United States v. O'Keefe*, 169 F.3d 281, 287 (5th Cir. 1999).

207. *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997).

208. *Tesser v. Board of Educ.*, 370 F.3d 314, 319-20 (2d Cir. 2004).

209. *General Motors v. New A.C. Chevrolet*, 263 F.3d 296, 329 (3d Cir. 2001); *Nieves-Villanueva*, 133 F.3d at 102; *Krulewitch v. United States*, 336 U.S. 440, 444-45(1949).

210. *Nieves-Villanueva*, 133 F.3d at 102.

#### 4.1 General considerations

When comparing the Italian civil proceeding versus American civil proceeding, one notable difference is the duration of the two proceedings and, specifically, the duration of the American “trial,” as compared to the duration of the Italian proceedings once the pleadings under Italian article 183 ICCP have been exchanged.

Italian civil proceedings can be inefficient in terms of the time it takes to litigate each case. While even the most complex United States trials could be resolved in terms of weeks or months, the Italian proceedings before first instance courts can last up to three years because the hearings required to resolve the lawsuit are scheduled so far apart. But inefficient delays are not the only problems caused by trial proceedings spread out over years.

The proceeding can also might be less fair to the parties because the delays in the litigation will cause the judge to be less familiar with the case than he otherwise would have been. In addition, extended time between hearings and litigation dragged out over several years can create gaps in evidence and explanations provided by counsel. And it is unlikely the judge’s notes will be sufficient to overcome these gaps because the minutes of an Italian hearing are not transcribed verbatim, like they are in the United States. Thus, it is highly possible that the notes taken by the judge are incorrectly recorded and contain defects.<sup>211</sup>

The Italian proceeding is also unfair in terms of predictability, because the time-lags among hearings could increase uncertainty as to the final outcome and will likely benefit one party to the damage of the other.

Some commentators might say that the delays in the proceeding are due to the lack of judges and personnel, while others believe that by increasing the number of judges and personnel to deal with cases, there would simply be more cases filed and the delays in the proceedings would be the same.<sup>212</sup>

The specialized nature of the Italian courts should favor efficiency more than the United States federal courts do. Specialized judges handle

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211. The minutes of the hearing in Italy are not a verbatim transcript (in contrast to U.S. procedure). Thus, like all summaries, it could contain defects.

212. “[A]ny reduction in delay increases the incentive to litigate and reduces the parties’ incentives to settle, with the consequent increase in litigation offsetting the reduction in delay. Therefore, most attempts at reform, such as adding judges, will only increase the number of dispositions, rather than decreasing the time to disposition. Adding judges to the system to reduce congestion is similar to expanding the lanes of a freeway, an improvement that would draw traffic off the side streets and from public transportation. More cases might flow into the system, and the lesser burden of litigating might reduce the subsequent incentives to settle, so the increased number of judges would be able to adjudicate basically the same percentage of cases filed in the same time frame.” Clermont, *supra* note 80, at 22.

criminal or civil cases (as well as administrative cases) and among each category (civil, criminal and administrative) there are further specializations<sup>213</sup> as to the types of proceedings usually dealt with by each department within each court. Therefore, the designated judge usually possesses the expertise to handle the proceeding pending before him more expeditiously and with less risk for an erroneous decision. However, specialization by itself is not enough to cope with the inefficiency of the Italian proceeding due to delays in the proceeding itself.

#### 4.2 *The pre-trial phase*

To reduce delays and improve fairness and efficiency, the Italian proceeding should be envisioned to start and finish in a short time frame. This would be possible only if the parties would exchange pleadings and set evidence requests before appearing before the judge. While the American proceeding is divided into two phases – a pre-trial and a trial phase, with only one phase fully developed before a judge and a jury – the Italian proceeding starts and ends before a judge, without a jury.

The full involvement of the Italian judge from the beginning of the proceeding may be inefficient because at this very preliminary stage, unless there is some defect in the complaint or answer that needs to be cured, or a particular procedural issue which calls for immediate attention and decision by the judge, there is no need for a judge's involvement and supervision.

In this respect, the ICCP provisions dealing with a labor proceeding can offer a model which should be considered for general application to an ordinary proceeding. In the labor proceeding, governed by article 409, there must be (i) a mandatory settlement attempt at the very beginning of the proceeding; (ii) claims and defenses made in the first pleadings (complaint and answer) which should indicate the evidence the parties intends to admit; (iii) one or two hearings devoted to the admission of evidence and to the discussion of the case; and (iv) a reading of the holding judgment to the parties at the end of the proceeding soon after the end of the discussion.<sup>214</sup> This type of proceeding is much more efficient and fair than an ordinary civil proceeding. Unfortunately, the legislator has not yet managed to develop such a proposal for all proceedings.

In 2003, in an unsuccessful attempt to satisfy the need for a more

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213. In addition to the main divisions between criminal and civil courts, there are additional divisions of tasks and competences within the same courts. For instance, within each Trib., there will be a judge dealing with company law proceedings, a judge dealing with labor law proceedings, a judge dealing with family law issues, etc. See GROSSI & PAGNI, *supra* note 29.

214. This is subject to the power of the judge to later file a full copy of the judgment, including the grounds supporting the holding. A "holding" judgment is just the decision of the case, basically, who wins and who loses, without any explanation for that. The grounds of the decision will be published later, together with the full text of the decision. *Id.*

efficient, and especially faster, proceeding, Legislative Decree no. 5/2003 (“D.Lgs. 5/2003”) dealing with company law proceedings was passed.<sup>215</sup> Pursuant to D.Lgs. 5/2003, a proceeding is divided into two parts: one without the presence of the judge and the other before the judge. In the first part, the parties exchange pleadings (without involving the judge), and only when the claims, defenses, and evidence are finally set do the parties schedule a hearing before the judge. The judge will then admit evidence and decide the case after a hearing or two unless there is a substantial amount of evidence that would require more evidentiary hearings to consider.<sup>216</sup> But a proceeding that would start without a judge may not be feasible. And this is one of the reasons why D. Lgs. 5/2003 has not been successful and was repealed by a recent reform of the ICCP.<sup>217</sup>

On the other hand, the American model, with its pre-trial discovery and pre-trial conferences before the judge, could not be used in Italy either because there is no discovery or managerial conferences before a judge prior to the start of the proceeding. And where the United States’ model won’t work either, perhaps the best model for Italy to consider is the above-mentioned labor proceeding model. The labor proceeding procedure under article 185 ICCP could be amended to provide that the judge, after the pleadings have been exchanged, should try to settle the dispute if on the face of the dispute it appears it is a case that can be settled.

Forcing early settlement negotiations is advantageous for parties because at the very least, it forces them to acknowledge the strengths of the parties relative positions. This realization alone is often enough to incite settlements that save time and costs. These settlement agreements could then be treated as a real judgment for enforcement purposes.

Even if the American and Italian proceedings seem very different on their face, at least as far as the structure is concerned (setting aside the problem of time) they function more or less in the same way. For example, (i) there is a phase devoted to defining the issues of law and of fact (which could be discovery and pre-trial conferences, for the American proceedings, and exchange of pleadings under article 183 ICCP for the Italian proceedings); (ii) a phase devoted to the admission of evidence; (iii) a phase devoted to final arguments; and (iv) the rendering of the judgment. The major difference, however, seems to be rooted in the law of evidence, and more specifically, the rule of relevance through which decisions about whether to admit evidence are made by inferential reasoning.

The mechanism of introducing evidence in the two proceedings is sometimes different because of the presence or absence of a jury. The introduction of evidence in United States’ trials follows the story telling method. Counsel presents to the jury a reliable story and provides them with

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215. See GROSSI & PAGNI, *supra* note 29.

216. *Id.*

217. *Id.*

as much information as possible to put them in a position to make the right decision. The story telling model requires a lot of circumstantial evidence to tell a complete story to the jury. And in order to provide that story to the jury, Unites States allows any evidence into the proceedings that is conceivably relevant.

This practice of admitting any relevant evidence into trial has brought the United States close to adopting "probability" as a standard for admitting evidence instead of "certainty." And "probability" as a standard creates an inferential chain of reasoning approach which might lead to incorrect results.<sup>218</sup> Furthermore, such a broad concept of admitting evidence means that additional rules<sup>219</sup> describing what evidence might be relevant, but cannot be admitted into evidence for fear of prejudicing one of the parties<sup>220</sup> or public policy, must also be added.<sup>221</sup> And it has also been argued that limiting instructions do not always help in making the jury properly consider the evidence offered.<sup>222</sup>

As an example of how inferential evidence can lead to incorrect results, one could consider the hearsay rule and the exception of non-assertive conduct, which does not constitute inadmissible hearsay. Non-assertive conduct is conduct that the actor held without the intention to communicate his belief by that conduct. Therefore, it is more likely that, by not intending to communicate his belief, the declarant was sincere in his statement. However, it is also likely that the non-assertive conduct had a meaning different from that inferred by the jury. One might then wonder whether the probable absence of just the hearsay danger of sincerity is sufficient justification for removing nonassertive conduct from the definition of hearsay altogether and admit it at trial as admissible and relevant evidence.

Usually, when evidence is admitted that would normally be excluded under the rule of hearsay, it is because of the need to tell a complete story to the jury or because the evidence could not be obtained otherwise without a hefty burden. However, the "necessity to tell a story" cannot always justify exceptions. Sometimes the exceptions contradict the rationale behind the general rule, as in the case of the assertive conduct exception to the hearsay

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218. See *supra* para. 3.6 for a discussion on character evidence, impeachment evidence and hearsay.

219. The existence of such a broad provision on relevance makes provisions like Fed. R. Evid. 404, 407, 408,409, 411 and 807 necessary. The procedures under Fed. R. Evid. 404, 407, 408, 409, 411 and 803, providing for the exclusion of evidence, which may be prejudicial to the defendant or contrary to public policy furthered by the same rules, may take substantial time for completion because they make the use of inferential procedures. Such procedures, besides being time consuming, bring the risk of making incorrect inferences, thus eventually reaching incorrect results.

220. See *supra* para. 3.6.1.2 for a discussion on FED. R. EVID. 807.

221. See *supra* paragraph 3.6.

222. See also Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation does not help*, 19 L. & BEHAV. 407 (1995).

rule. It is not easy to distinguish assertive conduct from nonassertive conduct. There is no scientific test to identify it, and therefore, there is room for error. It is the judge who must make this decision under Fed. R. Evid. 104(a) and he might be wrong. And, even if judges were to be right most of the time, considerable time and effort is still spent arguing and deciding preliminary questions of facts and foundational requirements under the Federal Rules of Evidence. But wasted time and effort arguing preliminary questions of fact is not the only inefficient result of admitting all relevant evidence.

Discovery, as a specific device of the American proceeding, can be a tool to achieve "fairness", but it can be sometime very expensive and time-consuming, considering the broad scope of discovery under Fed. R. Civ. P. 26(b)(1). The category "any non-privileged matter that is relevant to any party's claim or defense" may include evidence which, in the end, is not really relevant to the requesting party's claims or defenses.<sup>223</sup> This is because the party requesting the information may not know exactly what it is seeking. It may take time to analyze all the available evidence and find the evidence supporting the party's claims or defense. Once requested, the party obtaining the information will have to review it to eventually decide whether or not the evidence supports its case, and this demand and review process might be very expensive and time-consuming. Though this process can certainly time-consuming, it is fair because its intent is to further fair play and rationality in the decision-making process.

Discovery might be the only device in the hands of the parties to collect all the evidence they need in order to support their position at trial; however, it may be an expensive and time-consuming process. Further, because of discovery, the trial may be decided by how much the party is willing to spend. A party might be willing to spend more money to obtain the information which he needs to support his position at trial and, therefore increase his chances to win a case, but the party also runs the risk of losing at trial because his position is not sufficiently substantiated. The result is different in an Italian proceeding.

In the Italian proceeding, where there is no discovery period, no such possibility exists and, therefore, the party has no choice but to accept the risk of commencing a suit and eventually losing it because he was not able to offer sufficient evidence showing that his claim was well grounded. Winning or losing a case is always a matter of evidence. The perfect legal theory about the existence of a right is useless if the claim is not supported by sufficient evidence showing the existence of the plaintiff's right.

By providing discovery, the American system appears to be more "fair" than the Italian system because it eventually leaves to the party the decision as to whether the party should bear the costs of the discovery and

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223. See FED. R. CIV. P. 26(b)(1).

go to trial, or whether to settle the case before instead.

Parties to a litigation should be able to decide whether or not to go through a discovery process and to bear the costs of having access to the information which they need to eventually win the case. If such possibility does not exist, then the parties have fewer chances to adequately present their case, which is unfair.

A right to discovery increases the fairness of the proceeding and, eventually, its efficiency because there are more chances that, throughout the suit, the plaintiff will get what he wants. Dispositive motions, such as motion to dismiss under Fed. R. Civ. P. 12(b)(6), motions for judgment on the pleadings under Fed. R. Civ. P. 12(c), and motions for summary judgment under Fed. R. Civ. P. 56, highly increase the efficiency of proceedings and favor the saving of judicial resources.

Similarly in the Italian proceeding, the parties have the option to request the judge to immediately decide the case without starting the evidentiary phase, where the pleadings, on their face, show that there is no "triable issue," that is, either no relief at law exists that the plaintiff could claim or whether no evidence has been offered by the parties to support their claims or defense. Article 187 ICCP provides, "When the investigating judge considers the case ready to be decided on the merits without the need to acquire further evidence, the judge refers the parties to the panel of judges." And the judge could decide that the case is ready to be decided at the first hearing, once the complaint and the answer only would have been exchanged.<sup>224</sup> However, Italian judges are usually reluctant to grant such a request and prefer to go through the whole proceeding before making any decision as to whether the case should be dismissed for reasons analogous to the one supporting a motion under Fed. R. Civ. P. 12(b)(6) or under Fed. R. Civ. P. 56. Perhaps, by providing a specific motion like Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 56, the instrument under article 187 ICCP would be more effective. In other words, article 187 of the ICCP could be framed as a motion under Fed. R. Civ. P. 12(b)(6), or even as a motion under Fed. R. Civ. P. 56, the filing of which compels the judge to decide on the immediate dismissal of the case, and the judge's decision could be subject to review on appeal. Article 186 *quinquies* could be added to the previous provisions to expressly provide for a motion for immediate decision of the case because the pleadings and the evidence offered show that there is "no genuine issue as to any material fact" which deserves further consideration and, therefore, the claim should be dismissed.

### 4.3 Trial

One of the most efficient features of the United States jury trial is that the hearings are scheduled close in time to each other and a final decision is

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224. See Corte app, sez. 25.Oct. 20.05, n. 1004, Guir. It. 2005, II, 2.

reached as soon as possible. This is certainly attributable to the presence of the jury.<sup>225</sup> When a jury is convened to decide a case, these steps are necessary in order to save the jury's time and allow them to make a decision immediately after the evidence has been offered to them at trial.<sup>226</sup>

At trial, after the judge has deemed the evidence admissible, the parties offer the evidence to the jury. The main evidence is witness statements or exhibits that, absent any stipulations by the parties, are offered into evidence through witness testimony who will have to lay the foundation for their admission. The story telling approach adhered to by United States courts again provides the rationale behind this. Telling a jury a story through the help of witnesses helps them better understand the story itself and remember the documents which were offered to them as part of that story. The story is made by many circumstantial elements and inferences, so "a story" is needed to link, through inferential reasoning, the available evidence to the facts of consequence in the case.

Anyone can be a witness in a case as long as he has first-hand knowledge of the matter he testifies about, pursuant to Fed. R. Evid. 602. The plaintiff or the defendant may be witnesses in their own case and it is left to the jury to decide whether or not their testimony is reliable. This is different from the way testimony is treated in the Italian legal system, in which a party to an action cannot be witness in his own case. However, Italian judges can examine the parties to get information about the case (*interrogatorio libero*) and the parties' statements will be considered as circumstantial evidence, but they are not "technically" evidence.<sup>227</sup>

Therefore, there is no actual difference between the two systems as to the testimony provided by the parties to the litigation, except for the procedure to admit such evidence. Once the party answers the formal interrogatory, his answers will be treated as admissions and it will be eventually up to the opposing party to decide whether to claim that those answers are false so that the party should be charged with the crime of perjury. However, there might be differences in terms of fairness.

In the Italian civil proceeding, the party cannot spontaneously render any testimony. The only possible way to render testimony is to answer to the requests for clarifications made by the judge (*interrogatorio libero*) at the beginning of the proceeding. It is then left to the opposing party to decide whether or not to request an *interrogatorio formale*, provided that the necessary requirements are satisfied. However, *interrogatorio formale* is not similar to the spontaneous testimony rendered by the parties in the

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225. Judges do care about the jury's time, and about the risk that, by "dissolving" it through time, as in the Italian proceeding, the jury might get confused, both dangers which are considered under FED. R. EVID. 403 balancing test. See GROSSI & PAGNI, *supra* note 29.

226. Hearings in bench trials can be scheduled with long intervals in between.

227. This situation is different from the situation where the witness is subject to formal interview ("*interrogatorio formale*"), because in this case, the party's answers to questions will be treated as "admission" ("*confessione*").

American proceeding.<sup>228</sup>

There is a presumption for bias in the Italian legal proceeding that prevents the admission of the parties' testimony. This may seem unfair because the party might want to offer his testimony, and it is also inefficient because by excluding the possibility to consider the party's own testimony as evidence, fundamental information and evidence will probably be left out of the proceeding. This would offer fewer chances to correctly decide the case and more chances to get at an unreasonable and unfair decision.

#### 4.4 Courts and decisions

In the United States there are two basic levels of proceedings, and the United States Supreme Court may grant Certiorari by its own discretion.<sup>229</sup> In Italy, *Corte di Cassazione* does not have similar discretion, and once the procedural requirements to bring a case before it are met, *Corte di Cassazione* hears the case and decides whether or not to grant review and later remand a case to the lower court. This may be a more fair model than the United States legal proceeding, but in terms of efficiency, a second review might not always be necessary.

Considering that *Corte d'Appello* has the power to do a review *de novo* of the entire case, as to both the facts and the law of the case as if it was brought to the first instance court, there should be no need to challenge the judgment of *Corte d'Appello* before a superior court, unless there is truly a complex legal issue which may need further review. Not all cases, though, present extremely complex legal issues and many cases go to *Corte di Cassazione* for review without any serious need for a further review from the "judge of the laws."

As is the case with the U.S. Supreme Court, it should be left to the discretion of *Corte di Cassazione* to decide whether or not to review judgments issued by *Corte d'Appello*. This would preserve extraordinary resources. Finally, counsel would be encouraged to do a better job on the appellate phase, knowing that there could be no further possibility of appeal. Also, non-meritorious claims and defense would be reduced.

It would also be fairer to include the dissenting opinion in the Italian judgments issued by the panel of judges. This, in fact, would render each judge accountable for their decisions and push them to pay more attention. Furthermore, it would help the losing party to identify the reasons which would further an appeal and to see whether its defense in the prior proceeding matched the theory advanced by the dissenting judge to

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228. As already said, the party's answers to "interrogatorio formale" will be treated as admissions.

229. There are not really three levels of proceedings in the American federal system because the U.S. Supreme Court has discretion as to whether it would grant *certiorari* and review the judgment issued by an appellate court. See GROSSI & PAGNI, *supra* note 29.

eventually consider the chances of a successful appeal.

It is true that more judicial resources would be used in writing a single judgment, but perhaps better judgments would be written and would thus discourage the losing party from appealing the judgment. Furthermore, the parties might eventually settle the controversy if they knew that the position taken by the majority might eventually be reviewed by the appellate court, if the minority's position would be followed at that stage.

Pursuant to article 112 of the ICCP, the Italian judge may not grant to the parties a relief different from the one sought since there has to be a strict correspondence between what has been demanded by the parties and what is finally granted by the judge. Therefore, an Italian judge could not grant a remedy different from the one which the parties expressly requested in their pleadings and confirmed in their conclusions and final pleadings.<sup>230</sup> The provision of article 112 of the ICCP seems to be more predictable than the one under Fed. R. Civ. P. 54(c) in that it puts the parties on "notice" of what to expect, thus allowing them to properly defend against the possibility of the court granting the specific remedy sought.

Moreover, the mechanism under article 112 of the ICCP seems to be more efficient, because it tends to define more precisely the scope of the litigation, to the final benefit of the parties who will focus their efforts on specific facts, evidence, and legal theories. And the courts will be not required to put any effort in identifying the remedy sought.

In American law, remedy is not considered a substantive part of the claim. Therefore, Fed. R. Civ. P. 54 (c) gives too much power to the judges, and reduces the fairness of the proceeding because the opposing party is not on notice of what to expect. On the other hand, by being so flexible, Fed. R. Civ. P. 56 is efficient and fair to the party who could suffer damages if it had no right to get a relief somehow different from the one which was expressly claimed.

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230. Claims and objections which were not repeated in the conclusions would be considered as waived, unless the judge believes that the party's conduct strongly indicates its intention to keep those claims or objections. *Id.*

