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The Labyrinth of Evidence in Italian Appellate Proceedings[1]

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(provisional version – please do not quote)

SUMMARY: 1. Introduction. – 2. Evidence and appeals: a troubled marriage. – 3. The concepts: a basic glossary. – 4. Three different regimes. – 5. Final remarks.

1. Introduction

In Italy the reforms of civil procedure never rest. Italian academia has a long-standing tradition of wide and complex researches on the fundamental principles of civil litigation, evidence, enforcement and related matters. Nowadays, however, Government and Parliament appear to be convinced that the best way to deal with the issue of the unreasonable duration of trials is to pass three or four times a year bills that, under the slogan of economic development, cast some reforms here and there over the Code of Civil Procedure. In such a context of chaos, the scholars are rediscovering old debates that have apparently ceased for several years and old books are stepping down from the bookshelves to the purpose of supporting the never-ending work of interpreting new rules.

A bill approved in the summer of 2012 (law-decree no. 83/2012, passed as law no. 134/2012) has written a new episode in the saga of Italian appellate proceedings. The aim of the lawmakers was to reduce the workload of the Courts of Appeals, literally overwhelmed every year by thousands of incoming cases. Among other provisions, not relevant as far as evidence law is concerned, the new law amended the rules concerning admission of evidence that has not been offered during the first instance trial. As a consequence, we now have three different provisions on this matter, which are applicable to the three main civil proceedings (ordinary, employment and summary proceedings) respectively. The new rules appeared to reheat an old debate on whether evidence gathering should take place, or not, in appellate trials.

Before discussing some details of the most recent reform, it may be useful to think a little back to the steps that led to the present situation.

2. Evidence and appeals: a troubled marriage.

The first chapter of the story was written in the Code of Civil Procedure approved in 1940, and still into force (with a large number of amendments). The first draft of the text, published by the Ministry of Justice in 1938, ran up against a long-standing tradition where the parties suffered no estoppels affecting evidence gathering in the appellate trial. That is the main reason why both the bar and most universities criticized severely the proposal. In a nutshell, they argued that it was reversing the tradition without any valid reasons and imposing an unjustified limitation on the right of defense.

The criticism induced the new Ministry for Justice to introduce important changes before the final approval of the proposal in 1940. They, however, were not able to reverse the basic idea according to which the appellate judge should not remake the first instance trial, or give place to its second stage, but he should only check whether the first instance judge handled and ruled the case rightly and correct his errors, if necessary. Article 345 of the Code of Civil Procedure generally

[1] I wish to thank professors Michele Taruffo and Elisabetta Silvestri for their valuable advice for the preparation of this paper.

prevented the parties from offering any "new evidence" (*nuovi mezzi di prova*) to the appellate judge, except when the same judge ascertained that "serious reasons" (*gravi motivi*) existed.

After the fascist regime had collapsed and the war had ended, the bar revolted against the code. While they stated in public that the new code was a fascist one, the new estoppels, both in the first instance and in the appellate trials, were the real reason of their opposition: it was much more difficult to remedy the mistakes at a later stage of the proceedings. In any case, the strong lobbying carried out by the bar led to considerable results. A reform enacted in 1950[2], among other things, reversed the provision of article 345, enabling the parties to submit "new" evidence to the appellate judge without the need for any justification and with the only risk of being obliged to pay for the related costs.

The Code also included some special provisions applicable to employment litigation, but procedural rules – and above all the rules on appeals – designed quite a similar procedure to the one applicable to ordinary cases. The well known changes that affected economy and society between the late Sixties and the early Seventies revealed all the inadequacy of these procedural rules: they provided for a mainly written and quite cumbersome procedure, with a considerable duration. It therefore appeared as an urgent matter to reform such a crucial field of litigation, which directly affected a large part of the citizens and especially the lower classes.

This remark led to a major reform, finally enacted with the law no. 533/1973, which recasted most procedural rules applicable to employment and social security litigation. The new procedure was mainly oral and quicker, and based on the duty of the parties to include all their arguments and evidentiary claims in their initial pleadings. A number of bills enacted in the subsequent years made employment procedure applicable also to agricultural matters and litigation arising from leases and, in 2011, to several minor matters. The rules concerning appeal provide that, in employment cases[3], "no new evidence shall be admitted, ..., unless the court, also *ex officio*, deems that it is essential (*indispensabile*) to rule the case". The lawmakers clearly intended to design a quick appellate trial, where in a single hearing the judge could check the accuracy of first instance proceedings and gather evidence only in case it was strictly necessary in order to rule the case.

A general reform of civil procedure, enacted in 1990[4], turned the special rule of employment proceedings into the general rule applicable to ordinary proceedings, but excluded the admission of the "new" evidence *ex officio* and allowed also the admission of "new" evidence in case "a party prove(d) that it could not offer it during the first instance trial due to a cause it (could) not be held responsible for". It must be noted that the 1990 reform did not amend the rules applicable to employment litigation.

The last chapter of this historical overview is dated 2009, when the Parliament created a new procedure (so-called summary proceedings) applicable to simple cases. The choice of using the summary proceedings instead of the ordinary one is up to the plaintiff, but the judge can order the switch to the ordinary proceedings if he deems that the facts of the case require a complex evidence gathering. In those proceedings, the first instance judge has a very wide discretionary power as far as evidence admission and taking are concerned: he has to gather evidence in the most simple and quick way, with the only duty to grant the respect of the right of defense. Such a procedure raised some doubts form a constitutional point of view[5]. Therefore, the law – until 2012 – allowed the parties to request "new" evidence also in the appeals trial[6], only provided that the requested evidence was relevant to the case. Besides evidence, this appellate trial takes place according to the ordinary rules.

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[2] Law no. 581/1950.

[3] See article 437 of the Code of Civil Procedure.

[4] Law no. 353/1990.

[5] Italian scholars generally deem that proceedings with a summary evidence gathering cannot lead to a final decision on the merits of the case without harming the constitutional principles on fair trial (articles 24 and 111 of Italian Constitution).

[6] See article 702 *quater* of the Code of Civil Procedure.

Italians love their archeological finds. They are not only proud of the city of Rome and the Colosseum, but also love to maintain, in their legislation, some souvenirs from the era when God in person had the task of adjudication. That is probably the only rational explanation for the fact that the only provision that has never been amended is the one that allows the parties to request the taking of a decisive oath[7] at any time of the first instance or appellate trial and notwithstanding if ordinary or employment proceedings are applicable. Thankfully, the occasions when this kind of historical evidence is actually used are few and far between.

3. The concepts: a basic glossary.

Before broaching the subject of the last reform, some brief comments on the keywords of the commented provisions is needed. Italian scholars have widely discussed on the correct interpretation of words like "new" or "essential" evidence or concepts like "evidence that a party could not offer during the first instance trial": it is worth dedicating them a few lines.

The concept of "**new evidence**" (*nuovi mezzi di prova*) is the simplest one. Scholars and case law generally agree that evidence is "new" under two circumstances:

a) whether, by the same means offered in the first instance trial, a party wants to prove a different or further fact; or
b) whether the party offers to the appellate judge evidence that he did not offer to the first instance judge.

Let us suppose that, in a car wreck case, in the first instance trial, the plaintiff requested the examination of a policeman in order to prove that the car of the defendant was speeding too much. In the appellate trial, it would be considered as "new evidence" both the request to examine the same policeman on personal injuries caused by the defendant to a passenger in the car of the plaintiff, and the offer of the speed ticket issued by the policeman as an exhibit. In both cases, the relevant issue is whether or not the evidence was offered to the first instance judge. Therefore, if the first instance judge did not admit evidence that a party had offered, it should not be deemed "new" in the appellate trial.

The concept of "**essential**" (*indispensabile*) evidence is a more complicated one. To construe it literally would lead to absurd results: if a fact can be proved in several ways (e.g. with several witnesses and exhibits) no one of them can be deemed "essential". Otherwise, i.e. when there is an only way to prove a fact, such evidence should be deemed "essential". Therefore, Italian scholars and case law abandoned the idea of interpreting this concept literally and tried to give the word a sensible meaning starting from the aim of the law, i.e. forcing the parties to offer all available evidence to the first instance judge.

In this respect, Italian scholars have not been able to reach a unanimous interpretation, as it usually happens when the law is far from being clear. Commentators proposed different opinions on the issue concerning the concrete individuation of the cases when evidence should be deemed essential in the context of an appellate trial. The main opinions can be summarized in a few points:

a) according to the first opinion, the appellate judge should admit "new" evidence because it is "essential" when the first instance judge ruled against a party because he was not able to offer enough evidence in order to support his claim (so-called ruling according to the "burden of proof" principle);
b) other commentators wrote that any evidence not gathered by the first instance judge and relevant to rule on a decisive fact is "essential";

[7] The decisive oath (*giuramento decisorio*) is one of the three kinds of oath provided for by Italian law. It is like a challenge from the party that requests the oath, to the other party, on a disputed fact. If the requested party accepts to swear that the disputed fact actually took place, the judge is bound to deem that the sworn allegations are true. Otherwise, the requested party automatically loses on the specific issue. The decisive oath is regulated under articles 2736 and following of the Civil Code and under articles 233 and following of the Code of Civil Procedure.

c) an author deems that the appellate judge should admit evidence as "essential" when the first instance judge ruled on a fact that has not been fully proved (so-called *semiplena probatio*);
d) according to the last interpretation, evidence is "essential" when concerning a factual allegation which, if it is proved, causes the overruling of the first instance decision.

The last interpretation prevailed among the majority of scholars and also the grand chamber of Italian Supreme Court upheld it in a precedent dated 2005. This interpretation appears indeed to be the best one under the point of view of the legislative aim, since it is the most strict one: by introducing the criterion of "essential evidence", the lawmakers tried to compel the parties to discuss all the facts of the case during the first instance trial and destroy the bad habit of "keeping in the safe" some witnesses and documents to show them up only in the appellate trial.

A strict interpretation is also common as far as the concept of evidence that "a party proves that he **could not offer during the first instance trial** due to a cause it cannot be held responsible for" is concerned. According to the prevailing jurisprudence, admission of evidence pursuant to this rule requires something more than a mere excusable neglect: what it is actually required is an event which is totally out of control of the affected party, even though scholars do not have an unanimous opinion on how to identify all concrete possible events.

Evidence (especially exhibits) that did not physically exist when the first instance trial took place represent the most common circumstance under which appellate judges admit "new" evidence on the grounds of the mentioned rule. Leaving this simple case aside, scholars tried to elaborate some general criteria. I will try to list the most commonly accepted cases when "new" evidence should be admitted pursuant to this rule:

a) an extraneous event, or the opposite party, prevented a party from offering evidence to the first instance judge;
b) an event relevant to the purposes of the trial happened or the applicable law changed after the first instance trial;
c) a party needs to prove that the first instance judge grounded his decision on false evidence (e.g. counterfeit exhibits or suborned witnesses);
d) "new" evidence is needed because of a new joinder in the appellate trial[8];
e) in cases where the law allows new claims during the appellate trial[9], a party can offer "new" evidence to ground them.

It is quite obvious that drafting a complete list of cases is an impossible task. After all, this rule is aimed at protecting the right of defense and, more generally speaking, the right to a fair trial under exceptional circumstances. Therefore, the task would not only be impossible, but also useless, since it is necessary to grant the judge a certain discretionary power to face such circumstances, that cannot be always foreseen.

4. Three different regimes.

Hoping that the above clarifications worked like Ariadne's thread and helped in finding the way through our labyrinth, we can now move some steps forward to the Minotaur, or the most recent developments. As mentioned in the Introduction, during the summer of 2012 Italian Parliament enacted a reform that affected several rules on appeals. Among other things, the reform modified the rules on admissibility of evidence both in the ordinary procedure and in the summary one. On the contrary, the rules on admission of evidence in employment procedure (and in all other matters where employment procedural rules are applicable) were left untouched.

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[8] Under article 344 of the Code of Civil Procedure third parties can join in the appellate trial only under very particular circumstances (e.g. required joinders that should have been summoned to the first instance trial but they had not).

[9] The new claims allowed in appellate proceedings (e.g. further damages suffered after the first instance decision is issued) are listed in the first paragraph of article 345 of the Code of Civil Procedure.

A translated excerpt of the relevant provisions of the Code of Civil Procedure, as amended in 2012, could be helpful in understanding the differences.

Excerpt from article 345 (Ordinary proceedings) – No new evidence shall be admitted and no new exhibits shall be offered, unless a party proves that it could not offer them during the first instance trial, due to a cause it cannot be held responsible for. The decisive oath can always be requested.

Excerpt from article 437 (Employment proceedings) - No new evidence shall be admitted, except the evaluation oath[10], unless the court, also *ex officio*, deems that they are essential to ruling the case. The parties have the right to request a decisive oath at any time during the trial.

Excerpt from article 702 *quater* (Summary proceedings) – New evidence and new exhibits shall be admitted if either the court deems that they are essential to ruling the case or a party proves that it could not offer them during the summary trial, due to a cause it cannot be held responsible for.

The most evident difference exists between the ordinary and the employment rule. According to the first, the appellate judge should admit "new" evidence when a party proves that a situation exists that prevented it to offer the evidence to the first judge. According to the latter, the appellate judge may admit "new" evidence when he deems that it is "essential" to ruling the case. It should be firstly noted that, while the first criterion is strict and prevents the second from being relevant, the opposite is not true. Let us suppose that a party needed to prove that the first instance judge, in an employment case, based his ruling on false evidence: no appellate judge would probably exclude such evidence, unless the issue is clearly ungrounded. At the same time, it is very sensible of an appellate judge to deem that is "essential" to protect the right of defense: that is the reason why employment divisions of the Courts of Appeals usually admit "new" exhibits and witnesses when aimed at proving a fact that happened after the end of the first instance trial.

Based on those remarks, it seems reasonable to argue that a criterion based on flexibility and actually oriented to admit only the "new" evidence that is really useful is much better: it excludes any fruitless time consumption, as opposed to a strict and objective rule that says nothing about the real need to gather the "new" evidence. Of course, the lawmakers could have found clearer words, instead of using an expression (i.e. "essential") that makes sense only if interpreted in order to modify its meaning. However, when it comes to choose what is really useful to the purpose of a fair and (relatively) timely adjudication, it is always a wiser choice to grant the judge a certain amount of discretionary power, instead of fixing a strict written rule. Especially in cases where the choice is up to an experienced judge (as most Italian appellate judges are), it involves the meaningful power to select what is actually needed for the trial and to dismiss the requests made by lawyers only in order to remedy their mistakes or for a time-consuming excess of zeal.

The new rule applicable to summary proceedings appears to be a mix of the two criteria that have just been discussed. This is, probably, the way judges will construe it, i.e. by trying and applying both criteria before excluding offered evidence. Some of the first commentators, however, suggested a more broad and flexible interpretation of both criteria, for two reasons. First of all, the doubts concerning compliance of the summary proceedings with the constitutional principles on fair trial are still alive and this reform has someway strengthened them: some scholars envisaged the risk that the parties could be denied the right to fully prove their claims both in the first instance trial and in the appellate one. However, the right of defense could theoretically be in danger only if the first instance judge made a bad use of his discretionary power, excluding relevant evidence. Furthermore, as far as appeal is concerned, the new rule do not increase the risk that a rocket docket could damage the right of the parties to prove their claims: if evidence has been offered to the first instance judge, even if not admitted it is not "new" and a party can offer it to the appellate judge. Secondarily, it has been said that imposing restrictions on the evidentiary powers of the party will

[10] The judge can order the evaluation oath to a party when he deems that it is impossible to ascertain otherwise the exact value of a claim. See article 2736 of the Civil Code and article 241 of the Civil Procedure Code.

discourage the lawyers from using the summary procedure. Only the practical experience will tell us if this is true. Until now, even with a full right to offer evidence in the appellate trial, the number of lawyers that chose this procedure is still quite low.

The other remarkable difference between the summary procedure and the others is that decisive oath is not mentioned in the rule concerning the first. Given the legislative chaos, one can doubt whether the lawmakers made a willful choice or they simply forgot to mention it. A long-standing legislative tradition considers this evidence admissible at any time, even in the appellate trial, and the reason why that happens is that by means of a very simple procedure the judge can rule a case that may otherwise require plenty of evidence. On the other hand, oath is (rightly) criticized because it is a medieval way to fact-finding and it is everything but a way to find out the truth about facts. If the lawmakers chose not to mention it as a first hint of his future repeal, we should be grateful. However, it is impossible to find out any reason why the traditional rule was maintained for ordinary and employment procedures and not for the summary one.

Before trying to draw some conclusions, a picture of the monster created by the lawmakers may help in understanding its shape.

New evidence / **Procedure**	**Essential evidence**	**Evidence that a party could not offer during the first instance trial**	**Decisive oath**
Ordinary	No	Yes	Yes
Employment	Yes	No (unless essential)	Yes
Summary	Yes	Yes	No (unless essential)

The chart shows the shape of a legislative choice that makes no sense. Applicable procedure can depend on a choice made by the plaintiff, between ordinary and summary proceedings, or on the matter of the litigation, between ordinary/summary and employment proceedings, since the prevailing opinion is against the use of summary proceedings for employment matters. The option for excluding or limiting admissible evidence during the appellate trial is instead a political one: the Parliament has to choose if appeal should open the way to a new trial on the same issues or constitute only a way to check if the first judge ruled the case correctly. Like the Minotaur in the Greek myth, a strange creature that was half a man and half a bull (and for that reason it was confined in the Labyrinth), Italian lawmakers decided to stand midway, shaping an appellate procedure that is mainly a check on the first instance decision but also allows some fact gathering. This may be a questionable choice, but not an unreasonable one. When a political and general choice has been made, however, it makes no sense to create differences that, in the end, depend on the choice of a party of a single case or on the matter the case is about.

5. Final remarks.

The analysis of the shape of appellate proceedings, no matter of their nationality, demonstrates that the choice of the model is always a political one. Where “new” evidence in Italian appellate proceedings found no limits, procedural rules were often criticized because they offered too much guarantees to the parties. According to the critics, they did not guarantee a fair decision, since nothing prevented the parties and the judges to repeat the same mistakes they made in the first trial or to add new ones. Other opinions deemed that it was necessary to give the parties at least two possibilities to prove their claim. Many other examples can be found to argue that there are no convincing technical arguments in favor of a choice for a full second trial instead of a mere check that the first ruling is correct both on the merits and on procedural issues.

For about twenty years Italy has been following a general European tendency to limit issues and evidence that can be brought before the appellate judge. The argument, according to which justice cannot bank on unlimited resources gives serious grounds to this trend, along with the gradual

success of the principle of proportionality also in civil law countries. The need to ensure a reasonable duration of judicial procedures strengthens those grounds still further.

On the other side, to exclude evidence in any case from appellate trials can bring to unfair decisions, especially when new relevant facts have happened after the end of the first trial. The point is to find a good balance between the opposite needs: deliver a (relatively) fast appellate decision and preventing appeals from being used to remedy the mistakes made by the counsels during the first instance trial. Italian system is probably near to such an equilibrium, as far as evidence is concerned and setting aside many other issues concerning appellate trial.

The actual problem is that the lawmakers created a totally inconsistent system. As many Italian scholars have said for years, consistency cannot be reached by means of small and frequent reforms of single rules, but would need a general reform of Italian Civil Procedure, along with a major reorganization of the court system, as many other European countries did over the last decades.