

# **EVIDENCE IN CIVIL LAW – ITALY**

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**KEYWORDS:** • Civil Procedure • Evidence • Italian Civil Code • Italian Code of Civil Procedure

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## **Evidence in Civil Procedure in Italy**

### **1 Introduction**

Italian law of evidence still follows the arrangement of the Napoleonic Codes that were very influential for the Italian codification movement in the Nineteen century. Even in the Codes presently in force (codes enacted in the early 1940s), the relevant rules are split in two groups, in accordance with the much debated theory on the true ‘nature’ (substantive or procedural) of evidentiary rules. The rules governing the so-called ‘substance’ of evidence can be found in the Civil Code that devotes to the matter at hand a whole Title (‘Delle Prove’ – On Evidence) of Book Sixth, which regulates a variety of subjects under the heading ‘On the Protection of Rights’ (‘Della tutela dei diritti’). These rules list the evidence that is admissible; identify which kind of evidence can be offered as to demonstrate certain facts; allocate the burden of proof; and establish the probative value of each piece of admissible evidence. The rules on evidence that are deemed to be strictly ‘procedural’ can be found in the Code of Civil Procedure: in a nutshell, they govern the various steps to be followed both by the parties and the court in the process concerning the presentation and the taking of evidence.

### **2 Fundamental principles of Italian civil procedure**

Italian civil procedure knows quite a variety of fundamental principles. Some find their primary source in the Constitution. Leaving aside the constitutional rules concerning the judicial branch, it is worth mentioning the rule that is considered to be the cornerstone of the right of access to courts, that is, article 24. It reads: ‘Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts.’ Equally important for the administration of civil justice is article 111, according to which:

Jurisdiction is implemented through due process regulated by law.

All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials. [...]

All judicial decisions shall include a statement of reasons.

Appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts.

Other principles, related to the dynamics of adjudication and the distribution of powers between the court and the parties to a case can be found in the Code of Civil Procedure.

### 3 The principle of free disposition of the parties

One of the basic tenets of Italian civil procedure is the principle of free disposition of the parties: this principle, known in Italian as ‘*principio dispositivo*’, is often referred to by citing the Latin maxim ‘*Ne procedat iudex ex officio*’. According to Italian scholars, the principle has two main prongs. The so-called substantive prong is grounded in the rule according to which ‘Courts shall provide for the judicial protection of rights upon request of a party and, insofar as the law so mandates, upon request of the public prosecutor as well or *ex officio*’. In strict connection with this principle (that is laid down by article 2907, sec. 1 CC), the Code of Civil Procedure (at article 99) provides that ‘Those who want to assert their rights in court shall apply to the appropriate court’. The two rules just mentioned basically mean that the judicial protection of rights can be requested only by those who claim to be the bearers of the same rights; in addition, the rules are also aimed at preventing the court or, better yet, the judge from adjudicating a claim he himself has made, commencing the proceeding *ex officio*, since that would impinge upon his impartiality.

On this general background, the fact that occasionally the law grants public prosecutors (in Italian, ‘*Pubblici Ministeri*’ or PM) the power to initiate adjudication in lieu of the individuals who, in principle, should be the only subjects entitled to commence or defend an action is considered no exception: since public prosecutors in civil matters are the official ‘guardians’ of public interest, it makes sense that in cases concerning, for instance, minors or individuals affected by disabilities, the law allows the public prosecutor to ‘substitute’ for the interested person in instituting a civil proceeding. On the contrary, real exceptions to the principle of free disposition of the parties do exist, even though in a very restricted number: in the past, these exceptions could be found most of all in the field of bankruptcy law, but they have been repealed by recent reforms; other exceptions of minor importance, since they concern one of the few special courts that have survived the advent of the Constitution (and its prohibition against the operation of special courts), are constantly questioned in their legality before the Constitutional Court.

From the principle of free disposition of the parties another principle develops, namely the principle according to which the court is bound to rule on every claims made by the plaintiff and every affirmative defenses raised by the defendant, so that the remedy granted, if any, is precisely the remedy that was requested by the plaintiff. This principle, laid down by article 112 CPC, is known in Italy as ‘*principio della corrispondenza tra chiesto e pronunciato*’: it is a fundamental principle, since it makes it clear that the scope of the lawsuit is determined by the parties and, more precisely, by the factual allegations they offer in support to their claims and defenses. The scope of the lawsuit, in its turn, sets the boundaries of the judgment the court is expected to issue. If the court decides a case disregarding these boundaries, different grounds for appeal can result, such as ‘*ultra petita*’ or ‘*extra petita*’, which occur, respectively, when the

judgment grants the plaintiff something more than he requested (for instance, damages for an amount higher than the sum he claimed) or a remedy other than the one he petitioned for.

Going back to the principle of free disposition of the parties and its two prongs, the procedural one implies that, as a rule, the court must rely only on the evidence offered by the parties in support of the factual allegations they have made in their pleadings. Exceptions to the general rule (laid down by article 115, sec. 1 CPC) are provided for by the law, but it must be emphasized that they apply only insofar as the court is specifically entrusted with the power to take evidence on its own motion. That happens on a wide scale in the procedure followed in labor cases and in a variety of special proceedings in non-contentious matters. In ordinary proceedings, the court's powers to take evidence *ex officio* are quite restricted, and are limited to ordering inspections of persons or things; requesting written information from a public entity; or questioning the parties in an informal way, in order to clarify the facts of the case.

The principle of party control over the facts and the evidence offered to establish them suffers other exceptions: in fact, the court must accept as true not only the facts that are not in dispute between the parties, but also the facts that have been asserted by one party when the opponent has not challenged them in a specific way (article 115, sec. 1 CPC). In addition, the court is allowed to take judicial notice of the so-called notorious facts, that is, facts belonging to the common knowledge and experience (article 115, sec. 2 CPC). One might say that the court is allowed to take judicial notice of Italian law, too. Parties do not need to prove the legal rules that they deem applicable to their case, since the traditional Latin saying '*Iura novit curia*' applies, and therefore it falls within the court's responsibility to determine the applicable law (article 113, sec. 1 CPC). As a rule, the parties will advance legal arguments in support of their contentions, but the court can disregard them and reach a decision based on a legal theory other than the legal theories developed by the parties, provided that the boundaries set by their factual allegations and claims are respected.

In principle, the parties must assert their claims and defenses in the introductory pleading, which means that once adjudication has begun, new claims and defenses cannot be filed. This rule, though, is not inflexible. Both scholars and the case law take great pain to draw a line between the complete change of a claim or defense (the so-called '*mutatio libelli*') and a simple modification of a claim or defense (the so-called '*emendatio libelli*'): while the former is forbidden, the latter is allowed, even though only under certain circumstances and within strict deadlines. In reality, the divide is very fuzzy, to the point that it seems inconsequential to attempt a rationalization of a distinction that is quite unclear and it is often made with a good measure of empiricism.

Further elements that make the rule mentioned above not an absolute one depend on the law in force as well: according to article 183 CPC, in an ordinary proceeding before a court of first instance, at the first hearing the plaintiff can assert new claims and defenses insofar as they are 'consequences of the counterclaim or defenses made by the defendant'; furthermore, both parties can be authorized to assert new defenses, again

insofar as they are ‘consequences’ of both the new claims made by the opponent and the claims he has modified. In addition, at the same hearing the parties can ‘specify’ their claims and defenses: needless to say, it is quite difficult to identify in practice whether the parties have ‘modified’ their claims or defenses or have simply ‘specified’ them.

Linguistic subtleties aside, what seems worth emphasizing is that when the parties exercise their powers to adjust their targets by asserting new claims or defenses, as well as by modifying or specifying the ones they have made in the introductory pleading, as described above, the first hearing is postponed, as it is when the parties offer new evidence in support of their new claims and defenses: the result is that in Italy the preparatory stage of the lawsuit may develop along a series of piecemeal hearings, and lacks the concentrated character that is typical of the corresponding phase in the model of adjudication adopted by other continental European legal systems.

In appellate proceedings, in principle new claims are not allowed (article 345 CPC), even though an exception is made for claims concerning interests or damages accrued after the judgment that is appealed against was issued. New evidence cannot be offered, neither can new documents be produced, unless the parties show that in the proceeding before the court of first instance they failed to rely on the evidence (and the documents) they want to submit to the appellate court due to causes beyond their control.

#### **4 The adversarial and inquisitorial principles**

The legal sources of Italian civil procedure ignore both the adjectives ‘adversarial’ (in Italian, ‘accusatorio’) and ‘inquisitorial’ (in Italian, ‘inquisitorio’). The distinction between an adversarial and an inquisitorial model of adjudication is familiar to Italian scholars in civil procedure, but it is more common to come across it in academic writings concerning criminal procedure.

Quite often, at least with regard to civil cases, reference to the inquisitorial principle evokes the image of an authoritarian judge, who is personally and directly involved in the fact-finding process and is willing to deprive the parties of their basic rights. Of course, this is a misconception, but in Italy it seems hard to die, and every time an increase in the powers that the court can exercise *ex officio* is contemplated with the view to injecting efficiency into the pace of adjudication so as to reduce its length, the specter of the Grand Inquisitor is evoked by the lawyers and a few scholars as well. Maybe that explain, at least in part, the reasons why the idea of case management and managerial judges has not taken root in Italy yet, even though no one could deny – at least, for the sake of intellectual honesty – that the very heavy caseload burdening Italian courts probably would defy even the most serious attempt to manage cases in a sound way.

According to article 175 CPC, ‘The judge [in charge of the case] shall exercise all the powers that are aimed at making the development of the proceeding fair and expedite. He shall schedule the hearings and set the deadlines for the activities the parties are expected to perform’. The heading of the rule is ‘Direction of the Proceeding’ (in



Italian, 'Direzione del procedimento'), but Italian judges are not keen on exercising the powers that would allow them to keep a tight rein on the development of adjudication. Essentially they behave as 'traffic controllers', and, in light of the huge number of cases that pile up on their desks, one could not reasonably expect anything different.

The Code of Civil Procedure does provide for a little 'Materielle Prozessleitung' in the hands of the judges: for instance, at the first hearing the court 'can ask the parties, within the limits of the factual allegations they have made, the clarifications deemed necessary; in addition, the court can call the parties' attention to issues that could be raised 'ex officio' when, in the opinion of the court, these issues need to be addressed'. Again, courts only seldom resort to this power. The problem is that in general the judge in charge of a case presides over the first hearing without having read the introductory pleadings lodged by the parties, and therefore he has no knowledge of the issues in dispute. Therefore, even though scholars emphasize the importance of a meaningful cooperation between the judge and the parties in pinning down as soon as possible the scope of the lawsuit, by identifying both the factual and the legal issues to be decided (*thema decidendum*), as well as the facts that must be proved by evidence (*thema probandum*), in reality the primary role in shaping the lawsuit in the phase of the proceeding that ideally should be devoted to the 'preparation' of the case is played by the parties or, better yet, by their attorneys.

## **5 'Audiatur et altera pars'**

The principle expressed by the Latin precept 'audiatur et altera pars' is known to Italian civil procedure (as 'principio del contraddittorio'); actually, the scope of the principle goes well beyond procedure (whether civil or criminal), since the general understanding is that it applies to every situations in which public powers are exercised.

In the Italian Code of Civil Procedure, the principle is enshrined in article 101, sec. 1, according to which no judgments can be rendered unless both parties have been heard by the court. Actually, though, at present the most important source of the principle is the Constitution (which entered into force in 1948, that is, later than the Code): the case law of the Constitutional Court has placed the 'right to be heard' at the core of the right of action and defense, as provided for by article 24. At the constitutional level, the amendment of article 111 (dated 1999) has strengthened the principle even further in its essence as one of the foundations on which the concept of due process of law rests.

The principle 'audiatur et altera pars' is supposed to be observed throughout the whole development of a lawsuit: from a practical point of view, it means that the parties must be afforded effective and equal opportunities to participate in the proceeding, presenting their claims and defenses, and offering evidence to support them, so as to play an active role in helping the court arrive at a judgment. There are many possible 'declensions' of the right to be heard; they vary according to the stage of adjudication taken into consideration, and also according to the type of proceeding at issue, since Italian civil procedure knows summary, 'ex parte' proceedings in which the unfolding of the right to

be heard is conditional upon the initiative of the party that is interested, for instance, to have the court order set aside.

It is worth mentioning that the right to be heard applies not only with regard to the parties, meaning that, insofar as the plaintiff has the right to submit his claims and evidence to the court, the defendant, on his turn, has a corresponding right to advance his defenses and evidence in opposition to the initiatives of the plaintiff; it applies to the court as well in its relationship with the parties, and that is particularly important whenever the law entrusts the court with powers that can be exercised 'ex officio'. More precisely, article 101, sec. 2 CPC provides that if the court is inclined to base its judgment on an issue raised on its own motion, the parties must be heard on this very issue: failure to comply with this rule makes the judgment null and void and subject to appeal.

If the parties have a passive behavior, the assumption is that, in principle, it is their free choice not to act; obviously, since many steps of adjudication are geared to deadlines, failure to comply with deadlines entails the loss of the right to perform a certain activity. Only failure to make an appearance can bring about a default judgment against the plaintiff or, more frequently, the defendant.

As far as the right to equal treatment is concerned, the role of Italian Supreme Court of Cassation is to 'guarantee the exact observance and the uniform interpretation of the law, [and] the unity of the national law in force', with a view to ensuring equal treatment, so as to give actual meaning to the principle of equality before the law enshrined in article 3, sec. 1 of the Constitution ('All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions'). The Court is supposed to quash the judgments in which errors of law are found, namely errors made by inferior courts in the interpretation and therefore in the application of either substantive or procedural law. In spite of that, the judgments issued by the Court do not constitute precedents; they do not bind inferior courts, even though it is acknowledged that they have a 'persuasive' authority. In addition, some recent reforms seem to have conferred to 'the case law of the Court' a quasi-binding character, since according to article 360 bis, sec. 1, no. 1 CPC, an appeal to the Court of Cassation can be declared inadmissible if the judgment under appeal is consistent with the Court's case law, and the appellant does not offer 'any elements suitable to persuade the Court to either confirm or overrule its own case law'.

## **6 Principle of orality; principle of directness**

As mentioned above, the first Italian Code of Civil Procedure, namely the Code that entered into force in 1865, two years after the unification of the country under the Kingdom of Italy, was highly influenced by the French Napoleonic Code of 1806: it was a Code that provided for a very limited intervention of the State in the development of adjudication, a development that was essentially left to the parties (or, better yet, to their attorneys), who were conducting the case in front of a passive judge. Very soon

this approach showed its limits: proceedings were slow, very formalistic and, all in all, highly inefficient. Legal scholars turned their attention to a different model of adjudication and began to subscribe to the theory advanced by Franz Klein and to advocate the so-called ‘social function’ of civil justice. One of the major supporters of these winds of change was Giuseppe Chiovenda, one of the Founding Fathers of modern Italian civil procedure. According to Chiovenda, the modernization of Italian adjudication would imply the adoption of a model of proceeding based on the principles of orality, immediacy and concentration. The court would have to take control over the development of adjudication and get involved in the process aimed at ascertaining the truth; the preparation of the case and the main hearing would be conducted orally; the same judge would be in charge of collecting evidence, hearing the allegations and final conclusions of the parties, and delivering the judgment immediately after, so that adjudication, consisting either in a single hearing or in a limited number of consecutive hearings, would come to an end in a short period of time.

The ideas promoted by Chiovenda were very influential, and left a mark on the Code of civil procedure enacted in 1940: unfortunately, the Code was not born under a lucky star, since it was conceived during the fascist dictatorship and entered into force when World War II had already begun. Immediately after the war, the Code became the target of strong criticism and denounced as the legacy of an authoritarian regime. Degree by degree, the characters of orality, immediacy and concentration faded away due to a series of reforms, to revive again in the procedure for labor cases enacted in the 1970s. Yet further reforms, adopted under the pressure of a constantly growing courts’ caseload and the progressive expansion of the length of proceedings, have made those principles ideals to be cherished, but – as ideals often are – unattainable in reality. In spite of that, the CPC, at article 180, still solemnly proclaims that the preparatory stage of adjudication and the taking of evidence shall be conducted orally.

## **7 Principle of public hearing**

According to article 128 CPC, hearings are public: this being the rule, it is possible for the court to order that the proceeding takes place in chambers, if reasons regarding national security, public order or other compelling reasons (such as the interest of minors or the need to protect the privacy of individuals) suggest that a public hearing is not appropriate for the case at stake. It is interesting to mention that during the preparation of the Italian Constitution the possibility of a specific rule contemplating the publicity of hearings as a fundamental guarantee was contemplated; eventually, though, the idea was abandoned, since the guarantee was deemed to be already incorporated in the rule according to which ‘Justice is administered in the name of the people’ (article 101, sec. 1 of the Constitution).

## **8 Principle of pre-trial discovery**

Pre-trial discovery, being a typical feature of Anglo-American civil procedure, is unknown to the Italian legal system. However, under certain circumstances it is possible to collect information to be used as evidence in future proceedings before the

commencement of a lawsuit: the matter is governed by articles 692-96 bis CPC ('*Dei provvedimenti di istruzione preventiva*'), and concerns only the depositions of witnesses and experts, as well as the so-call judicial inspection of places, objects or persons. The interested party must apply to the appropriate court, stating the reasons why it is necessary to hear a witness in advance, for instance demonstrating that the witness is seriously ill and is likely to be dead by the time a lawsuit has begun or has reached the evidence-taking stage; the party is also required to indicate the claims and defenses that he intends to submit to the court by instituting the lawsuit in which he will rely on the witness deposition. If the object of the request are either the expert witness report or the judicial inspection, the requirement of urgency must be met, too. The preliminary taking of evidence follows the procedure provided for interim measures; witnesses are heard at a special hearing, ordered by the court after having heard the parties. Experts are required to attempt the conciliation of the parties; if the attempt is successful, the agreement reached can be made enforceable by a court order; if, on the contrary, the attempt at conciliation fails, the expert's report is lodged with the court and might be used in a future dispute between the same parties.

## **9 Other general principles**

Italian civil procedure knows quite a variety of general principles. Some arise from constitutional provisions: one may mention the principle concerning the independence of the judiciary (articles 101, 102 and 104 of the Constitution), as well as the principle according to which 'All judicial decisions shall include a statement of reasons' (article 111, sec. 6 of the Constitution). Similarly, the principle granting an unconditional right to bring an appeal to the Italian Supreme Court (the '*Corte di cassazione*') on points of law is grounded in the Constitution (article 111, sec. 7), even though this is a matter of interpretation, since the constitutional rule, by itself, could be read differently.

Other principles find their source in the Code of Civil Procedure: this is the case, for instance, of the principle according to which parties must be represented in judicial proceeding by their attorneys, except for small claims cases. Similarly, the Code provides for the so-called 'loser pays principle', namely, the rule charging the losing party with the costs and the attorney's fees sustained by the winning party, even though courts have the power to mitigate a strict application of this rule upon an evaluation of the circumstances of the case at hand.

## **10 General principles of evidence taking**

### **10.1 Free assessment of evidence**

According to article 116 CPC, sec. 1, 'The court must evaluate the evidence in accordance with its prudent judgment, except as otherwise provided by the law'. This means that, in principle, courts are expected to weigh the evidence freely: prudently freely – one must underline – since freedom does not mean capriciousness in the assessment, in light of the fact that courts are bound to lay down the reasons that led them to accept or reject the evidence offered in the judgments they issue.

There are exceptions to the rule of free assessment of evidence. It is customary to distinguish between ‘free evidence’ (‘prova libera’, in Italian) and ‘legal evidence’ (‘prova legale’, in Italian): the expression ‘legal evidence’ refers to evidence whose probative value is pre-determined by the law. ‘Legal evidence’ includes, in general terms, documentary evidence, party admissions, party oaths, and conclusive presumptions.

As a rule, courts must rely only on evidence offered by the parties. Italian courts lack a general power to take evidence on their own motion, which is possible only as long as a specific legal rule entrusts courts with such power. This rule is enshrined in article 115, sec. 1 CPC. The same rule, though, states that the court can base its decision on facts that have been alleged by one party and have not been challenged specifically by the opposing party: in short, this means that uncontested facts do not need to be supported by evidence. Furthermore, according to sec. 2 of article 115 CPC, the court is permitted to take judicial notice of notorious facts and rules based on common experience.

The Italian legal system does not rely on any methodological guidance that could be followed by the courts in the assessment of evidence: as mentioned above, in their judgments courts must explain the reasons supporting the choice of a certain piece of evidence instead of another one as the basis for the decision they have arrived at. This explanation is essential in order to make sure that judgments will not be reversed on appeal.

## **10.2 Evidence in general**

As a general rule, evidence must be relevant for the case at hand, as well as admissible. Relevancy is the criterion according to which the only evidence the court should rely upon is the evidence having a logical connection with the facts in dispute, so that the evidence is relevant insofar as it allows to establish whether or not these very facts are true. As far as admissibility is concerned, relevant evidence must be legally admissible as well, meaning that certain items of evidence cannot be used in adjudication because of specific rules of exclusion laid down by the law.

From a certain point of view, the types of evidence that can be presented in adjudication are listed in different legal sources as a *numerus clausus*. In spite of that, there is a vast amount of case law on the so-called ‘prove atipiche’, meaning evidence that is not listed as admissible in any legal sources, but all the same can be admitted under special circumstances.

In a hypothetical hierarchy of admissible evidence, documentary evidence is at the top. Documentary evidence includes various types of writings, sketches, models and mechanical reproductions, such as photographs, films, recordings and other kinds of reproductions describing things or events. Electronic documents and other forms of reproductions made available by the development of IT are subject to autonomous

regulations, laid down by special statutes. Specific rules govern the probative value of bookkeeping records of business entities that are subject to registration.

Writings can be divided into public deeds and private writings. Public deeds (in Italian, ‘atti pubblici’) are documents prepared and signed by a notary public or any other public authorities entrusted with the power to grant ‘public faith’ to the deeds they draw up (article 2699 CC). In addition, public deeds must comply with a few formal requirements. Contracts, bills of sale, a few public records and many other written instruments can be equated – as far as their probative value is concerned – to ‘atti pubblici’. Private writings are documents signed by a person other than a public notary or a public authority.

In principle, public deeds and private writings are conclusive evidence that the statements they report have been made by the person whom the document indicates as the author of the statements themselves. It must be emphasized, though, that not even public deeds are conclusive evidence as regards the intrinsic truth of the statements they report, with the only exception concerning the statements of the public notary himself. In particular, a public deed is conclusive evidence that it was made by the public notary who signed it. It is also conclusive evidence as regards any events that the notary states as having occurred in his presence; furthermore, it is conclusive evidence as regards the performance of any acts that the notary certifies he himself has performed. In order to deprive public deeds of their special evidentiary weight a special proceeding, known as ‘querela di falso’ must be instituted.

As far as private writings are concerned, they are conclusive evidence that the person who appears to have signed the document is in fact the person who actually signed it and is the author of the statements made in the document: one has to keep in mind, though, that the probative value just described is attached only to the so-called ‘recognized private writing’, meaning the documents that have not been disavowed in court by their alleged author. In fact, a special proceeding is provided for with a view to challenging the conclusive evidentiary value of private writings of the parties (‘disconoscimento della scrittura privata’, literally meaning disavowal of private writings): in particular, the party against whom a document is introduced into evidence may challenge the genuineness of what the documents asserts to be his writing or his signature.

Special rules govern the probative weight of other documents, such as telegrams or copies of documents, as well as private writings authored by third persons.

The importance of documents as evidence and the fact that their evidentiary value place them at the top of an hypothetical hierarchy of admissible evidence depends also on the substantive rules according to which certain contracts can be proved by written evidence only, while other contracts, which in principle do not require to be signed or proved in writing, can be proved by written evidence only if their value is above a certain threshold.

Under Italian law, testimony refer exclusively to statements made in court by third parties (witnesses), which means that neither the statements made by the parties to the action nor expert opinions are considered testimony (since experts are considered auxiliary officers of the court). Testimonial evidence is assessed freely by the court, but a variety of rules exist so as to guarantee that witnesses are competent and reliable. Therefore, as an example, third persons who have an interest in the matter at stake (so that they could join the action as parties) are considered incompetent witnesses. Similarly, factor such as the personal relation between the prospective witness and the parties to the case can be the reasons for excluding the testimony, and so are elements like the age and the physical or mental condition of the person.

As mentioned above, testimony is excluded as regards contracts whose value exceeds a certain threshold (article 2721, sec. 1 CC), contracts that can be proved only by written evidence: one must emphasize, though, that the exclusion of testimony is not absolute since the law grants the court a discretionary power to allow testimony, in light of the nature of the parties and the content of the contract to be proved, so that one can safely say that in practice what was the rule (i.e., no oral evidence, but only documentary) has become the exception. In spite of that, the Civil Code provides for other articles that show a clear preference of the Italian legal system for documentary evidence as opposed to oral evidence. Reference is made to the rules (articles 2722-3 CC) according to which testimony may not be used to prove agreements supplementing or contradicting the content of a document, if the agreements were reached prior to, or simultaneously with, the drafting of the document. If supplementing or contradicting agreements are alleged to have been reached after the drafting of the document, the court may admit testimony insofar as it finds that oral modifications to the content of the document are likely to have been made. In any event, the Civil Code lays down a sort of 'safeguard clause' according to which, in spite of any contrary rules, testimony is always admissible under special circumstances such as, for instance, when the party has lost the documentary evidence without fault or when it was practically impossible to obtain written evidence (article 2724 CC).

The statements of the parties may have a special evidentiary value when they take the form of a confession or an admission made during the so-called formal interrogatory ('interrogatorio formale'), as well as when they are issued under oath.

As far as confession is concerned (article 2730-5 CC), it is the statement made by a party as to the truth of a fact that is unfavorable to the party himself, and favorable to his opponent. A confession can be rendered in court or out of court: in either case, the probative value of the confession is conditional upon a few requirements that must be met by the party, who must be competent to dispose of the rights in issue or, in case of an out of court confession, must have made his statement to his opponent or to an agent of his opponent.

In principle, a confession is conclusive evidence insofar as the needed legal requirements are met. In particular, the confession made in court is conclusive evidence if it is contained in a pleading or motion signed by the party personally; similarly, it is

conclusive evidence if its content makes it an admission made in response to the so-called formal interrogatory, which is deemed to be a procedural tool at the disposal of a party who wants to force his opponent to make an admission. In practice, formal interrogatories are hardly ever used, since experience has shown that only rarely they are useful in eliciting the admissions they seek.

A relic from the past is the oath, which the Italian system of evidence still contemplates. There are various types of oath. The so-called decisory oath ('*giuramento decisorio*', article 2736 sec. 2, 1) CC) is taken by one party upon a challenge made by his opponent; among the requirements that must be met to make the decisory oath admissible, one seems significant, that is, the requirement according to which the facts to be proved by the oath must be 'decisive', meaning facts that, once established, allow the court to decide the whole case (or, at least, part of it). Article 2739 CC lists a variety of circumstances making the decisory oath inadmissible: for instance, decisory oath cannot be used to prove a contract whose validity is conditional upon its written form; neither can the oath concern an illegal act or omission. If all the legal preconditions and requirements are met, the decisory oath is conclusive and irrefutable evidence: the other party can neither prove the contrary of the facts sworn to, nor does he have any forms of appeal allowing him to attack the judgment issued upon a decisory oath that later was ascertained as false. In light of that, one may say that the decisory oath is the archetypical example of 'legal evidence', whose probative value is absolutely indisputable, even one the party who swore the oath is later convicted of perjury. The Civil Code provides for two other types of oath (article 2736, sec. 2, 2)), the supplemental oath and the oath of estimation. The supplemental oath ('*giuramento suppletorio*') is the oath the court can defer to a party 'in order to decide the case, when the claim or the defenses have not been fully proved, but are not devoid of any proof'. The oath of estimation is a special type of supplemental oath to which the court may resort to when the amount of the claim cannot be determined in any other ways.

### **10.3 Burden of proof**

Since the court is supposed to decide upon the evidence offered by the parties, they have not only the burden to allege the facts that are relevant for the case at issue, but also the burden to prove these very facts. But the parties to a case are at least two, and therefore it is not inconsequential to establish which facts each party is supposed to prove. The court must issue a judgment anyway, even when a relevant fact has remained uncertain; the court cannot issue a simple '*non liquet*', leaving the case undecided, but it must render a judgment on the merits, either granting or denying the remedy the plaintiff asked for. Therefore, the party who was supposed to prove the fact that has remained uncertain will lose the case.

The harshness of this consequence is mitigated by two principles. First of all, a fact can be ascertained even through evidence that was not offered by the party who was supposed to prove that very fact, insofar as it is evidence that has been filed in the official records of the adjudication (e.g., evidence offered by the other party or the public prosecutor): in other words, as long as a fact has been proved somehow, it



becomes irrelevant to identify whether the plaintiff or the defendant was supposed to prove that very fact. Second, the court has the power to take evidence ‘ex officio’: as mentioned above, it is not a broad and general power, but it is still a power that, if exercised, can help the court overcome the uncertainty as regards facts that the parties were expected to prove.

On these premises, it appears obvious that each party is inclined to prove the facts that are favorable to his case. This is a logical criterion according to which the party carrying the burden of proof could be determined; but this criterion only would not be sufficient, since each fact can be presented in a positive and in a negative way, meaning in terms of existence or inexistence of the same event, according to the interest of the party who is offering evidence in support of his ‘version’ of the fact in issue.

Therefore, the law provides for a few criteria in light of which it is made clear which facts each party must prove. These criteria are laid down by article 2697 CC: in general terms, this rule makes it clear that each party has the burden to prove the facts showing that his claim or defense is well founded. More precisely, the party who claims a right has the burden to prove the facts supporting his claim; the (opposing) party has the burden to prove that those facts are ineffective or that the right claimed was modified or extinguished. Therefore, the rules governing the burden of proving a fact are connected to the rules establishing the burden of alleging that same fact: one can say that the party bearing the burden of pleading is the same party bearing the burden of proof. In order to identify which party bears the burden of pleading and therefore of proving a fact, it is of paramount importance to determine whether this very fact creates, modifies, hinders or extinguishes a right, according to substantive law. In principle, therefore, the plaintiff must prove the facts that support his claim (meaning the facts that he states are the ones giving rise to his right), while his opponent, in his defenses, must prove the facts that allegedly have modified, hindered or extinguished the right claimed by the plaintiff. From a certain point of view, the defendant is better situated than the plaintiff, since he is not bearing any burden of proof as long as the plaintiff has not proved the facts supporting his claim (this is the essence of the Latin maxim ‘actore non probante, reus absolvitur’). Of course, once these facts (known in Italian as ‘fatti costitutivi’) have been proved, the defendant, in order not to lose the case, will have to absolve his burden of proof, proving the facts (known in Italian as ‘fatti impeditivi’, ‘fatti modificativi’ and ‘fatti estintivi’) that have modified, hindered or extinguished the legal effects of the facts proved by the plaintiff. The real difficulty, then, is to identify – as regards the right claimed – which facts, according to substantive law, are the ones that ‘create’ a right, and which ones, on the contrary, are the facts that come into play as facts suitable to hinder, modify or extinguish the right itself.

The burden of proof may be shifted by the law or by the parties, under certain circumstances: the shifting provided for by a specific legal is qualified as a legal presumption (‘presunzione legale’). Legal presumptions may be conclusive (‘juris and de jure’) or rebuttable (‘juris tantum’): only the latter ones bring about a shifting in the burden of proof.

The importance of the burden of proof reaches its peak when the court has to issue its judgment on the case: it is at this point that the court must draw its conclusions as regards failure to comply with the burden of proof, issuing a decision against the party who had the duty to prove certain facts, and failed to provide the evidence necessary to prove them. Therefore, at the final stage of adjudication the burden of proof, which at the outset of the proceeding came into play as the rule indicating what has to be proved by which party, becomes a ‘rule of judgment’: while the former rule is binding on the parties, the latter applies to the court.

#### **10.4 Expert opinions and advice**

As mentioned earlier, under Italian law the opinion of experts is not considered as evidence. As a matter of fact, the expert is qualified as an auxiliary officer of the court, and his task is to assist the court in collecting and assessing evidence, emphasizing though that the court is not bound to follow the expert opinion, but has the discretionary power to evaluate it freely.

Experts can be appointed either ‘ex officio’ or upon the request of a party, when the court deems that the assistance of an expert is necessary: no further specifications are provided for by article 61 CPC. An expert opinion can be requested as regards any science, art or trade; it is even possible to appoint an expert to know the content of legal rules to which the principle ‘jura novit curia’ does not apply (e.g., foreign law, ancient law or customary law).

As a rule, experts are selected from special records kept at each court. The expert, once appointed, works under the direction of the court; he may inspect persons, things and places, question the parties and third persons, and make sketches and models. He may appear at hearings, but his reports are in writing.

If the court appoints an expert, the parties, on their turn may do likewise. The parties’ experts may accompany the court-appointed expert during his investigations, and they can submit to the court their own reports.

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