

COST AND FEE ALLOCATION IN ITALIAN CIVIL PROCEDURE

I. The Basic Rules: Who Pays?

1. In Italian civil procedure the basic rule concerning cost and fee allocation is set by article 91 paragraph 1 of the Code of civil procedure. According to that provision, at the end of the proceeding the court will order the losing party to reimburse his/her opponent's expenses, including lawyer's fees. It is the so called *principio della soccombenza*, which applies to court costs, lawyers' fees and other expenses likewise.

The justification for this cost-shifting rule is traditionally said to derive from the general principles concerning the judicial protection of rights. According to those principles, as a result of litigation, the successful party should be put in the same situation as he/she would have been if the other party had not brought or defended the claim. On the contrary, if the victorious party were to bear permanently the cost of the litigation, he/she would have to deduct them from what he/she has gained or preserved through it. Therefore, even if successful, he/she would be in a worse position than he/she was before the beginning of the proceeding. This would amount to an infringement of the right to an effective remedy protected by article 24 of the Italian Constitution.

Italian legal scholars also emphasize that the justification for the loser pays all rule is the mere fact of losing the claim and not a blame on the unsuccessful party. Actually, it is usually said that his/her position should not be equated with that of a tortfeasor, because litigating is not an unlawful act, but the exercise of a fundamental right¹.

However, besides this classical and still prevailing view, alternative justifications have been suggested². Among them, a recent one is worth mentioning, because it seems to mirror a current trend in Italian legislation and case law on this subject. According to this opinion, the obligation to reimburse the opponent's expenses is a sanction for an abuse of process, while the mere fact of losing the claim may be just a signal of this abuse³.

2. In the Italian legal system the regulation on costs is not very detailed compared, for instance, to the English one. In principle all of the winner's costs and fees are reimbursed and there is no general reasonableness test.

3. The loser pays all rule applies also in appeal proceedings. What should be noted in this regard is that the condition of being a successful party, therefore entitled to the reimbursement of costs and fees, is assessed on an overall basis, considering the final outcome of the lawsuit. This means that if an appeal court renders a judgment in favor of the appellant it has the power to revise the lower court allocation of costs, even if that part of the lower court decision was not challenged. It also means that if an appeal court upholds the appeal, the unsuccessful appellee will have to bear the costs of the proceedings in the lower court as well as of the appeal⁴.

4. As a general rule, during the course of the case each party bears the cost of his/her procedural steps, including the taking of evidence. With respect to the other steps which are necessary for the

¹ Crisanto Mandrioli, *Diritto processuale civile I Nozioni introduttive e disposizioni generali*, 16th ed. (2004, Torino: Giappichelli), pp. 339-342; Giuseppe Chiovenda, *La condanna nelle spese giudiziali*, 2nd ed. (1935, Roma: Società editrice del "Foro Italiano"), pp. 155-176.

² On these different views, see Annalisa Lorenzetto Peserico, heading *Spese giudiziali* in *Digesto discipline privatistiche, sezione civile*, volume XVIII, 669 (1998, Torino: UTET), pp. 672-674.

³ Francesco Cordopatri, *L'abuso del processo e la condanna alle spese*, (2005) *Rivista trimestrale di diritto e procedura civile* 249.

⁴ See e.g. Francesco P. Luiso, *Diritto processuale civile, I Principi generali*, 4th ed. (2007, Milano: Giuffrè), p. 417 and Cassazione civile, sezione I, decision no. 21402 of August 7, 2008, (2008) *Guida al diritto* iss. 44, 51.

continuation of the case, the court has a discretion to decide who will pay for them, unless there is a particular legislative regulation⁵ (e.g. art. 210, last paragraph, of the Code of civil procedure provides that if one party applies for a court order to have any specific document produced by another party, the requesting party has to bear the expenses). Anyway it should be noted that these expenses are not a significant factor in the overall costs of litigation⁶.

5. After litigation commenced, if the parties settle their dispute in court, the settlement is recorded in the minutes of the proceedings (*processo verbale*). In this case article 92 paragraph 3 of the Code of civil procedure provides that each party will bear his/her own costs, but the parties may also regulate this aspect otherwise, provided that the agreement is included in the *processo verbale*.

It should be noted, however, that according to the available data only a mere one per cent of cases are disposed of in this way⁷.

More often the parties settle their dispute out of court, through negotiations between their lawyers. In this case usually they do not inform the court. The lawyers simply stop attending hearings, because according to the Italian Code of civil procedure, if no party attend two hearings in a row the court will automatically discontinue the case for “lack of prosecution”⁸. According to judicial statistics, about forty percent of the first instance proceedings commenced end without a judgment⁹ and it is generally acknowledged that in most cases this is due to discontinuance for party inactivity ensuing an out of court settlement¹⁰.

In this case the Code of civil procedure provides that each party will definitively bear the costs and fees incurred so far¹¹. However, again, nothing prevents the parties from reaching a different agreement.

On the other hand, if a case is discontinued for a party’s withdrawal¹², that party will bear all the costs, unless the parties otherwise stipulate¹³.

II. Exceptions and Modifications

1. According to the Code of civil procedure, the court may deviate from the basic rule that costs follow the event in several situations.

First, the court may exclude the costs it thinks are excessive or unnecessary. Second, the court may order a party to reimburse the other party any expense incurred as a result of his/her unfairness, irrespective of who was successful¹⁴. But these two rules are not much applied.

Instead there is a third exception to the loser pays all rule which occurs very frequently: if no party is totally successful or there is another “good cause”¹⁵, the court may decide that each party

⁵ Presidential Decree No. 115 of May 30, 2002, art. 8.

⁶ See Vincenzo Varano and Alessandra De Luca, *Access to Justice in Italy*, (2007) *Global Jurist*, Vol. 7, Iss. 1, (Advances), Article 6, p. 9.

⁷ This figure refers to the proceedings before the justices of the peace (i.e. honorary judges with jurisdiction over small claims and minor offences). *Statistiche giudiziarie civili 2004* (2006, Roma: ISTAT), table 2.3 p. 40 (available also at www.istat.it). There are no statistical data concerning the *tribunali* (i.e. the courts of first instance of general jurisdiction). Anyway, it can be safely said that the percentage of settlements before these courts cannot be higher (and probably is even lower).

⁸ See Mauro Cappelletti, Joseph M. Perillo, *Civil Procedure in Italy* (1965, The Hague: Martinus Nijhoff), pp. 313-314.

⁹ In 2004, for example, of 1,483,954 concluded cases, 651,481 proceedings ended without a judgment. *Statistiche giudiziarie civili 2004*, *supra* nota 7, table 2.9 p. 43.

¹⁰ Sergio Chiarloni, *Civil Justice and Its Paradoxes: An Italian Perspective*, Adrian A.S. Zuckerman (ed.), *Civil Justice in Crisis* (1999, Oxford: Oxford University Press), 263, p. 271.

¹¹ Code of civil procedure, art. 310, last paragraph.

¹² Mauro Cappelletti, Joseph M. Perillo, *Civil Procedure in Italy*, *supra* nota 8, pp. 312-313.

¹³ Code of civil procedure, art. 306.

¹⁴ Code of civil procedure, art. 92, paragraph 1.

bears his/her own costs in whole or in part¹⁶. According to our Court of cassation, this was a widely discretionary power and the lower courts were not even to state what the good cause was¹⁷ (and therefore that decision could not be scrutinized by the appeal courts). However, because the recourse to this exception had become too frequent and there was a widespread perception that it was being abused, in 2005 the need to state explicitly the “good cause” was introduced¹⁸. The extent of the exception has been further reduced by the Law No. 69 of June 18, 2009¹⁹, in force since July 4, 2009, so that now courts can deviate from the loser pays all rule only if no party is totally successful or there are other “serious and exceptional reasons”, that should be explicitly stated.

The 2009 law has also amended article 91 of the Code of civil procedure in order to introduce a further exception to the loser pays all rule. According to this new provision, if the victorious party fails to obtain a judgment more advantageous than a conciliation proposal, and he/she had refused it without good cause, he/she will bear all the fees and costs incurred after the proposal was made²⁰.

This provision seems to strengthen a trend that had emerged in “corporate cases”. The legislative decree No. 5 of January 17, 2003, in force since January 1, 2004, provided for a new special regulation of proceedings to be used in these cases, including a particular regulation for judicial and extrajudicial conciliation. According to the relevant provisions, if the attempt at conciliation fails and then a suit is brought, the court will take into account the conduct of the parties during the conciliation stage to decide about cost and fee allocation. On this grounds it will also be able to depart from the costs-shifting rule²¹. A similar provision was introduced by the Legislative Decree No. 68 of April 9, 2003, for copyright cases too²². Due to a complete failure²³, the special procedure for corporate cases has been almost totally abrogated by the 2009 law. The only provisions that still exist are just those concerning arbitration and conciliation, including the special regulation on cost and fee allocation.

Finally, there is also one exception based on the type of dispute. It was established by the Law No. 533 of August 11, 1973, regulating individual labor disputes and disputes concerning social security benefits. Besides providing for a special procedure, this law stipulated that in the second type of disputes the losing worker would not reimburse the costs of the successful social security agency unless his/her claim was proved to be manifestly unfounded and frivolous²⁴. The relevant provision was rewritten in 2003²⁵ and an income eligibility requirement was introduced. Its amount is twice the legal aid financial threshold²⁶. In 2009 the provision has been amended again,

¹⁵ Some examples of the reasons why Italian courts declined to award all or part of the costs are given in Andrew Colvin and Vincenzo Vigoriti, *Transnational Civil Procedure in Italy*, (2004) 23 *Civil Justice Quarterly* 38, p. 51.

¹⁶ Code of civil Procedure, art. 92, paragraph 2.

¹⁷ See, e.g. Cassazione civile, sezione I, decision no. 8540 of April 22, 2005, (2006) *Giurisprudenza italiana*, part 2, 336.

¹⁸ Law No. 263 of December 28, 2005, art. 2, paragraph 1, letter a). See Giampiero Balena and Mauro Bove, *Le riforme più recenti del processo civile* (2006), Bari, Cacucci, pp. 110-111. For the judicial interpretation of the new text, see Cassazione, sezioni unite civili, 30 luglio 2008, n. 20598, (2009) *Giustizia civile*, part 1, 115.

¹⁹ Law No 69 of June 18, 2009, art. 45, paragraph 11.

²⁰ Law No. 69 of June 18, 2009, art. 45, paragraph 10.

²¹ Legislative Decree No. 5 of January 17, 2003, arts 16 and 40, paragraphs 3 and 5 as amended by Legislative Decree No. 37 of February 6, 2004.

²² Law No. 633 of April 22, 1941, art. 194bis.

²³ For a critical appraisal of the “corporate” procedure reform, see Federico Carpi, *The Parties and the Judge in the New Commercial Proceedings in Italy and the Ideological Choices*, (2006) 25 *Civil Justice Quarterly* 70.

²⁴ Code of civil procedure, Supplemental and transitory provisions, Art. 152. See Vincenzo Vigoriti, *Access to Justice in Italy*, in Mauro Cappelletti & Bryant Garth eds., *Access to Justice. A World Survey Volume I Book 2*, (1978, Milano: Alphenaaandenrijn, Giuffrè: Sijthoff), 649, p. 660.

²⁵ Decree Law No. 269 of September 30, 2003, art. 42, paragraph 11.

²⁶ See Paolo Sordi, *Le spese processuali nelle controversie previdenziali*, (2007) *Rivista del diritto e della sicurezza sociale* 93.

establishing that in any case the costs ordered to be paid cannot be higher than the amount in controversy²⁷.

2. Not only labor disputes enjoy a special procedure, but also a mandatory attempt at conciliation is provided for them. According to articles 410 to 412bis of the Code of civil procedure as amended by the Law No. 80 of March 31, 1998, before bringing a suit, the claimant has to file an application to the conciliation committee at the provincial labor office, who is to perform the attempt. However, if the attempt is not made within the next 60 days, the parties can proceed directly to court (or to arbitration). This is what happens in most cases, because the conciliation committees are overloaded with applications and therefore are very often unable to comply with the sixty days time limit. As a result, “the mandatory attempt of conciliation turns out to be a mere formality”²⁸.

However, in case the attempt at conciliation is performed and it is unsuccessful, article 412 of the Code of civil procedure provides that the reasons are to be recorded in a *processo verbale*. In the subsequent dispute, the court will have to “take into account” this record when deciding about the allocation of costs.

Following a similar pattern, a mandatory attempt at conciliation to be performed by an administrative body is provided also for other types of disputes (e.g. some disputes in the field of telecommunication services²⁹). However, in these cases, according to the special regulation, the result of the attempt has no impact on the allocation of costs.

3. Probably because fee and cost allocation is not a major issue in Italian civil justice, it would be surprising to find an agreement on this topic in a contract.

4. As in other civil law countries, in general the parties to a civil case must be represented by a lawyer. Self representation is allowed in very limited and exceptional cases. First, before the justices of the peace, if the amount in controversy is under 516,46 euros, or on court permission. The permission will be granted upon consideration of the nature and value of the dispute³⁰. Second, in individual labor disputes, if the value of the claim is lower than 129,11 euros³¹. Third, lawyers may appear for themselves before the courts in which they are qualified to represent other persons³².

III. Encouragement or Discouragement of Litigation

1. Traditionally, the rules governing cost and fee allocation are not seen as an incentive or a deterrent to litigation by Italian civil procedure scholars and legislature. For example, the only exception to the loser pays all rule based on the type of cases (i.e. disputes concerning social security benefits) is generally considered to be grounded on the will to remove barriers to access to justice rather than to encourage claims against social welfare agencies.

However there are signs of the emergence of a greater awareness of the possibility to use these rules to influence parties behavior.

First, article 96 of the Code of civil procedure provides that, on application by the victorious party, his/her opponent may be ordered to pay also the damages caused by his/her having brought or defended the claim “in bad faith or with gross negligence”. In some cases (e.g. if the claim on

²⁷ Law No. 69 of June 18, 2009, art. 52, paragraph 6. This provision applies only to the proceedings started after July 4, 2009.

²⁸ Vincenzo Varano and Alessandra De Luca, *Access to Justice in Italy*, *supra* nota 6, p. 14.

²⁹ Law No. 249 of July 31, 1997, art. 1, paragraph 11, implemented in 2002. The regulations governing this procedure can be found at the website of the Communications Regulatory Authority www.agcom.it.

³⁰ Code of civil procedure, art. 82.

³¹ Code of civil procedure, art. 417.

³² Code of civil procedure, art. 86.

which the party obtained and enforced a provisional remedy was unfounded) the code only requires that the unsuccessful party acted “without normal prudence”.

Until recently, this rule, obviously aiming at punishing but also avoiding unlawful behaviors, has been strictly construed and scarcely used. However, within a greater awareness of the need to strike a balance between the right of access to justice and the prevention of abuses of process, there seems to be a trend to strengthen this provision, both in recent case law and scholarly writings³³. Moreover, the Law No. 69 of June 18, 2009 added a new paragraph to article 96 that confers on courts the power to order the losing party to pay a further amount besides the costs, on their own motion³⁴. Despite its vagueness³⁵, this new provision is a clear signal of the intent to enhance costs sanctions against abuses of process.

Furthermore, the exceptions to the loser pays all rule based on the conduct of the parties during the conciliation stage³⁶ differ partially (e.g. as to the extent of judicial power to depart from the basic rule). But what is clear is that through them the legislature intended to use the allocation of costs as a tool to deter litigation by encouraging the parties to accept reasonable conciliation proposals.

Also the alternative justification of the cost-shifting rule that has recently been suggested, according to which the obligation to reimburse the opponent’s expenses is a sanction for an abuse of process³⁷, could be ascribed to this trend.

2. It is not very easy to quantify the up-front expenses that a would-be litigant has to pay, because there are rather wide variations and there are no reliable statistical data.

As for court costs, their measure ranges between 30 euros (for cases worth no more than 1,100 euros) and 1,110 euros (for cases worth more than 520,000 euros). If the amount in controversy cannot be determined, the contribution amounts to 170 euros for claims before the justices of the peace and 340 euros in the other cases³⁸.

A similar variation can be found in the retainer, although its amount will usually be much more substantial. It will depend on the value and complexity of the case, but also on the experience and standing of the lawyer.

With reference to the costs of taking evidence, expert fees are the most important heading. Again, they differ greatly depending on the subject matter of the dispute and on the expert. In this connection, it should be remembered that experts are appointed by the court, who also set their fees with reference to the relevant professional tariff. However, very often the parties also instruct their own experts, who will follow the work of the court expert and submit their reports to the court³⁹.

On the whole, it cannot be said that these up-front payment have a deterrent effect on many potential litigants. Rather, as it is widely known, in Italy “the real problem facing the would-be litigant is the intolerable duration of the proceeding”⁴⁰.

IV. The Determination of Costs and Fees

³³ See, also for further references, Luigi P. Comoglio, *Abuso del processo e garanzie costituzionali*, 2008 *Rivista di diritto processuale* 319, esp. pp. 322-327 and 347-353; Rosaria Giordano, *Responsabilità delle parti per le spese ed i danni e abuso del processo*, 2007 *Giurisprudenza di merito* 43, pp. 43-49.

³⁴ Law No. 69 of June 18, 2009, art. 45, paragraph 12.

³⁵ See Andrea Proto Pisani, *La riforma del processo civile: ancora una legge a costo zero (note a prima lettura)*, 2009 *Foro italiano* 221, column 222.

³⁶ See *supra* II.1.

³⁷ See *supra* I.1.

³⁸ Presidential Decree No. 115 of May 30, 2002, art. 13.

³⁹ See Mauro Cappelletti, Joseph M. Perillo, *Civil Procedure in Italy*, *supra* nota 8, pp. 230-233.

⁴⁰ Vincenzo Varano and Alessandra De Luca, *Access to Justice in Italy*, *supra* nota 6, p. 3.

1. Court costs are regulated by the Presidential Decree No. 115 of May 30, 2002, known as *Testo unico delle spese di giustizia*, a consolidation of all the primary and secondary rules relating to the costs of justice.

Since March, 1, 2002 court costs consist mainly in the so called *contributo unificato*, a single payment that has to be made by the party who requests docketing, usually the plaintiff (whereas previously each party had to make various payments to initiate and pursue the proceeding). The measure of this contribution is set with reference to the amount in controversy⁴¹. Only for a few specific types of claims (e.g. those concerning lease or condominium resolutions) the amount of the contribution is a fixed sum⁴². The law provides also for some exemptions, for instance in cases concerning child maintenance payments or in individual labor disputes⁴³.

Other fees are charged for specific activities such as the service of documents, but these are not substantial. There is also a fee for registration of the judgment. According to the subject matter, it may be a fixed amount (at present 168 euros) or it may be a percentage of the amount in controversy, ranging from 1% to 8%⁴⁴.

2. The general criteria to be followed in the determination of lawyers' fees are identified by the statute regulating the legal profession. For contentious work they are the amount in controversy and the level of court seized; for non-contentious work, the value of the subject matter only. The relevant legislation also provides that for each step or series of steps a fee scale with a minimum and a maximum should be fixed⁴⁵.

The determination of which steps are to be remunerated and of the amount of that remuneration is proposed by the *Consiglio Nazionale Forense* - the national bar council - and approved by the Minister of Justice, who first has to obtain the advice of the Interministerial Committee on Prices and of the Council of State⁴⁶. At present, the matter is regulated by the Ministerial Decree No. 127 of April 8, 2004.

Obviously, besides being paid fees, lawyers are also entitled to have their expenses reimbursed. The 2004 decree distinguishes two headings: expenses supported by documents and general expenses, calculated as 12.5% of fees.

As for the determination of fees, while for non-contentious work there is just one kind of fee, called *onorari*, for contentious civil work there are two kinds of fees: *diritti*, for single steps made (e.g. service of an act, hearing attendance), and *onorari*, for the services performed (e.g. study of the controversy, preparation of the claim or the defense). This difference is the consequence of the distinction once existing in the Italian legal profession between *avvocati* – the legal experts who were paid *onorari* - and *procuratori* – who acted in the proceedings on behalf of the party and received *diritti* for their services⁴⁷.

Diritti are predetermined by the decree and are binding, but they represent the lesser element of lawyers' fees. As for *onorari*, that are the most important heading, only a minimum and a maximum amount are set, together with the criteria to be followed in the determination of the sum due in the single case. If the special characteristics of the case so require, it is possible to go beyond the maximum, but a special leave by the local bar council is needed⁴⁸. Instead, the minimum fee until recently was binding.

The binding minimum fee was traditionally founded on the need to protect the “dignity” and “decorum” of the profession together with its financial independence, but in recent times it has

⁴¹ For information about its amount see *supra* III.2.

⁴² Presidential Decree No. 115 of May 30, 2002, art. 13.

⁴³ Presidential Decree No. 115 of May 30, 2002, art. 10.

⁴⁴ Presidential Decree No. 131 of April 26, 1986, Part 3, art. 8.

⁴⁵ Royal Decree Law No. 1578 of November 27, 1933, art. 58.

⁴⁶ Royal Decree Law No. 1578 of November 27, 1933, art. 57.

⁴⁷ See for further information Mauro Cappelletti and Joseph M. Perillo, *Civil Procedure in Italy*, *supra* nota 8, pp. 56-59.

⁴⁸ Ministerial Decree No. 127 of April 8, 2004, Chapter 1, art. 4 and Chapter 3, art. 9.

come under attack as a barrier to free competition and to the free circulation of lawyers within the EU. According to its opponents, it prevented or hampered young lawyers from entering the market, because they could not charge lower fees although they were less experienced. Furthermore, the existence of this limit was seen as a barrier for foreign lawyers willing to practice in Italy, because they could not charge a fee below the minimum although in their country of origin such a limit did not exist⁴⁹.

Deciding the joined cases C-94/04 *Cipolla* and C-202/04 *Macrino, Capodarte*, on December 2006⁵⁰ the European Court of Justice confirmed its decision in the case C-35/99 *Arduino*⁵¹, according to which the Italian system is valid as far as the procedure to establish the fee scale is concerned⁵². However, it also established that

“legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyer’s fees such as that at issue in the main proceedings for services which are (a) court services and (b) reserved to lawyers constitutes a restriction on freedom to provide services laid down in Article 49. EC. It is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives”⁵³.

A few months before the ECJ decided these cases, however, in order to implement these very EU principles and to promote greater competition in the market for professional services, the Decree Law No. 233 of July 4, 2006,⁵⁴ abolished minimum (but not maximum) fees and established that within January 1, 2007 all codes of ethics were to be amended in order to comply with the new regulation. This measure was and still is fiercely criticized by the legal profession, who is resisting its full implementation⁵⁵ and is even trying to restore the old fee scale⁵⁶.

3. At the end of the proceedings each party submits an itemized bill of expenses incurred and fees earned to the court⁵⁷. Then, the specific amount to be awarded to the parties is determined by the court, who has the power to check the fees and exercises a discretion about their determination, although within the limits set by the fee scale.

As a result, the court may reduce the amount awarded, but what happens more frequently is that the court decides that each party bears his/her own costs in whole or in part⁵⁸. In both cases the successful party may have to pay some fees to his/her lawyer in excess of the amount awarded by the court.

The decision on cost and fee allocation is not separate from the judgment, but takes the form of an autonomous part of it.

⁴⁹ See COMMISSION OF THE EUROPEAN COMMUNITIES, *Report on Competition in Professional Services*, COM(2004) 83 final, February 9, 2004, paragraphs 31-36; ID., *Commission Staff Working Document. Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services*, COM(2005) 405 final, September 5, 2005, paragraphs 65-73 and Opinion of Advocate General M. Poiares Maduro in Cases C-202/04 *Macrino, Capodarte* and C-94/04 *Cipolla* at <http://eur-lex.europa.eu>.

⁵⁰ [2006] ECR I-11421. See Martin Illmer, *Lawyers’ Fees and Access to Justice – The Cipolla and Macrino Judgment of the ECJ (Joined Cases C-94/04 and C-202/04)*, (2007) 26 *Civil Justice Quarterly* 301.

⁵¹ [2002] ECR I-1529.

⁵² paragraphs 44-54.

⁵³ paragraph. 70.

⁵⁴ Converted into law and amended by the Law No. 248 of August, 4, 2006.

⁵⁵ See the report Autorità Garante della concorrenza e del mercato, *Il settore degli ordini professionali* (IC 34) (2009), published on the site www.agcm.it/index.htm, pp. 15-19.

⁵⁶ See, e.g. article 12 of the proposal for the reform of the statute regulating the legal profession passed by the *Consiglio nazionale forense* on February 27, 2009 and submitted to the Minister of Justice, available on the website of the Consiglio Nazionale Forense www.consiglionazionaleforense.it.

⁵⁷ Code of civil procedure, Supplemental and transitory provisions, art. 75.

⁵⁸ See *supra* II.1.

V. Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, and Litigation Insurance

1. In Italy, as in other European countries, contingency fees have always been illegal and any agreement to the contrary was void. Lawyers could only agree the payment of a further fee in addition to the ordinary one in case of success, provided that it was reasonable. It is the so-called *palmario*, which, anyway, did not seem to be much widespread.

However the above-mentioned Decree Law No. 233 of July 4, 2006, besides abolishing minimum fees, also repealed the traditional prohibition on contingency fees provided by article 2233 paragraph 3 of the Civil code. That provision was replaced with the requirement that all agreements concerning fees be in writing. Hence, today in the Italian legal system lawyers can reach with their clients any kind of agreement concerning fees, provided that it is in writing.

Apart from this formal requirement, no other regulation is provided by the law, for instance with reference to the type of cases where contingency fees are allowed. And the code of ethics only provides that in any case lawyers' fees should be proportional to the work done⁵⁹ (which, by the way, is illogical, since the contingency fee is agreed *before* the litigation begins, and conflicts with the very nature of contingency fee⁶⁰).

The gap is rightly criticized by many scholars⁶¹, whereas the legal profession seems more occupied with resisting this change and possibly restoring the previous prohibition. This opposition to contingency fees - and to the abolition of binding minimum fees⁶² - is typically grounded on the need to protect clients against unscrupulous behaviors and preserve the quality of the services provided by lawyers. However this is mainly rhetoric. Actually, not only Italian developments mirror a wider European trend⁶³, but also this kind of agreements already exist in practice⁶⁴ and they are not giving rise to particular problems.

Perhaps this hostility, together with the fact that the change is very recent, is among the main reasons for the lack of data on the use of contingency fees.

2. After the abolition of minimum fees and of the prohibition of contingency fees, in Italy the only existing limit concerning lawyers fees is set by article 1261 of the civil code, under which disputed rights (i.e. rights that are being litigated) cannot be assigned to lawyers or other professional involved in the administration of justice. Hence disputed rights can only be assigned to other kinds of persons.

3. In Italy a few collective actions (i.e. actions that can be filed by qualified organizations for the protection of collective interests) exist for specific types of claims, especially in the field of

⁵⁹ Codice deontologico forense, art. 45, as amended in June 12, 2008. The Code of Ethics is available on the site of the Consiglio Nazionale Forense www.consigionazionaleforense.it.

⁶⁰ Lotario Dittrich, *Profili applicativi del patto di quota lite*, (2007) *Rivista di diritto processuale* 1141, pp. 1150-1152.

⁶¹ See e.g. Ugo Carnevali, *Compenso professionale e autonomia privata: il patto di quota lite: problemi civilistici*, in Remo Danovi, a cura di, *Compenso professionale e patto di quota lite*, (2009, Milano: Giuffrè), pp. 2-3, 5-7; Lotario Dittrich, *Profili applicativi del patto di quota lite*, *supra* nota 60, pp. 1148-1150; Piero Schlesinger, *Liberalizzazione e avvocati*, (2006) *Corriere giuridico*, 1337.

⁶² See *supra* IV.2.

⁶³ See Christopher Hodges, *Europeanisation of Civil Justice: Trends and Issues*, 26 (2007) *Civil Justice Quarterly* 96, pp. 101-103; Gerhard Wagner, *Litigation Costs and Their Recovery: The German Experience*, 28 (2009) *Civil Justice Quarterly* 367, pp. 378-379.

⁶⁴ See Alexander Layton & Hugh Mercer, eds., *European Civil Practice Vol. 2*, 2nd ed. (2004, London: Thomson – Sweet & Maxwell), p. 331.

consumers' protection⁶⁵. A feature common to all these actions is that they do not offer the payment of damages but an injunctive relief only⁶⁶.

However, article 2, paragraphs 445 to 449, of the Law no. 244 of December 24, 2007, added article 140*bis* to the so called Consumers' Code⁶⁷, under which consumers are entitled to act collectively in order to claim damages. This remedy, was to enter into force on June 30, 2008, but this date has been postponed several times, so that at the moment of writing it is January 1, 2010.

No special regulation is provided with regard to the funding of any of these actions, nor for cost and fee allocation, because from a strictly procedural point of view these organizations are treated as individual plaintiffs⁶⁸.

4. Legal expenses insurance exists in Italy since a long time. In general it is sold as ancillary to automobile liability and household policies. It is not expensive (between 50 and 100 euros a year for a standard policy), but it is not widespread. Reliable sources report that the average annual expenditure per capita for this product is 3.92 euros, compared to 37.60 euros in Germany⁶⁹. Apart from the general Italian aversion to insurances, probably this is due to the fact that the costs of litigation are not so high in our system, but also to the very low perception of this risk by ordinary people. However, according to the annual reports of the Italian insurance authority (ISVAP), the premiums for legal expenses insurance, although less than 0.5% of the total amount of premiums paid, have been increasing at about a 10 percent rate in the last ten years⁷⁰.

As to its functioning, legal expenses insurance in Italy follows a common pattern. In the beginning, in general in-house lawyers assess the policyholder claim and try to reach a reasonable settlement. If no settlement is agreed, the insured party is free to choose his/her lawyer and the policy will cover all the costs and fees connected to the litigation (including any cost awarded to the opponent) up to a certain amount. Anyway, usually there is a requirement that the claim has a reasonable prospect of success.

VI. Legal Aid

1. Although article 24 paragraph 3 of the Italian Constitution requires that poor person shall be assured the means to proceed and defend themselves before any court, until very recently poor litigants could only avail themselves of *gratuito patrocinio*. This scheme had been established just after the reunification of Italy⁷¹ and it was founded on the imposition on lawyers of the duty to act gratuitously. In practice, because of its many flaws, it was almost never used⁷².

The first scheme based on state compensation of private lawyers (*patrocinio a spese dello stato*) was established by the Law No. 533 of August 11, 1973 regulating individual labor disputes and disputes concerning social security benefits. But this scheme was scarcely applied and rapidly fell into desuetude, mainly for two reasons. First, the financial threshold for admission to the benefit

⁶⁵ See Law no. 281 of July, 30, 1998, art. 3, then reproduced in Legislative Decree No. 206 of September 6, 2005, art. 140.

⁶⁶ See generally Andrea Giussani, *Azioni collettive risarcitorie nel processo civile*, (2008, Bologna: Il Mulino), esp. pp. 181-190 and Elisabetta Silvestri, *Italy*, (2009) 622 *The ANNALS of the American Academy of Political and Social Science*, No. 1, 138.

⁶⁷ Legislative Decree No. 206 of September 6, 2005.

⁶⁸ See Elisabetta Silvestri, *Italy*, *supra* note 66, pp. 144-145 and Andrea Giussani, *Azioni collettive risarcitorie nel processo civile*, *supra* nota 66, pp. 224-235, esp. p. 226.

⁶⁹ *Il Sole-24Ore*, January 26, 2009, 20.

⁷⁰ The annual reports are published on the Authority website www.isvap.it.

⁷¹ Law No. 2626 of December 6, 1865, later reproduced, together with its amendments, in the Royal Decree No. 3282 of December 30, 1923.

⁷² An effective description of that scheme and of its main flaws can be found in Mauro Cappelletti, *The Emergence of a Modern Theme*, in Mauro Cappelletti *et al.*, *Toward Equal Justice. A Comparative Study of Legal Aid in Modern Societies*, (1975, Milano: Giuffrè, Dobbs Ferry: Oceana), pp. 33-36.

was settled in 1973 at a rather low level and never adjusted to inflation. Second, labor unions had always been an effective source of legal assistance for affiliated workers. As a result, not only the demand for legal services in this area was already met, but also labor unions were wary of encouraging the use of the new scheme lest they lose the power deriving from the previous situation⁷³.

Only in 2001 a legal aid scheme based on state compensation of private lawyers was provided for all civil (and administrative) cases⁷⁴. This result was obtained by extending the scope of the legal aid scheme established for criminal cases in 1990⁷⁵, although with some significant changes. In 2002, before the new law came into force, all the rules concerning legal aid were gathered into the *Testo unico delle spese di giustizia*⁷⁶ with some adjustments.

No state aid has ever been provided for advice and assistance before or outside litigation.

According to the present system, the assisted person can choose his/her lawyer only among those who asked to be included in the special list of lawyers willing to do legal aid work kept by each *Consiglio dell'ordine degli avvocati* (i.e. the local lawyers' association).

Since 2001, when it was established, this list has been one of the most discussed topic of the Italian legal aid scheme. In particular, the legal profession immediately objected to the limits imposed on client freedom to choose his/her lawyer, arguing that the assisted persons were not obliged to select their legal representatives from these lists. The Constitutional court, however, upheld the legislative regulation excluding that it infringed the right to defense established by art. 24 of the Italian Constitution⁷⁷.

Also the requirements originally prescribed for the registration in the list - namely the six years professional experience - were strongly criticized. The intense campaign of the legal profession against this part of legal aid law has achieved some results. In 2005 an amendment⁷⁸ to the *Testo Unico*, while confirming that the lawyer had to be chosen only from those included in the list, changed the conditions for the registration, reducing the minimum period of professional experience to two years. Consequently, at present to be included in the list of those willing to do legal aid work, lawyers must satisfy the following conditions: a specific professional experience in one or more fields, no disciplinary sanction in the last five years, and the enrolment in the *albo degli avvocati* (i.e. the register of practicing lawyers kept by the local lawyers' associations) for at least two years.

The assisted person is exempted from court fees and other charges, and the state pays the other costs, namely counsel and expert fees. However no interim payments are provided for and there is a significant disparity vis-à-vis ordinary fees: the fees for civil legal aid cannot be higher than *half the average* amount of ordinary fees. This is a marked difference compared to criminal legal aid, because in that case lawyers' fees cannot be higher than the *average* amount of ordinary fees. This difference has been widely condemned as unreasonable and resulting in too low fees. Recently, however, the Italian Constitutional court established that this regulation is not unconstitutional, because it cannot be considered unreasonable, given the differences existing between civil and criminal justice⁷⁹.

Finally, it should be noted that in civil cases, the assisted party has a duty to pay back the costs paid in advance for his/her if the state cannot recover those costs from the opponent and he/she has become able to reimburse them. The state also has an action of recovery against the assisted person

⁷³ See Vincenzo Vigoriti, *Italy*, in Frederick H. Zemans ed., *Perspectives on Legal Aid. A Comparative Survey*, (1979, London: Pinter), 177, p. 186.

⁷⁴ Law No. 134 of March 29, 2001.

⁷⁵ Law No. 217 of July 30, 1990.

⁷⁶ Presidential Decree No. 115 of May 30, 2002, arts 74-89 and 119-136.

⁷⁷ Constitutional Court, *ordinanza* (ruling) no. 299 of June 28, 2002, (2002) *Foro italiano*, part I, 2949 annotated by Giuliano Scarselli.

⁷⁸ Law No. 25 of February 24, 2005.

⁷⁹ Constitutional Court, *ordinanza* (ruling) of July 27, 2005, no. 350, (2005) *Giurisprudenza costituzionale*, 3336.

for all the taxes and duties due to the Treasury, provided that the assisted party has obtained at least six times the amount of such sums through the judgment or the settlement.

2. In Italy there is not a pro bono tradition - at least nothing comparable to the American or even the English situation - partly because for a long time gratuitous work for indigent people has been imposed as a duty on the legal profession. Nor are there public interest law firms or legal clinics. Also the contribution of religious and charitable organisations is negligible⁸⁰.

Instead, trade unions have traditionally been involved in offering subsidized legal services to their associates⁸¹, and usually when a worker has a legal problem they are the first source of advice he/she turns to. More recently, also other organizations such as consumers groups and tenants organizations have started providing legal services to their members. Anyway, ordinary people are less aware of their existence.

All these organisations in general offer an initial general advice through their lay personnel and then refer clients who need it to lawyers specialized in the relevant area of law, with whom they usually have an arrangement concerning fees.

3. The scope of the current legal aid scheme is wide: it is provided for all courts, all kinds of cases (the only exception concerns claims assigned by others, unless one can prove that the assignment has been made to pay pre-existing debts) and all stages of proceedings (although the party who loses at first instance cannot avail herself of legal aid for appeal), both for plaintiffs and defendants.

In order to be eligible for legal aid, a person must pass a means and a merits test. The power to decide upon the applications for civil legal aid has been granted to the *Consiglio dell'ordine degli avvocati* of the court of appeal district of the judge who has jurisdiction on the case, although the application can be reiterated to the judge in case of refusal.

As for the merits test, the applicant only has to show that his/her case is "not manifestly unfounded".

The means test is the same for all types of legal aid: the applicant has to show that his/her annual taxable income before allowances is below a threshold determined by the law. At present that limit is 10,628.16 euros⁸². This means that the monthly income of the applicant cannot exceed the sum of 885 euros, which is a low amount compared to Italian standard of living⁸³. Moreover, if the applicant lives with his/her family what has to be taken into consideration is the family taxable income, but the threshold remains the same. In addition, if the annual taxable income exceeds that sum it is not possible to get legal aid: no partial assistance is provided for. As a result, the middle class has no access to legal aid.

4. On the whole, the costs of litigation are not generally considered as being a serious barrier to access to justice for many potential litigants. As emphasized above, in Italy the real barrier that deters many persons from asserting their claims is the excessive length of proceedings⁸⁴.

However it is highly probable that, given the low financial threshold for legal aid eligibility, there is a group of persons who are excluded from access to justice because their income is above the legal aid limit but cannot afford the services of a lawyer. In spite of this, there are no data on this aspect and, for the sake of truth, this is not a topical issue in Italy.

⁸⁰ The situation has not changed since the late seventies. See Vincenzo Vigoriti, *Italy*, *supra* note 73, pp. 186-187.

⁸¹ Vincenzo Vigoriti, *Italy*, *supra* note 73, pp. 187-188.

⁸² Ministerial Decree of January 20, 2009.

⁸³ According to the Italian national statistics institute, in 2007 the risk-of-poverty threshold for a two member family in Italy was 986.35 euros per month. ISTAT, *La povertà relativa in Italia nel 2007* (2008) at www.istat.it.

⁸⁴ See, e.g., the Interim Resolution CM/ResDH(2009)42 of the Committee of Ministers of the Council of Europe, available at the website http://www.coe.int/t/cm/home_en.asp.

5. Even though the Italian system ensures a certain proportionality between court costs and lawyers' fees, on the one hand, and the amount in controversy, on the other hand, this is not true for small claims. Indeed, up to a certain amount the costs of justice are higher than the amount in controversy, so that litigation is not economic feasible. Hence "it is highly unlikely that a consumer sues a manufacturer for a non working dishwasher. It is much less expensive (and, above all, faster) to buy a new one."⁸⁵

VII. Examples

1. It is not easy to quantify the costs of litigation in Italy, for several reasons. To begin with, they vary greatly depending on different factors - first of all, the steps needed in each particular case - that cannot be predicted. In addition, it is impossible to find statistical data on the average costs of single types of proceedings, partly because costs are not a debated issue, and partly because in our system there is not a tradition of empirical studies of this kind⁸⁶.

Hence, here the reader can only be offered a good faith estimate of the sum total of costs and fees of litigating to final judgment a routine non-family case, based on the knowledge of the writer and on interviews with some lawyers

- for a small claim (the equivalent of \$ 1,000): €2,000 (\$ 2,800);
- for a small to medium claim (the equivalent of \$ 10,000): €5,500 (\$ 7,800);
- for a medium to large claim (the equivalent of \$ 100,000): €30,000 (\$ 42,600);
- for a large claim (the equivalent of \$ 1,000,000): €60,000 (\$ 86,000).

These estimates are based on a couple of assumptions. First, that in each case there are just one plaintiff and one defendant. Second, that in the two most expensive cases a court expert is appointed, together with and an expert for each party.

2. If a party lost a \$ 100,000 claim after litigation, his/her cost and fee liability would not be much different depending on his/her position as a plaintiff or as a defendant. Provided that the judge applies the loser pays all rule without exceptions, he/she would be liable towards his/her opponent for a sum roughly similar to the amount of his/her costs and fees, i.e. about 22,000 dollars.

Conclusions

After the short and not very fruitful movement to reform legal aid in the early 70s, the costs of civil justice have been a rather neglected topic in Italy. After all, the amount of costs and fees was not excessive, and some mechanisms to provide access to justice in socially sensitive areas (e.g. labor disputes⁸⁷) existed. Only judges and practitioners were confronted with this subject in their run-of-the-mill work.

However, in recent times a growing interest in this topic can be observed, that has led to significant legislative interventions. Three main trends can be identified.

First, an attempt by the legislature to limit judicial discretion as to the possibility to deviate from the basic loser pays all rule⁸⁸. The amendments to the relevant provision got a good reception from the public because they tackled what was largely perceived as a problem. But it is too early to evaluate their effectiveness. Furthermore, the changes that were introduced could have a disturbing side effect, leading to an increase in the appeals grounded on cost allocation (only). And the courts could react to such a development by frustrating the legislative intent.

⁸⁵ Vincenzo Varano and Alessandra De Luca, *Access to Justice in Italy*, *supra* note 6, p. 7.

⁸⁶ See Vincenzo Vigoriti, *Access to Justice in Italy*, *supra* note 24, pp. 649-650.

⁸⁷ See *supra* II.1, IV.1, and VI.

⁸⁸ *se supra* II.1.

This possible side effect would contrast with a second trend: the emergent awareness that the rules on costs can be a useful tool to help discourage frivolous litigation and abuses of process. Actually, their potential to deflate litigation and therefore deal with the problem of delay underlies the new exceptions to the loser pays all rule based on the conduct of the parties during the conciliation stage⁸⁹ and the growing importance of article 96 of the Code of civil procedure⁹⁰. The effectiveness of these measures is far from certain, but the trend is likely to continue.

Lastly, there is a trend toward a liberalization of the rules on the determination of lawyers' fees, with the abolition of binding minimum fees⁹¹ and the repeal of the prohibition on contingency fees⁹². These measures are strongly criticized by the legal profession, who is resisting their full implementation and is even trying to restore the previous regime, taking advantage of the undergoing attempt to reform the whole regulatory framework for professional services. The outcome of this conflict is not easy to forecast, but probably the more time passes the more the new regime is likely to last.

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⁸⁹ See *supra* II.1.

⁹⁰ See *supra* III.1.

⁹¹ See *supra* IV.2.

⁹² See *supra* V.1.