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Reducing Disparities in Civil Procedure Systems: Towards a Global Semi-Adversarial Model

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REDUCING DISPARITIES IN CIVIL PROCEDURE SYSTEMS: TOWARDS A GLOBAL SEMI-ADVERSARIAL MODEL

Cesare Cavallini[*] & *Stefania Cirillo*[**]

Abstract

It is commonly perceived that the main difference between adversarial and non-adversarial systems of civil procedure is the party charged with the duty to gather facts and evidence. Generally speaking, in adversarial systems, it is the lawyers who gather facts and collect evidence while in non-adversarial systems, like continental Europe, it is the judges who bear that responsibility. Although this dichotomy exists, it is fundamentally flawed to conclude that the non-adversarial systems, such as the Continental ones, differ from the American system because of the inquisitorial method both in fact-gathering and evidence-gathering. The real differences, as we will demonstrate, are mainly the parties' roles in the preliminary phase of the lawsuit, the methods of discovery, the judge's involvement in the case, and the techniques for examining non-documentary evidence. Both systems present advantages and drawbacks regarding efficiency (cost-saving) and efficacy (truth-finding) in the administration of justice. Suppose the procedural divergence is not entirely irreconcilable. Can they complement each other? In this respect, we specifically ask if an adversary system can help the most troubling aspects of non-adversary practices. If so, is it possible to reconcile the non-adversarial model with a preliminary phase typical in adjudication in the adversarial system? The recent Italian reform on civil procedure allows us to shed light on these questions. This more adversarial proceeding emerging from new Continental trends might seem particularly exciting for two reasons. Firstly, it introduces a stimulating new framework to reshape the debates about civil justice reform in an adversary system. Secondly, it suggests a new way of thinking about traditional domestic and country-specific rules and outlines a unified model of a semi-adversarial system.

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INTRODUCTION

A preeminent author famously claimed that the inquisitorial system of civil procedure is superior to the adversarial system because of the advantages of proactive judging.[1] We do not believe that either system is superior to the other since the differences are warranted by history, the structure of the substantive law, and institutions. However, we will try to demonstrate how the two systems are not mutually exclusive; in fact,

1. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823–24 (1985).

recent times have seen a partial convergence. Common law moved toward managerial judging while civil law can benefit from party-led discovery in the introductory phase of the lawsuit.

Generally speaking, the process of harmonization revealed difficulties about procedural rules. Indeed, these rules appear strictly tied to (and influenced by) the political history and cultural tradition of each legal system. However, the idea of a "global civil procedure" encompassing procedural rules, practices, and social understandings that govern litigation and arbitration continues to be prominently discussed in both domestic and international scholarship.[2]

Among the procedural rules, we focus our attention on the rules governing the gathering of facts and evidence. Trials are mainly a matter of facts.[3] To this effect, the long-debated distinction between the *adversary proceeding*, mostly ascribed to common law systems, and the *inquisitorial proceeding*, commonly ascribed to civil law systems, appears blurred. There is, therefore, an opportunity to unify, at least partially, the two systems of civil procedure.[4]

Looking at the American system, its legal proceedings historically had inquisitorial or otherwise non-adversarial features. While people may think this to be strictly taboo, in common law systems, there is a tendency to reduce parties' involvement in the proceeding and increase the judge's

2. For a recent eloquent discussion on the matter see Alyssa S. King, *Global Civil Procedure*, 62 HARV. INT'L L.J. 223, 223 (2021) (conceptualizing a notion of Global Civil Procedure; delineating examples of the phenomenon such as conflicts of interest rules for adjudicators, aggregation, and discovery or disclosure rules; and considering the limits of global civil procedure.). *See also* Aaron D. Simowitz, *Convergence and the Circulation of Money Judgments*, 92 S. CAL. L. REV. 1031, 1031–32 (2019); John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895, 1899–900 (2017); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMP. L. REV. 1, 1 (2011); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 442 (2010); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 51–52 (2009); Richard L. Marcus, *Putting American Procedural Exceptionalism in a Globalized Context*, 53 AM. J. COMP. L. 709, 709–10 (2005); Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 4 (2001); Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States – Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147, 157 (1994).

3. Marvin E. Frankel, *Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975) (noting that "trials occur because there are questions of fact").

4. *See, e.g.*, MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3–6 (1986); *see also* Michele Taruffo, *Aspetti fondamentali del processo civile di common law e di civil law* [*Fundamental Aspects of the Common Law and Civil Law Civil Processes*], 36 REVISTA DA FACULDADE DE DIREITO UFPR 27, 32 (2001).

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powers.[5] Moreover, over the years, the generalization of the dichotomy resulted in certain misconceptions like that of the meaning and the role of the principle of concentration, as commonly outlined by U.S. literature.[6] The concentration of legal procedure into one event has been considered a distinctive principle of the adversarial system.[7] However, this principle also exists in Continental legal systems, representing an ancient cornerstone of interpretation, study, and reform for several non-adversary countries, like Germany and Italy.[8] The traditional Anglo-American interpretation of this principle is unrealistic. Changes in the role of the judge and in the scope of pretrial proceedings gives a chance for this principle to be more focused on the judge's role than on the idea of one final hearing, an approach that is inevitably closer to the Continental view of this principle.

Analogously, civil law systems have acquired robust adversary features through the years, and a prominent example is the liberal process hinging on intense enforcement of the dispositive principle,[9] meaning that

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5. *See, e.g.*, Dodson & Klebba, *supra* note 2, at 14–15 (noting *inter alia* that especially in complex litigation, "managerial techniques include departing from the trial plan proposed by the parties, appointing special 'science panels,' applying flexible evidentiary rules, and delegating the implementation of an alternative dispute resolution plan to magistrates"); *see also* Mullenix, *supra* note 2, at 15–20 (noting attributes of effective judicial management, for instance how judicial supervision should be timely, continuing, firm, fair and carefully prepared, and emphasizing the enhanced judicial role in fact-finding with reference to the expansive use of court-appointed expert witnesses, use of special science panels, proposing or creating trial plans and taking an activist, hands-on approach to resolving complex litigation while flexibly administering evidentiary rules).

6. *See* discussion *infra* Section I.B and accompanying notes.

7. *See, e.g.*, OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 5 (2d ed. 2017) (noting that "[t]he concentration, orality, and immediacy of procedure, especially at the proof taking stage, are certainly related to the presence of the jury, as well as a passive role for the judge and the markedly adversarial nature of the proceeding."); *see also* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 524, 529–30 (2012); Benjamin Kaplan, *Civil Procedure-Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 419 (1960).

8. GIUSEPPE CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE [FOUNDATIONS OF CIVIL PROCEDURAL] 371–72 (1934).

9. Taruffo, *supra* note 4, at 32 (noting that the ancient experience of the classical liberal process, hinged on an intense and all-pervasive implementation of the dispositive principle, which shows that nothing has been more unusual in the history of civil law civil process than a truly inquisitorial model of civil process); *see also* Geoffrey C. Hazard & Angelo Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, 39 CORNELL INT'L L.J. 59, 69 (2006) (noting the restricted role of the judge in alternative dispute resolution procedures for commercial cases); Astrid Stadler, *The Multiple Roles of Judges in Modern Civil Litigation*, 27 HASTINGS INT'L & COMP. L. REV. 55, 56 (2003) (noting the restricted role of the judge in Spanish civil procedure rules).

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only the parties are empowered to determine the subject of the proceeding,[10] even if accompanied by the supervision of the judge.

A crucial example of the feasibility of the convergence of adversarial and inquisitorial procedure is the 2022 Reform of civil procedure in Italy.[11] Following the Reform, the Italian system of civil procedure, while maintaining its non-adversarial characteristics, acquired some adversarial features to strengthen its judiciary system in terms of efficiency and effectiveness.[12] This change in the Italian system might open the door to a new way of thinking about domestic and country-specific law within a globalized context, moving towards a semi-adversarial (global) system.

The method we use to analyze the dichotomy is analytical and interpretative. It involves the study of specific features of a procedural system and its justifications and implications with the goal of understanding whether such features appear more like an adversarial or a non-adversarial way of conducting the process. To this effect, these features assume a life of their own, regardless of the specific legal system: adversarial and non-adversarial features can be identified in Continental and Anglo-American countries.[13] For the sake of the subsequent discussion, it is relevant to point out precisely the features we will inspect to support our conclusions. The first is the influence of the judge in the introductory or preparatory phase of the proceeding. That is the phase that, in the United States, begins with the service of the pleading and ends with the pretrial phase, and for civil law systems, it is the phase which includes the service of pleadings to counterparty, the filing of the pleading before the judge, and the preliminary activities of the process. This introductory phase is crucial for defining how a judge's power may influence gathering information (even with a subject matter defined by the parties), the selection of the information alleged by the parties, and other activities in preparation for the trial. In other words, this phase concerns the choice of facts to be proven.[14] The second feature inspected concerns strictly the methods used for taking evidence at trial. That is how evidence is presented in court, which includes the methods of examining witnesses by the judge or by battling lawyers.[15]

This Article proceeds in three parts. Part I defines certain concepts and terminology of fact-gathering and evidence-taking across adversarial

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10. *See* Langbein, *supra* note 1, at 823–24 (noting that the description is correct only insofar as it refers to that distinctive trait of Continental civil procedure, judge led fact-gathering).

11. With the Law passed on November 25, 2021, number 206, and the relevant implementing decrees, i.e., Legislative Decrees No. 149/2022, 150/2022, and 151/2022, Italy issued a general reform of the Italian code of civil procedure. *See generally* CODICE DI PROCEDURA CIVILE [C.p.c.].

12. *Id.*

13. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 2–4 (1997).

14. *Id.* at 5, 74–75.

15. *Id.* at 74–75.

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and inquisitorial structures in order to show how the dichotomy currently stands. Part II explores the impact of the different features of each system on efficiency (cost-saving) and efficacy (truth-searching) in civil lawsuits. The idea is to uncover possible global rules, borrowing from domestic models. Part III describes the Italian reform and shows how reconciliation may happen. The Italian civil justice reform and its renewed procedural structure place compelling new arguments at the center of the discussion, also in respect of an adversary scenario. This allows us to show that a partial unification of civil procedure is practically achievable.

I. ADVERSARIAL MODEL VS. INQUISITORIAL MODEL: WHAT IS WRONG?

The classic distinction between the Anglo-American adversarial model and the Continental inquisitorial model of civil procedure should be reconsidered. The distinction reveals its inconsistency if approached traditionally. For the purposes of this Article, there are a couple of cornerstones that deserve to be rethought. First, what the *inquisitorial* model means, if compared to the *adversary* one; second, the role of the principle of concentration in both systems, as U.S. literature has wrongly conceptualized only as a prerogative of the adversarial system.[16]

A. *Misconstructions Regarding Civil Law Systems*

An adversarial system is traditionally considered an adjudicative system, where the parties control procedural action and the adjudicator's role is essentially passive.[17] Distinctive features commonly ascribed to an adversarial system include "reliance on oral testimony, a dialectical paradigm for truth-seeking, decision making by lay jurors, party-controlled procedures, the right of parties to waive procedural requirements by mutual agreement, emphasis on procedure over substantive result, and a neutral judge concerned only with the integrity of the process."[18] Moreover, the adversarial system is distinguished by two phases: the pretrial and the trial.[19] Here, the trial is the decision

16. *Id.*

17. *Id.* at 74; *see* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 4–8 (2d ed. 1977); Robert W. Millar, *The Formative Principles of Civil Procedure*, 18 ILL. L. REV. 1, 9–24 (1923).

18. Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice*, 76 JUDICATURE 109, 109 (1992).

19. Robert Kagan coined this term to indicate some distinctive qualities of governance and legal process in the United States, i.e., policymaking, policy implementation, and dispute resolution by means of party-and-lawyer-dominated legal contests. Concerning the jury, he explains how American jurors, in contrast to judges in Europe, are not given written summaries of the issues and evidence in advance: the facts of the dispute must be presented to them orally by

making phase for which the jury is responsible.[20] The jury is the preeminent passive decision maker and, is thus a unique trait of "adversarial legalism."[21] Concerning discovery and evidence-taking, this system entrusts only the litigants and their lawyers with seeking evidentiary material, preparing it for trial, and presenting it before the court,[22] without the judge's involvement.[23]

In contrast, an inquisitorial system places the judge in a prominent role in conducting and controlling the trial.[24] Indeed, the characteristics of an inquisitorial system are the "reliance on official documentation, a scientific paradigm for truth seeking, no juries but a career judiciary trained specifically for the bench rather than the U.S. model of selecting judges from the ranks of practicing attorneys, nonpartisan state-controlled procedure, rigid state regulation of the legal process, and activist judges who intervene to ensure a solution based on the merits of the case."[25] There is no distinction between pretrial and trial: a claim implies only a single event (the trial), structured in several hearings.[26] Continental Europe does not know the trial by jury: the only decisionmaker must be a judge.[27] Concerning the preliminary phase of a lawsuit and the evidence taking, in an inquisitorial system, the decisionmakers play a more pervasive role. They are responsible for

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lawyers. Moreover, unlike a European judge, American jurors cannot comment during the trial or indicate that they are satisfied on a certain point. Hence lawyers, uncertain of which issues will be regarded as crucial, must cover all issues and, often call extra witnesses to testify to play it safe. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 127 (2d ed. 2019).

20. *Id.*

21. *Id.*

22. DAMAŠKA, *supra* note 13, at 74.

23. For a historical and constitutional analysis concerning the reasons of the limits placed on federal judges in the American system see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 381 (1982) ("The limits placed on federal judges by the adversarial system comported with the views of those who drafted the Constitution. The framers, reacting against the King's autocratic judiciary, wanted both to ensure federal judicial independence from the Executive and to vest substantial adjudicatory power in the people. Hence the Constitution gave a principal role to the jury in both civil and criminal trials and permitted Congress to limit the Supreme Court's appellate review of 'factual' determinations.").

24. HERBERT J. LIEBESNY, FOREIGN LEGAL SYSTEMS 15 (4th ed. 1981); JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 32 (2d ed. 1969); *see also* Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1193–268 (1958) (discussing the German system as an example of the inquisitorial process); Benjamin Kaplan et al., *Phases of German Civil Procedure II*, 71 HARV. L. REV. 1443, 1443–72 (1958) (also discussing the German system as an example of the inquisitorial process).

25. Strier, *supra* note 18, at 109.

26. *Id.* at 111.

27. *Id.* at 109.

gathering and sifting through evidence while the parties' lawyers exercise more passive power in the matter, i.e., controlling the court's work.[28]

It is commonly known that the adversary system is prominent in the Anglo-American system of justice while Continental systems, like the Italian and German ones, are closer to the inquisitorial model where the judge has more pervasive powers.[29] Nonetheless, this generalization needs some clarification.

Before explaining the actual contours of the dichotomy between adversarial and inquisitorial systems, it is essential to understand the difference between several aspects of the preliminary and introductory (and accordingly fact-gathering and evidence-taking) phases of lawsuits in civil law countries, which are commonly referred to with the same meaning. One must be aware that in every Continental system, based in the civil law tradition, there are different stages relevant to the disclosure and the discovery of information.

The first phase concerns the introduction of facts and evidence such as documents, witnesses, and so forth.[30] This phase is mainly adversarial because only the parties can introduce facts and information to support their alleged facts and claims (i.e., the evidence).[31] Judges have no power to introduce facts on their own motion and only minimal power to order the production of specific evidence, and this power may only be exercised if grounded in facts alleged by the parties.[32] Furthermore, since proceedings are not separated into pretrial and trial phases, the parties may allege facts and evidence from the beginning of the proceeding until certain time limits set by Continental civil procedure law,[33] which expire

28. *Id.*

29. *Id.*

30. Amos Gabrieli & Michal Alberstein, *Conflict Resolution Procedures Within the Courtroom: Between the Adversarial and Inquisitorial Traditions*, 51 GA. J. INT'L & COMPAR. L. 87, 100 (2022).

31. *Id.*

32. *Id.*

33. Following the German Code of Civil Procedure, the first step for the identification of the issues are the written pleadings, i.e., the statement of claim, *Zivilprozessordnung* [ZPO] [Code of Civil Procedure], § 253 (Ger.), and the statement of defense, *id.* § 277. With these pleadings, the parties state the exact facts of their respective version of the case and present evidence supporting their defenses. *Id.* § 130. In several cases, the introductory pleadings are followed by a preparatory stage where the parties may clarify certain matters like the applicable law, the factual basis of the case, and the available means of evidence. More specifically, the identification of the relevant factual and legal issues may be done orally or through written submissions, both following a judge's order. First, the presiding judge may decide to schedule a *Früher erster Termin*, "advance first hearing", and—potentially—may also set a deadline for the defendant by which he has to submit a written statement of defense. *Id.* § 275. On this hearing, the parties identify the issue and the proceeding may also terminate. If the proceeding does not terminate at the advance first hearing, the court shall issue all orders still required to prepare the main hearing

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during the course of the proceedings. The judge is involved in the process from the beginning when the plaintiff serves the claim on the defendant and then submits it to the court.[34]

The second stage strictly focuses on evidence gathering as it is when the judicial selection of legally valid and relevant non-documentary evidence (as parties request witness hearings) occurs.[35] The parties file evidentiary requests, and the judge decides what non-documentary evidence to admit.[36] This phase recognizes the judges' prominent role in governing the selection of information: they have a broad power to curtail inadmissible and, especially, irrelevant evidence.[37]

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for oral argument. Alternatively, the judge may order the defendant to submit a written pleading within a statutory term, starting a preliminary written proceeding *(Schriftliches Vorverfahren*). *Id.* § 276. Moreover, the presiding judge may set a deadline for the plaintiff to respond to the statement of defense. This exchange of pleadings aims to identify the issues for the main hearing for oral argument. Moreover, the judge may also issue specific orders to ensure that the parties properly prepare the main hearing and make comprehensive and sufficient submissions before the main hearing, requesting better or more evidence or improvement of legal arguments. In this early stage of the proceeding the parties are required to offer specified means of evidence, along with the assertion of facts. According to the Codice di procedura civile, the Italian code of civil procedure, the plaintiff's initial complaint has to provide a detailed statement of the claim. *See* C.p.c. art. 163 (It.). As in Germany, the initial complaint is only a structure for the subsequent proceedings because it is followed by parties' further exchange of pleadings and documents. More specifically, within a period of time fixed by the law (seventy days before the hearing) the defendant may file his written answer. *Id.* The defendant may appear before court directly, i.e., making his defense for the first time in the first hearing. However, in such a case, he loses some relevant defense powers may be exercised only in the written answer submitted timely (seventy days before the hearing), like the possibility to file a counter-claim. *Id.* art. 167.
Before the 2022 Reform, at the first hearing, the law allows parties to make amendments, specify or modify their claims and defenses and even file new claims under certain conditions defined by law. *Id.* previous version of the art. 183, paras. 3–4. Moreover, at first pleadings the parties may ask (and the judge must allow the request) to submit three new pleadings. *Id.* previous version of the art. 183, para. 6, nos. 1–3. With the first pleadings (to be submitted within thirty days from judges' order to file these three pleadings), the parties may specify or modify their claims and defenses. *Id.* With the second pleading (to be submitted within thirty days from the first pleading's expiration date), the party may answer the first pleadings submitted by the other parties and may add additional evidence requests. *Id.* This pleading represents the last time limit for evidence requests. *Id.* With the third pleading (to be submitted within twenty days from the second pleading's expiration date), the party may request counter-evidence (i.e., evidence to challenge the evidence alleged by the other party in the second pleading). *Id.* As we will deeply examine below, one of the main amendments of the 2022 Reform is to allow the first hearing to play a new role. To this effect, it provided that the the boundaries of the facts and evidence are to be fixed before this hearing. Thus, the parties must file the three pleadings we mentioned before (and not after) the first hearing. *Id.* art. 171 *ter*.

34. *Id.* art. 163.

35. *Id.* art. 183, paras. 4–5.

36. *Id.*

37. For instance, in the Italian system, the judge will consider inadmissible the request of testimony that violates the limits provided from Article 2721 to Article 2726 of the Italian Code

After selecting the admissible and relevant evidence, a hearing for evidence collection (for witnesses' examinations, inspections, etc.) is scheduled.[38] The evidence collection, or evidence-taking, usually occurs over the course of several hearings.[39] Indeed, evidence collection itself is subject to further procedural rules as is the examination of witnesses, and Continental systems present a stark contrast to the common law here. Evidence-taking in the Anglo-American system is characterized by strict association of all evidence with one party or the other.[40] This leads to the lawyer's power to prepare witnesses and experts, and examine them both directly and through cross-examination.[41] By contrast, the Continental administration of justice assigns the taking of evidence to the judge and strongly disapproves of the counsel's preparation of witnesses.[42] For this reason, when the court accepts the party's evidentiary requests, the evidence becomes a court's source, and the tie between witnesses and counsel weakens.[43]

It can be deduced from the above overview that the distinctions between the *adversarial* Anglo-American system and the *inquisitorial* Continental systems are reduced in civil lawsuits for two reasons.

The first reason concerns the power to identify the questions of law at issue and the evidentiary material related thereto.[44] To this effect, there are no *inquisitorial* powers in the Continental system of civil justice since he codification era started with the 1806 Napoleonic Code.[45] Indeed, since the introductory acts, the civil proceeding has been structured around a specific conceptual framework that exclusively empowers the parties to allege claims and material facts.[46] In other words, even in an inquisitorial system, the parties' lawyers have the primary responsibility to identify the legal issues at stake, develop the legal analysis, and allege material facts that will be subject to proof (i.e., the *thema decidendum et probandum*).[47] The law of civil procedure has strictly forbidden judges from introducing facts *sua sponte* in both the Italian and the German systems. This is grounded in the principle of judicial impartiality

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of Civil Procedure (e.g., the testimony is not allowed to ascertain the existence of contracts that exceed the value of 2.58 Euros). *Id.* arts. 2721–26.

38. *Id.* art. 184.

39. *Id.*

40. *See* FED. R. CIV. P. 26.

41. *See* FED. R. CIV. P. 27, 30.

42. *See* C.p.c. art. 163 (It.).

43. DAMAŠKA, *supra* note 13, at 105–08.

44. *Id.*

45. *Id.*

46. Langbein, *supra* note 1, at 824; *see also* Burkhard Bastuck & Burkard Gopfert, *Admission and Presentation of Evidence in Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 609, 609–27 (1994).

47. *Id.*

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provided by Section 111, paragraph 2 of the Italian Constitution[48] and Section 97, paragraph 1 of the German Constitution.[49] Moreover, there is a very limited set of rules that allow judges to introduce evidence on their own initiative.[50] Judges' evidentiary authority is subject to stringent limitations which allow control by parties: (i) judges are obligated to submit the evidence they introduce to the debate by the parties, so that they may raise appropriate defenses and submit mitigating evidence; (ii) judges may not justify seeking evidence by claiming the evidence requested by the parties is deficient to ascertain the facts.[51] Indeed, the judge's powers to compel production of specific evidence may be exercised only if grounded in the facts alleged by the parties.[52] Furthermore, in all Continental systems of justice, judges have significantly less responsibility and fact-finding power in civil lawsuits than in criminal proceedings.[53] The power of civil litigants to shape factual issues limits the court's independent investigative activity compared to the court's more expansive role in criminal matters.[54] In civil cases, even when judges are responsible for developing testimony, they cannot call their own witnesses in Continental systems,[55] with rare exceptions.[56]

48. Art. 111.2 COSTITUZIONE [COST.] [CONSTITUTION OF THE ITALIAN REPUBLIC] (It.) ("All court trials shall be conducted with adversary proceedings and parties shall be entitled to equal conditions before a third-party and impartial judge.").

49. GRUNDGESETZ [GG] [BASIC LAW], S IX, art. 97.2 (Ger.) ("Judges shall be independent and subject only to the law").

50. C.p.c. art. 115, para. 1, *translated in* SIMONA GROSSI & CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE 160 (2010) ("save where otherwise provided by the applicable law provisions, the judge shall base his decision on the evidence offered by the parties or by public prosecutor, as well as on the facts which have not been specifically denied by the party who filed his appearance."). More specifically, these judges' evidentiary powers are mainly the following: the possibility to order inspections of persons and objects, *id.* art. 118; the possibility to ask information to public administrations, *id.* art. 213; the possibility to summon a witness who has been mentioned by another witness during a deposition, *id.* art. 257; the possibility to summon a witness who has been mentioned by the parties as individuals knowing certain facts, *id.* art. 281-ter. Likewise, the German Code of Civil procedure provides that, for instance, the court may order both parties to appear in person at informal party hearings where asking questions on facts that could be a source of information, ZPO § 141, the court may order the other party or a non-party to disclose and produce specific document or paper or a reasonably specific group of documents or papers if one the parties refer to it in its submissions, *id.* § 142, the court may direct that visual evidence is to be taken onsite, *id.* § 144.

51. C.p.c. art. 115 (It.).

52. The exercise of limiting judges' evidentiary powers is also an *extrema ratio*, meaning that it may be exercised when the strict enforcement of the burden of proof, pursuant to Article 2697 of the Italian Code of Civil Procedure, would make it impossible for the judge to decide the dispute. C.p.c. art. 2697.

53. DAMAŠKA, *supra* note 13, at 106.

54. *Id.* at 149.

55. *Id.* at 125.

56. For these exceptions see discussion *supra* note 51.

The second reason the systems are perhaps less dichotomous than they might seem concerns judges' preliminary screening role in reviewing evidence submitted by the parties. This is not specific to adversarial civil law countries as judges play a role in screening evidence in adversary-oriented countries as well. Evidence is inadmissible if it is considered irrelevant or if it meets criteria provided by the "exclusionary rules."[57] More specifically, evidence related to a fact that is a proper object of proof in the proceedings is relevant.[58] Further, the exclusionary rules also exclude certain relevant evidence from consideration.[59] These rules are highly complex since they are often accompanied by exceptions, some of which are quite precise and others are formulated in broad and flexible terms.[60] In addition to strict exclusionary rules, the judge may discretionarily exclude evidence under rules allowing them to prevent the admission of evidence that may negatively impact a proceeding's fairness.[61] Nonetheless, many authors point out that only a tiny subset of exclusionary rules are truly idiomatic,[62] and they operate mainly in criminal cases.[63] However, as previously mentioned, non-adversarial systems also empower judges to curtail inadmissible or irrelevant evidence. The distinctions supporting the dichotomy are, thus, weakened by these similarities.

B. *The Modern Role of the U.S. Judge and the Impact on the Principle of Concentration*

The dichotomy between adversarial and inquisitorial systems traditionally conceived of in Anglo-American literature requires a further clarification to correct a partial misunderstanding. We want to refer to the inveterate opinion on the exclusive common law prerogative of the principle of concentration as one of the distinctive characters of the (U.S.) adversary system.[64]

Most scholars trace the historic origins of the principle of concentration to England's courts of equity and the instituting of the jury at that time as an essential component of trial.[65] It seems to us that the principle of concentration grew pragmatically from the need for jurors to decide the case after having heard all the evidence during a single

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57. *Id*.

58. IAN DENNIS, THE LAW OF EVIDENCE 5 (4th ed. 2010).

59. *Id.*

60. *Id*. at 6.

61. *Id.*

62. DAMAŠKA, *supra* note 13, at 12.

63. DENNIS, *supra* note 58, at 62.

64. *See* CHASE ET AL., *supra* note 7, at 5.

65. *See* Langbein, *supra* note 7, at 529; Stephen Goldstein, *The Anglo-American Jury System as Seen by an Outsider (Who Is a Former Insider)*, *in* 1 THE CLIFFORD CHANCE LECTURES: BRIDGING THE CHANNEL 165–70 (1996).

continuous meeting.[66] In other words, the principle of concentration became a feature of the common law system as a result of the peculiar structure of civil proceedings at the time. One can, therefore, understand why the Continental systems of civil justice, notably still jury-free, never developed such a principle of concentration.

As a result, recent efforts in the Continental systems to follow the principle of concentration by promoting the use of well-prepared preliminary conferences are considered to be merely strengthening the managerial role of the judge from the Anglo-American perspective. On the contrary, if there is a central principle characterizing the Continental civil justice system since the era of codification, it is the nineteenth century's iteration of the principle of concentration, together with the principles of immediacy and orality.[67] These principles inspired the purpose of Continental civil procedure—to reach the decision of the case as quickly and accurately as possible.[68] The more important question is thus not whether the principle of concentration is significant in the common law system, as we know it is, but rather what the principle means in today's civil law jurisdictions and how legislatures and judiciaries can elevate it.

The answer to that question is twofold. First, if we suppose that the principle of concentration were to be fully implemented in a judicial system, it would require all the parties' activities (allegations of facts and presentation of evidence) to be organized within a single period, one as short as possible but remaining effective enough to satisfy the right to be heard. This would provide the decision maker with a clear and complete view of the case.

Secondly, despite the principle of concentration originating in the common law, it is worth noting that under the Federal Rules of Civil Procedure, the locus of the principle of concentration is now Rule 16, which permits the judge to schedule one or more pre-trial conferences to manage the claims presented in the case and the related evidence as the

66. *See* Langbein, *supra* note 7, at 529; *see also* Oscar G. Chase, *American Exceptionalism and Comparative Procedure*, 50 AM. J. COMP. L. 277, 293 (2002) ("A concentrated trial is virtually mandatory when a group of lay people are required to take time out of their own work lives to hear and help decide a dispute, but is hardly necessary when the facts will be heard by a professional judge who will be at the court daily.").

67. *See generally* CHIOVENDA, *supra* note 8, at 371–72 (More specifically, the principle of concentration indicates that a case should be treated in a single hearing or in a few closely spaced oral sessions before the court, carefully prepared through a preliminary stage in which writings were not necessarily to be excluded. While the principle of immediacy refers to a direct, personal, open relationship between the adjudicating organ and the parties, the witnesses, and the other sources of proof. Finally, the principle of orality means an efficient, swift, and simple method of procedure, based essentially on an oral trial in which the adjudicating body is in direct contact with the parties (not only with their counsel) and the witnesses.).

68. *See id.*

parties proceed through discovery during the pretrial phase.[69] While the pretrial conference is increasingly relevant, it is viewed as a "nontrial procedure,"[70] and it aids the parties in not pursuing trial but rather reaching a summary judgment decision or a settlement of the case.[71] One can, therefore, conclude that the essence of concentration is changing. This change moves towards the crucial role of managerial judging, and related powers conferred to the judge to summarize relevant facts, evidence, and legal arguments.[72] Two assumptions underlie this argument. First, as hinted at above, the typical model of common law procedure now focuses on a single phase—the pretrial. Here, the parties, under the direction of the judge, clarify the boundaries of the dispute, acquire information about their respective defenses and the evidence that might be used at a possible trial, and consider the possibility of settlement or other methods of dispute resolution.[73] Since ninety-five to ninety-seven percent of all civil cases are resolved without a trial,[74] the pretrial conference is useful in its original scope (i.e., to prepare for trial) only when it fails to ensure an early close of the case, which is rare.[75] Secondly, the pretrial phase does not consist of only one hearing. It takes place in separate sessions that can also be numerous and complicated and can require, at least in the most complex cases, a lengthy amount of time.[76] The association of the principle of concentration with the "day-in-court"[77] is thus far from reality. No principles, institutions, or values exist empyreal and abstractly, isolated from the changing circumstances of history and society,[78] and thus the principle of concentration now best describes a procedure where, even across discrete installments, the managerial judge guides the proceeding towards its conclusion by curtailing unnecessary elements and defining the boundaries of the lawsuit more clearly. Indeed, it may be expected that the judge uses his managerial powers to lead the case to its conclusion as quickly and efficiently as possible.

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69. FED. R. CIV. P. 16.

70. Langbein, *supra* note 7, at 542.

71. *Id.*

72. Langbein, *supra* note 1, at 825.

73. *See* ZPO § 279.

74. John Barkai et al., *A Profile of Settlement*, 42 CT. REV. 34, 34 (2006).

75. *Id.*

76. *See* Taruffo, *supra* note 4, at 37.

77. DAMAŠKA, *supra* note 4, at 51 (The Author uses this expression to indicate the trial model where all material bearing on the case is preferably considered in a single block of time. While, the opposite variant, commonly ascribed to Continental systems, provides for proceedings developing through separate sessions at which material is gradually assembled in a piecemeal, or in installment style).

78. Mauro Cappelletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and School Trends*, 25 STAN. L. REV. 651, 651–52 (1973).

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Therefore, today, it is hard to say that the principle of concentration is a distinctive characteristic of the common law and the adversarial system rather than the Continental model. On the contrary, that does not seem to be true, and the errors in the traditional view juxtaposing the adversarial and inquisitorial models reveal a significant starting point in evaluating how the systems may converge. To this end, the significance of the principle of concentration assumes a different identity which allows its identification in both legal systems, even if separate and distinct. It seems that in both procedural systems preparatory hearings (or a pretrial conferences) play a crucial role in the enforcement of the principle of concentration (along with the principle of orality and immediacy). Here, the judge eliminates the redundant and pointless elements from the case and restricts the controversy to those few essential questions which warrant a decision.[79]

These observations show how the time has come to discover and refine a global system of civil procedure based on a semi-adversarial model.

C. *Two Aspects of the Dichotomy*

There are two important aspects to the dichotomy in discovery proceedings pertaining to the different methods of party-led discovery and the role played by judges in the process.

Continental civil procedure recognizes the presence and the active role of the judge from the beginning of the lawsuit. That is, from the first hearing after the introductory pleadings are filed by the parties. In the non-adversarial systems, a sharp distinction between pretrial and trial does not exist: cases proceed along a continuum, characterized by different time limits, for the presentation of facts and evidence.[80] There is neither a specific pretrial phase during the proceeding in which all the evidentiary material must be collected, nor a general duty of *comprehensive* disclosure of material relevant to the case as a whole.[81] On this continuum, judges have significant control over the process of information exchange: even if they are not allowed to introduce new facts, they take control from the beginning of the lawsuit. For instance,

79. DAMAŠKA, *supra* note 4, at 51.

80. *See* discussion *infra* Section II.A and accompanying notes.

81. *See* ZPO § 138.1 ("The parties are to make their declarations as to the facts and circumstances fully and completely and are obligated to tell the truth"); *id.* § 139.1 ("To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.").

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in the German system, there is a duty for parties to assert pertinent facts as a precondition of evidence taking, along with strict judicial control of the relevant facts during the early stage of the proceedings.[82] Section 138.1 ZPO, through a sort of hendiadys, requires the parties to tell the truth and to disclose the case's factual circumstances fully and completely.[83] The *kooperativen Prozess* is facilitated by the court's oversight of the parties' obligations, which allows the court to clearly define the relevant facts and evidence necessary to issue final judgment.[84] The parties' disclosure duties allow them to refine the factual basis and the legal argument for their respective defenses. However, unlike the U.S. system, German civil procedure does not impose a general duty on either party to produce evidence in favor of the other.[85] A German court may impose this duty on the parties only if it is directed to by a substantive statute. Nonetheless, German judges also have specific but minimal powers to order the introduction of evidence on the basis of facts alleged by parties.[86]

Similarly, in the Italian system of justice, at least until the 2022 Reform we will inspect, the judge tends to be closely involved from the introductory phase, assuming a strict managerial role in controlling the issues and admission of evidence submitted by the parties. Judges may, therefore, require additional allegations of facts where there are incomplete pleadings[87] and may issue orders to remedy other defects.[88] After the first hearing, they may also decide that the lawsuit can be

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82. *Id.*

83. The pertinent text of Section 138.1 reads "*die Parteien haben ihre Erklärungen über tatsächliche Umstände vollständig und der Wahrheit gemäß abzugeben*." Antonio Carratta, *Dovere di verità e di completezza nel processo civile, Parte prima* [*Duty of Truth and Completeness in the Civil Process, Part One*], 1 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 59 (2014).

84. *See generally* CHASE ET AL., *supra* note 7, at 292 (for a general overview on comparative issues, with particular reference to the German system of discovery and privilege).

85. *See* Bastuck & Gopfert, *supra* note 46, at 613.

86. *See generally* discussion *supra* note 50.

87. C.p.c. art. 164, *translated in* GROSSI & PAGNI, *supra* note 50, at 190 ("(4) The complaint is null also where the [requirement] under number 3 of Article 163 lacks or is completely uncertain, or if the description of the facts under number 4 of the same article lacks. (5) The judge, [having] . . . assessed the nullity of the complaint pursuant to the previous paragraph, assigns to the plaintiff a final time limit for renewing the complaint or, if the defendant has appeared before the judge, a time limit for [supplementing] the claim. The waivers [that] occurred, and the rights vested before the renewal or the [supplementation] remain valid").

88. *Id.* the previous version of the art. 183(1), *translated in* GROSSI & PAGNI, *supra* note 50, at 203 ("At the hearing scheduled for the first parties' appearance and trial, the investigating judge, *sua sponte*, checks the observance of the principle of parties' equal opportunity to defense and, where necessary, takes the decisions proved by Article 102, second paragraph; Art 164, second, third, and fifth paragraphs; Article 167, second and third paragraphs; Article 182, and Article 291, first paragraph"). Following the 2022 Reform, judge can not issue these order at the first hearing. She has to issue it before the first hearing. *Id.* art. 171 *bis*.

disposed of without any discovery activities,[89] or they may schedule a hearing (usually, several hearings) for evidence taking.[90] The judge may also outline a settlement proposal and invite the parties to consider it.[91] Moreover, parties in the Italian procedural system do not have discovery tools at their disposal like those in the American system. For instance, there is no specific obligation to reciprocally disclose relevant documents. If a relevant document is held by the adverse party or a non-party, the party may only be required to disclose it if the judge specifically orders its disclosure, which is only possible under certain conditions.[92] Evidentiary materials are only identified and supplied by the lawyers based on the information provided by the client as there are no direct requests of the adverse party. Moreover, a request for non-documentary evidence must be presented before the court that, as previously said, will grant that request only if relevant and legally admissible under the Code of Civil Procedure. As also previously described, a restricted amount of evidence may also be ordered by the court on its own motion.[93] Although at times restricted, the judge is vested with several powers concerning the information exchange between parties and, more generally, the direction and the management of the case. The contours of these powers are the result of the absence of a pretrial phase focused only on the exchange of information between parties. Continental systems of civil procedure run counter to the common law systems in so far as they disavow the idea of two phases of a case.[94]

The traditional adversarial system, as embodied by the 1938 U.S. Federal Rules of Civil Procedure, provided that, following the filing of

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89. *Id.* art. 187, *translated in* GROSSI & PAGNI, *supra* note 50, at 210 ("1. when the investigating judge considers the case ready to be decided on the merits without the need to admit additional evidence, the judge remands the parties to the panel of judges. 2. The judge may remand the parties to the panel of judges to have it decide on a preliminary issue on the merits of the case when the decision on this issue may define the whole case.").

90. *Id.* art. 184, *translated in* GROSSI & PAGNI, *supra* note 50, at 206 ("At the hearing scheduled by the order under Article 183, seventh paragraph, the investigating judge acquires the evidence already admitted to the proceeding"). Following the 2022 Reform art. 184 refers to art. 183, instead of art. 183, seventh paragraph. *See also id.* art. 188, *translated in* GROSSI & PAGNI, *supra* note 50, at 211 ("The investigating judge proceeds to the admission of evidence and, once the admission is completed, he remands the parties to the panel of judges for the decision of the case, pursuant to the following article").

91. *See id.* art. 185-bis (provides that the judge must have regard to the nature of the case and the value of the dispute; moreover, the subject of the lawsuit must allow easy and prompt legal solutions).

92. *See id.* art. 210, *translated in* GROSSI & PAGNI, *supra* note 50, at 221 (These conditions are (i) the actual necessity of the document to prove a material fact, (ii) the precise identification of the document and of the person in possession of it, and (iii) overcoming the protections afforded by privileged rule).

93. *See* discussion *supra* note 50.

94. Arthur Engelmann, *History of Continental Civil Procedure*, *in* 7 THE CONTINENTAL LEGAL HISTORY SERIES 33 (Robert W. Millar trans., 1927).

the complaint, the judge did not intervene during the pretrial stage. The judge was involved only if requested by the parties (e.g., setting a date for trial or deciding motions for summary judgment). The parties could commence discovery, negotiate a settlement, or take no action for years without any judicial intervention.[95] Among the aspects of the traditional adversary process that have been altered over the years, many U.S. scholars mention the additional responsibilities assumed by judges in pretrial case management,[96] with particular attention to the evolution of Rule 16.[97] However, the increased pretrial involvement of judges does not drastically change the essential pretrial aspects of the adversary system. Managerial judging is increasing in federal courts as a response to complex lawsuits and to prevent discovery abuses,[98] which mainly entails narrowing and clarifying the fundamental issues in the case, along with the relevant facts, with the upholding party control over discovery.[99]

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95. Resnik, *supra* note 23, at 384 (discussing the role of the parties in preparation for trial and describing the growth of judicial case management over the years); *id.* at 391–92 (explaining how the role of the parties in preparation for trial was even more autonomous before the adoption of the 1938 Federal Rules of Civil Procedure (citing Robert W. Millar, *The Mechanism of Fact-Discovery*, 32 ILL. L. REV. 424, 449 (1937))); *see id.* at 392 n.64 (concerning state court innovations with respect to common law discovery (citing Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 869–77 (1933))); *id.* at 393 (The 1938 Federal Rules allowed litigants to ask for court's help. Through the years, judges' role in ruling on discovery issues became qualitatively different from their role in the traditional model. Indeed, to decide discovery questions, the judges (i) "must immerse themselves in the factual details of the case," (ii) "must consider the parties' litigating strategies," (iii) besides reading parties' briefs, they often "must engage in lengthy and informal conversations with the parties," and (iv) "by granting or denying discovery requests, [they] alter the scope of suits by making some theories and proofs possible and others unlikely;" becoming thus involved in the lawsuit. Then, Amendments to the Federal Rules provide rules for pretrial management in all cases, expanding the federal judge's pretrial powers noticeably.).

96. *See* Resnik, *supra* note 23, at 404. *See also* MARVIN E. FRANKEL, PARTISAN JUSTICE 43–44 (1980); Richard Marcus, *Looking Backward to 1938*, 162 U. PA. L. REV. 1691, 1695 (2014); Charles E. Clark, *Objectives of Pre-trial Procedure*, 17 OHIO ST. L.J. 163, 167–69 (1956) (describing the traditional purposes of pretrial conferences).

97. *See, e.g.*, Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L. REV. 714, 714 (1983) ("The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a forensic setting, is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society."); WILLIAM GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 24 (1968); Stephen A. Saltsburg, *The Unnecessarily Expanding Role Of The American Trial Judge*, 64 VA. L. REV. 1, 15–16 (1978).

98. *See, e.g.*, Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 BYU L. REV. 579, 582 (1981) (discussing abuse of discovery rules).

99. *See, e.g.*, Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 34 (1984) ("So long as a record of contacts with the judge is kept and the parties can put allegations of improper prejudice on the record, there is no reason to fear the judge's familiarity

Indeed, pretrial managerial functions mainly serve to limit the facts and issues to those relevant for the final verdict, to sanction for abuse of discovery and lack of cooperation, to curtail superfluous and unnecessary discovery requests and those demands which are not proportional to the nature and the scope of the claim, to facilitate the resolution of the case on the merits, and to encourage settlement.[100] Pretrial conferences are ordered to give the pretrial judge the complete set of facts, claims, and evidence in the case, as the parties consequentially file them during the pretrial phase. Nonetheless, during pretrial discovery, attorneys are expected to act with minimal judicial oversight. Even if the parties' discovery plan is created under the judicial supervision of a Rule 16 pretrial conference, it is created and tailored by the attorneys in accordance with their own assessment of the best way to proceed in the particular case. Moreover, the subject of this discovery plan (i.e., the methods of discovery) reflects the relationship between discovery and individualism, representative of the American adversarial way to conduct the process. Thus, parties still have great control in collecting facts and evidentiary materials. Indeed, under the distinctive American rules regarding discovery, each party has the power to directly require the counterparty (or other potential witnesses) to answer oral or written questions under oath outside the presence of the judge and before an

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with the action. What point is there in delivering a sanction scalpel capable of being employed to fit the punishment to the abuse with precision and delicacy, only to blindfold the surgeon?"); *see also* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 342–43 (1989) ("While the parties may be forced to adhere to timetables that they would not otherwise have chosen, they are still responsible for the packaging. Opponents of managerial judging seem to fear that judges will take more control over substantive aspects of litigation, particularly by pressuring the parties to settle. Whether this fear is justified is doubtful. In any event, the experience of continental Europe establishes that an adjudicatory system can withstand much more judicial management than the American system has and still be fair. But it also suggests that the system itself may need additional procedures to help ensure that fairness.").

100. For a general overview of the amendments to Federal Rules see CHASE ET AL., *supra* note 7, at 325 (noting that the amendments to the Federal Rules aim at making the discovery phase proportional to the scope and the nature of parties' claims and defenses). In such respect, for instance, Federal Rule of Civil Procedure 26(b)(1) was modified to allow the court to limit discovery if its costs outweighed its likely benefits. In 1999, section (ii) was introduced Federal Rule of Civil Procedure 26(a)(1) that imposes to parties a duty to disclose some basilar information regarding their claims, without any requests from the counterparty. In such respect, Federal Rule of Civil Procedure 16 plays a crucial role by providing that the court has to review the discovery plan in a pretrial conference. The scope of the pretrial conference is to prevent litigation by limiting the issues under discussion and by allowing only to the relevant issues to go forward. Moreover, the federal courts may impose sanctions to litigants if they abuse the discovery process or they do not answer to requests for discovery or to comply with mandatory disclosure. FED. R. CIV. P. 37(b). Finally, the Federal Rules of Civil Procedure were amended by affecting the pleading and the discovery. More specifically these amendments were designed to promote early and effective judicial case management. For a list of 2015 amendments see CHASE ET AL., *supra* note 7, at 329.

officer (a deposition);[101] to answer written questions under oath, outside the presence of the judge or any other officer (interrogatories);[102] to produce documents, electronically stored information, and tangible things, or enter onto land for inspection;[103] where physical or mental condition is at issue, to arrange for a medical examination of a party by a physician of the opponent's choosing;[104] and to make requests for admission to a party.[105] The core of the distinction is that in an adversarial system, the parties have an obligation of reciprocal disclosure, and there are special sanctions for non-compliance.[106] Therefore, despite changes in the civil procedure rules aimed at reducing the latitude of discovery for cost-minimization reasons, the methods of discovery reveal that the concepts of individualism, egalitarianism, laissez-faire, and anti-statism still hold a unique place in shaping American pretrial discovery.[107]

Moreover, the Anglo-American belief in party control over the collection of evidence remains another aspect of an adversary system that remains important during the trial phase before a passive decisionmaker (the jury or the judge). Here, the difference between the two systems is harsh. The continental administration of justice assigns the collection of evidence to the judge or some other officials and strongly disapproves the counsel's preparation of the witnesses. The most salient trait of the trial is the court's obligation to ascertain the truth of the contested matter for itself: the judge is primarily responsible for interrogating parties and witnesses, selecting expert witnesses, demanding production of relevant documents, and summarizing the evidence.[108] With particular reference to the examination of witnesses, the lawyers propose testimony and call witnesses, but when the court accepts counsel's evidence initiative, this evidence becomes a court's source, and the tie between witnesses and the attorney weakens. Witnesses are interrogated by the court based on questions submitted by the parties and then screened and selected by the court. Attorneys then reserve the right to develop their positions on the significance of the evidence. The witness testimony is performed with an uninterrupted narrative: the judge asks separate questions, which imply a narrative response, without breaks and disruptive tactics.[109]

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101. FED. R. CIV. P. 30 (Depositions by Oral Examination); FED. R. CIV. P. 31 (Depositions by Written Questions).

102. FED. R. CIV. P. 33 (Interrogatories to Parties).

103. FED. R. CIV. P. 34 (Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes).

104. FED. R. CIV. P. 35 (Physical and Mental Examinations).

105. FED. R. CIV. P. 36 (Requests for Admission).

106. FED. R. CIV. P. 26.

107. *See* Chase, *supra* note 66, at 277.

108. *See* Langbein, *supra* note 1, at 828.

109. Strier, *supra* note 18, at 111.

In contrast, the crucial characteristic of the adversarial model of evidence-taking at trial is that all evidence is associated with one or the other party, as a sort of proprietary approach to all evidence presented in the process.[110] To this effect, the structure of evidentiary rules and evidence-gathering methods during the trial phase has been designed to insulate decision makers from extraneous and impermissible information[111] and to ensure fair play between the parties.[112] For this reason, witnesses belong to the party who called them. This association between the parties and their witnesses is clear, especially in those common law systems where the counsel is allowed to prepare and coach witnesses for the courtroom appearance. Moreover, the attorneys directly question witnesses and have the opportunity to cross-examine.[113]

A similar difference exists for experts. In non-adversarial systems, expert witnesses are appointed by the court and instructed by the judge regarding the questions they will respond to in their opinions. For this reason, they are viewed as a sort of judge's aid and assistant. The parties have the option to call their own experts, but the judges nonetheless instruct them.[114] On the contrary, in the adversary scenario, the sphere of partisan control on selection and preparation is extended to experts: American litigants hire and carefully coach their expert witnesses.[115]

As the procedural aspects we have outlined show, there is no doubt that a dichotomy between adversary and non-adversary systems of civil procedure exists, but it concerns mainly the methods of discovery, and the judge's role and involvement in the early stages of a case. To this effect, the central idea, derived by the public role of the proceeding, fitting with the Continental culture, is that the judge must have, since the beginning the role of conduct and manage the course of the proceeding.[116] This justifies the absence of a comprehensive discovery pretrial phase and the relevant nonexistence of an obligation of reciprocal disclosure.

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110. DAMAŠKA, *supra* note 13, at 76 (discussing "polarization of means of proof").

111. *See* JOHN J. MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE 128 (1898) (commenting on the exclusionary rules and noting "The object of a trial is the ascertainment of the truth of the facts in issue between the parties, to the end that justice may be rendered. All things are to be made subservient to this object. There are considerations, however, which must govern the proceedings of the court in the carrying on of its business; considerations which, if lost sight of in any one case, would certainly affect the ability of the court to serve its purpose.").

112. *Id.* at 135 (commenting the rules on the examination of witnesses and noting "The successful and orderly administration of justice requires that some system be followed in the introduction of testimony upon a trial, and a uniform system has grown up; a system which has satisfied the English and American idea of fair play.").

113. *Id.* at 334 (for an in-depth description on how far the cross-examination may be extended and an analysis on the differences between American and English systems).

114. *See* Langbein, *supra* note 1, at 835–40.

115. *See* KAGAN, *supra* note 19, at 126.

116. Michele Taruffo, *Cultura e processo*, 1 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 63, 75 (2009).

However, the intensity and the extensiveness of the judge's managerial power vary among the systems. In addition, in the Continental system, evidence taking is a public function, dominated by judges, rather than a private function run by lawyers. Therefore, in striking contrast to the Anglo-American tradition, the civil law judge takes responsibility for conducting the evidence-taking by questioning witnesses and appointing and examining the expert.

Despite such disparities, the 2022 Reform of civil procedure in Italy confirms that convergences are feasible. Following the mentioned Reform, Italian civil procedure acquired some adversary features to strengthen its judiciary system in terms of efficiency and effectiveness. To properly understand the Reform and its scope, it necessary to point out the impact of divergent structures in civil proceedings, both in terms of efficiency and efficacy.

II. THE IMPACT OF THE DISTINCTIVE FEATURES OF DIVERGING SYSTEMS

There are several strengths of a pure adversary system. Many scholars support the adversary system for the role of pretrial discovery in incentivizing litigant's to settle;[117] its adherence to the ideal of contradictory debate and, therefore, its fairness;[118] the role of cross-examination for discovering the truth;[119] and given the epistemic limitations of human cognition, its reliability compared to non-adversarial systems.[120]

However, some drawbacks emerge in terms of both efficiency of the proceeding, like the expense and complexity of the adversarial modes of discovery and trial, and of efficacy of the proceeding given the incentives to distort evidence (especially by coaching witnesses and experts) and inequality of counsel issues. Such drawbacks will be deeply investigated in this section. This discussion also gives us the chance to reflect on the meaning that concepts of efficiency and efficacy assume with respect to discovery and evidence-taking. Further, we seek to understand if compromise between adversarial and non-adversarial means of dispute resolution overcome such drawbacks and lead to a more efficient administration of civil justice, as well as more effective adjudication.

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117. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 422–27 (2d ed. 1977); *see also* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1–5 (1988).

118. John A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT'L & COMP. L.Q. 281, 282–83 (2003).

119. WILLIAM TWINING, RETHINKING EVIDENCE 85–86 (2d ed. 2006). *See generally* JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (1974).

120. Baldassarre Pastore, *Truth in Adjudication*, *in* THE LEGITIMACY OF TRUTH 341–44 (R. Dottori ed., 2003).

A. *The Impact on the Efficiency of Administration of Justice*

It is commonly remarked that adversarial systems are less efficient than the non-adversarial ones, although some scholars have claimed the opposite.[121] Broadly speaking, one of the most significant challenges of economic analysis of justice is determining the means by which to measure the efficiency of the judiciary.[122] To this extent, examining the notions of efficiency discussed in the Economic Analysis of Law might be helpful as Judge Posner presents a concept of efficiency, namely the theory of "wealth maximization," which is a variant of Kaldor-Hicks's theory.[123] Following the traditional concept of efficiency outlined by Judge Posner, "value" represents "human satisfaction as measured by aggregate consumer willingness to pay for goods and services." Consequently, efficiency, as conceptualized by the theory of "wealth maximization," means "exploiting economic resources in such a way that value is maximized." Judge Posner's theory of efficiency as "wealth maximization" requires that every economic operator is rational and aims, with its behaviors, to maximize his utility (market behavior). However, is it plausible that people are rational only when they are transacting in markets and not when they are engaged in other life activities, such as litigation? The discrepancy can be resolved by viewing the issue through an economic lens, conceiving the law as a set of incentives to citizens. Under this approach, every legal rule represents, for its rational recipient, a cost to follow a particular behavior and, consequently, the recipient will follow this behavior only when its cost (the cost to respect it) is less than what they stand to gain.

Judge Posner's models and final remarks introduce two assumptions that may appear, at first glance, contradictory. The models and remarks within which these assumptions are found are highly persuasive with respect to the role of a preparatory phase structured with complete and comprehensive allegation of claims, facts, and evidence requested by parties, all without a judge's intervention. Under Judge Posner's school of thought and in the context of conditions that bring parties to litigate rather than to settle, we will show how the adversarial structure achieves

121. *See, e.g.*, Richard A. Posner, *An Economic Approach to the Law of Evidence* (John M. Olin Program L. & Econ. Working Paper No. 66, 1999); Ronald J. Allen et al., *German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988).

122. Eminent authors discussed the value of the efficiency in shaping the substantive and the procedural rules. *See generally* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Guido Calabresi, *An Exchange: About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980); Ronald Dworkin, *Why Efficiency? – A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980).

123. POSNER, *supra* note 117, at 10.

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its goals more efficiently than those typical of non-adversarial procedure. More specifically, an adversarial structure, which strictly delimits the discovery of evidence and the taking of evidence, favors settlement. In contrast, with relation to the rules governing the taking of evidence strictly, even using an economic model elaborated by Judge Posner, Continental methods of evidence taking appear more desirable in terms of cost minimization to their adversarial counterparty. In this respect, the Italian Reform we will examine in section III will show how these two conclusions are not irreconcilable.

1. The Role of a Comprehensive Preliminary Phase

We start by outlining the first assumption. The analysis starts with the incentives that bring parties to litigate before a court rather than settle.[124] The settlement decision in civil lawsuits is a classic issue of making a decision under uncertainty. Since settlement costs are usually lower than the cost of litigation, the reasons for settling cases help us understand the determinant of the total direct costs of legal disputes. When are cases settled? Judge Posner offered the following model. Litigation occurs when the plaintiff's minimum offer is greater than the defendant's maximum offer. The plaintiff's minimum offer represents their expected value of the litigation (the value of the judgment if they win), plus settlement costs, multiplied by their estimated probability of winning, minus the value of the litigation expenses. Instead, the defendant's maximum offer represents their expected value of the litigation (the cost of their litigation expenses), plus the cost of an adverse judgment, multiplied by the estimated probability of plaintiffs winning, minus settlement costs.[125] In this model, any measure that reduces the plaintiff's minimum offer or increases the defendant's maximum offer by affecting one of the mentioned variables will reduce the likelihood of litigation. On the contrary, any measure that increases the plaintiff's minimum offer or reduces the defendant's maximum offer by affecting one of the mentioned variables will increase the likelihood of litigation. Thus, having laid down the process for settlement decisions, we aim to answer the following question: how does a preliminary phase of litigation (e.g. the pretrial phase) impact settlement rate? Judge Posner measured the effects of such a model with certain specific procedural rules. For this

124. Several authors presented theoretical model of litigants' choice to settle or to go to trial. *See, e.g.*, Gary M. Fournier at al., *Litigation and Settlement, an Empirical Approach*, 71 REV. ECON. & STAT. 189 (1989); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, J. LEGAL STUD. 13 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, J. LEGAL STUD. 11 (1982); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

125. Posner, *supra* note 117, at 417.

Article, we will examine the effect of this model on the rules governing pretrial discovery.[126]

The principal cause of litigation is a sort of mutual optimism among the parties in winning that may derive from each party's lack of information about the other party's position. During settlement bargaining, every party is hostile to show information to other parties because if the settlement negotiations fail, a party loses the value of surprising the other party with the information at trial. Under the traditional approach of Continental procedure, the parties have an incentive to not disclose their information. This basically depends on two factors. First, the absence of a preliminary phase strictly defined boundaries of the claim and related discovery requests discourages settlement. As previously stated, the time limits in this respect occur at a more advanced stage of the dispute.[127] Additionally, the rules enforced throughout the years that obliged the judge to attempt to achieve a settlement have been truly unsuccessful. For instance, in Italy, the inadequate results deriving from these rules led the legislature to abrogate them.[128] Only an amendment that places the definition of the *thema decidendum et probandum* at the preliminary stage may affect parties' incentives to reconcile the dispute.

The Federal Rules of Civil Procedure give a central role to a pretrial conference in the litigation process. According to pretrial discovery rules, each party can obtain relevant information from the other party before the trial, putting an end to the surprise effect as the parties disclose information and documents that may be relevant to the claims and defenses in the case.[129] After all, the rule drafters' goal was to avoid a trial in every case, yet to create the option for a trial—where deserved—in every situation.[130] That presumption was behind the design of the original rules. Moreover, even after the reforms aimed at identifying and discouraging discovery overuse (with the introduction of proportionality into Rule 26(b)(1) or the managerial power conferred by Rule 16 for pretrial), the essential division of litigation into two phases has not changed. In other words, the idea of a specific phase to decide what facts

126. *Id.* at 422–27.

127. *See supra* Section I.A and discussion *supra* note 18.

128. Legge 26 novembre 1990, n.353, *in* G.U. Dec. 1, 1990, n.281 (It.) (made compulsory a conciliation attempt by the judge and, to this purpose, imposed the personal appearance of the parties at the first hearing); Legge 14 maggio 2005, n.80, *in* G.U. May 14, 2005, n.111 (It.) (repealing the compulsory conciliation attempt at the first hearing).

129. *See* John P. Frank, *Pretrial Conferences and Discovery – Disclosure or Surprise*, 1965 INS. L.J. 661, 662 (1965) ("There are two fundamental purposes for eliminating surprise at trial. The first is to improve the administration of justice by securing a fair, equitable, reasonable, and just result. The second is to speed trial so as to consume less time for counsel, for parties, and, more important, for the courts. The two objectives are closely interrelated.").

130. *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1812 (2015).

will be subjected to proof, strictly distinct from an evidence taking at the trial, still remain even after the reform that tried to curtail the abuse of discovery. In addition, the managerial role of U.S. federal judges established the success and progressive increase of settlement as a result of the pretrial conference. Now, the relevant result analyzed by Judge Posner is that a pretrial discovery provision could enable each party to improve and refine its estimates on the outcome of the case, reducing uncertainty and optimism in the outcome.[131] For this reason, in many cases, pretrial discovery could be efficient means to reduce case backlog by increasing the rate of settlement. The effect of a type of pretrial discovery rule could be analyzed with respect to Rule 35 of the Federal Rules of Civil Procedure that permits the defendant, in a case regarding the plaintiff's health or fitness, to examine the latter by an expert designated by the former.[132] Through Rule 35, if a defendant becomes

131. POSNER, *supra* note 117, at 422–27; *see also* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1–5 (1988) (emphasizing that an advantage of attorneys conducting discovery is that both sides develop a sense of the case's monetary value and the potential risks which may help the attorneys evaluate the merits of the case and settlement options).

132. FED. R. CIV. P. 35 (Physical and Mental Examinations)

(a) Order for an Examination. (1) In General. The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. (2) Motion and Notice; Contents of the Order. The order: (A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report. (1) Request by the Party or Person Examined. The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined. (2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests. (3) Request by the Moving Party. After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. (4) Waiver of Privilege. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition. (5) Failure to Deliver a Report. The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. (6) Scope. This subdivision (b) applies also to an

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aware of the conditions of the plaintiff's injury, which is higher than he expected, the defendant will be led to increase his estimate of his expected cost. Consequently, the pretrial discovery phase increases the defendant's maximum offer. As a consequence, the phase makes settlement more likely, reducing the amount of the pending litigation. In conclusion, the pretrial discovery rule could reduce the direct cost of litigation by incentivizing parties to settle. To this effect, rules that incentivize settlement do not represent a betrayal of the importance of a fair decision. It is commonly known that strict conflict-solving goals are accepted in civil lawsuits: *pactum enim legem vincit et amor judicium* (an agreement supersedes law and love over the court's judgment).[133] However, this is not the sole goal of the civil adjudication process. The full discussion of the goals of the civil process must take into account the fairness of the adjudication. In the next paragraph II.B we will deeply examine the balance between these two purposes. Again, the Italian Reform will represent the optimal process that balances these two goals.

2. The Role of Judges in Evidence-Taking

What is the meaning of efficiency in evidence-taking? An in-depth analysis regarding the efficiency of adversarial evidence-taking has also been conducted by Judge Richard A. Posner through two possible economic models: a search model and a cost minimization model. First, Judge Posner tried to model evidence-taking as a problem in search, the solution to which corresponds to a utility-maximizing choice.[134] The evidence search process thus confers benefits and incurs costs. Judge Posner considered that the benefits, in economic terms, are a "positive function" of (i) the probability (p) that if the evidence is taken into account by the decisionmaker, the case will be decided correctly and (ii) the stakes (S) in the case. Therefore, the full expression of the benefits is p(x)S, where x represents the amount of evidence. But the formula must also consider the costs of the trial (c), which represents a positive function of x. Therefore, the net benefits are given by the following:

$$B(x)= p(x)S - c(x).$$

The optimum amount of the search [B (x) is equal to 0] satisfies P(x)S=c(x), meaning that the search should reach the point where the marginal cost and the marginal benefit are equal. The search model concludes that the quantity of evidence at the optimum point will

examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

133. *See* DAMAŠKA, *supra* note 13, at 113–14.

134. Posner, *supra* note 117, at 481–84.

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increase: (i) the higher the stakes in the case; (ii) the lower the cost of obtaining the evidence; and (iii) the greater the effect of evidence for increasing the probability of an accurate decision.[135]

An alternative economic model proposed by Judge Posner pertains to cost-minimization. In this respect, the social goal of the evidentiary process is to minimize the sum of the direct costs (such as lawyers', judges', and litigants' time) and the error costs (the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it).[136]

Following this line of Judge Posner's evidence-taking analysis, the costs and benefits and, therefore, the optimal kind and amount of evidence search vary based on the type of searcher (i.e., a professional judge or the lawyers). Speaking about professional judges, Posner suggests that even if a judge would seem, at first glance, a highly efficient searcher because of their selection, training, and experience, in-depth scrutiny leads to different insights. Indeed, judges have low incentives to do a good job because the results of their evidence gathering are challenging to criticize. Therefore, the outcome may not be as accurate. Moreover, the amount of search conducted by a professional judge may be too costly: the judge may be highly paid and usually needs several auxiliary judicial personnel to conduct the search, who also must be paid. Besides, Posner extends the drawbacks of a searching judge to the fairness of the decision. Since the judicial inquiry is commonly conducted behind closed doors, and the public's reliance on the judge's work is limited, the judge may issue a popular outcome, regardless of justice.[137] Posner suggests that, although economic analysis does not furnish any convincing basis for choosing between the two systems, adversarial evidence-taking, structured in a system where the evidence search is conducted by lawyers and presented to a jury, overcomes the drawbacks of a professional judge as searcher. Posner finds particular strength in the adversarial system in the following respects:[138]

(i) since lawyers may be paid by the litigants based on the success of the trial, their incentives to find evidence favorable to their clients and weaknesses in the opponent's evidence are high. Hence, if the stakes involved are at least a rough proxy of the amount of the social costs of an inaccurate decision, as the abovementioned equation describes, the amount of search conducted will be close to the socially optimal amount.

(ii) The private benefits of searching for evidence may lead to an excessively high or an excessively low amount of evidence compared to the social benefits. However, when the private search results in an amount

135. *Id.* at 481–82.
136. *Id.* at 484–85.
137. *Id.* at 487–88.
138. *Id.* at 488–97.

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of evidence that is socially excessive, judges, as in the American adversarial system, may limit the amount of search. Indeed, they can curtail pretrial discovery, limit the length of the trial, and exclude evidence at trial under Rule 403 of the Federal Rules of Evidence. Those types of rules thus have the function of limiting the external costs generated by an adversarial system. On the contrary, when the private search results in an amount of evidence that is socially insufficient, the rules governing the burden of production force them to collect more evidence that they independently would collect, ameliorating this issue.

(iii) Since jurors may not ask questions of the witnesses, trial by jury penalizes bad lawyers. It creates, therefore, an incentive to have a higher quality of lawyer than in a bench trial. In the latter, indeed, the judge compensates for lawyers' insufficiencies.

(iv) The competitive character gives more incentive to the searchers (the lawyers) to search for evidence with more commitment than in a system where searching for evidence is assigned to the judge. Moreover, it encourages lawyers to find the opponent's defects and weaknesses. In this sense, the adversarial system relies on the market more than non-adversarial systems, and the market is, by definition, a more efficient producer than the government.

(v) Even if the jurors may be less experienced than a professional judge, twelve inexperienced jurors with an experienced supervising judge may be better than a single experienced judge. Moreover, the jurors may be closer to witnesses and parties than a professional judge in terms of social background, occupation, education, and experience. This may render it easier to understand the credibility of witnesses.

(vi) Both jurors and judges may be subjected to cognitive errors. However, the trial by jury is protected from cognitive errors both by the presence of a gatekeeper (the judge) and by cross-examination. More specifically, since in a trial by judge, no one protects the decisionmaker from confusing or prejudicial evidence, trial by jury may proceed more rationally than trial by judge. Besides, the cross-examination is used by each lawyer as a method to show the deficiencies of the opponent's witnesses, which may induce jurors into error. Therefore, the error costs are reduced.

(vii) The jury trial, for its structure, is more easily monitored by the public than the bench trial. In cultures tending to distrust officials, this aspect enhances the social acceptance of the judicial decision.

Even if the models proposed by Judge Posner's analysis are highly persuasive with respect to the organization of the machinery of justice,[139]

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139. *See* Cesare Cavallini & Stefania Cirillo, *The Judge Posner Doctrine as a Method to Reform the Italian Civil Justice System*, 2 CTS. & JUST. L.J. 1, 8, (2020) (We tried to demonstrate how the failure of several Italian legal reforms was based on methodological errors, which led to

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his evidence-taking analysis is affected by a high level of generality.[140] To this effect, his analysis, since considering only "pure" systems (as opposed to a mixed system with an inquisitorial regime of judicial evidence gathering and an adversarial system of jury decision making), rests on assumptions about the evidence gathering process and its implications that appear reasonable but unrealistic. Concerning the economic models, Judge Posner's search approach seems to fail in reality when he considers the costs of the trial as a positive function of the amount of evidence: c(x). On the contrary, uncovering more evidence may prevent the trial process since the latter could be more costly than a pretrial search for additional evidence that may bring the matter to settlement. In other words, the greater the evidence at stake is—especially in a system where the judges may not narrow the inquiry to what they consider to be "relevant" for the verdict and have a merely passive role—the greater the likelihood of civil settlement. Therefore, it is erroneous to believe that the total trial costs increase with the increase of evidence. Moreover, since the increase of evidence may reduce the likelihood of an appeal, it avoids another direct prospective cost.[141]

Posner's drawback regarding the absence of "control" over judges' work and their lack of incentives to do a good job because the results of their evidence gathering are difficult to criticize is an odd assumption from the standpoint of a civil law jurist. Rather, the duty of judges to give reasoning for their decisions and, consequently, parties' right to challenge such decisions before a court of second instance should be a powerful deterrent against judicial misconduct. Moreover, even if lawyers are utility maximizers, they may secure higher hourly returns by briefly settling cases for smaller sums than by litigating them successfully for more considerable sums to obtain an accurate decision.[142] Therefore, the lawyers are not necessarily more motivated than a professional judge to seek out evidence.

Moreover, Judge Posner's analysis describes the common law as it is, by emphasizing the economic rationales of the adversarial structure,

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the inefficiency of the system itself. Accordingly, we proposed an alternative in methodology. For the mentioned purpose, we used the theories and methods studied by Judge Posner concerning the judiciary system and, more specifically, the theory of wealth maximization. In particular, we evaluated if the Posnerian methodology could be applied to the reforms to come from the Italian judiciary system in relation to the machinery of justice, like judges' appointment, methods to determine judges' salary, methods to determine judges' performance, methods to determine lawyers' fee, division into pretrial and trial system.).

140. Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1620, 1639–41 (2001).

141. *Id.* at 1641–52 (the author sketched a general discussion on the problematic aspects of Judge Posner's economic approaches to law of evidence).

142. *Id.* at 1655.

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regardless of the shortcomings (and the inefficient results) that a pure adversarial model may incur.

We will now show how an adversarial system in evidence taking, exemplified by the U.S. system, may lead to inefficient results.[143] We will also try to investigate if an adjustment of adversarial evidence-gathering may overcome those inefficiencies.

For the sake of the subsequent discussion, it is relevant to examine the concept of efficiency used by Professor Langbein and his insights. Professor Gross, discussing Professor Langbein's descriptive accounts,[144] explains how in a context like legal procedure, it is difficult to define a precise concept of efficiency. Namely, since procedural rules represent a significant portion of the legal system and an essential function of government, their notion of efficiency can be used in such a broad sense that it loses any analytic value. For instance, if efficiency is considered in this context as a function of its social utility, the social value of the efficiency becomes tautologically undisputable. However, describing what is "good" as efficient does not help to recognize the "good." For this reason, by using a more restrictive notion of efficiency, it is more helpful to describe the efficiency of legal procedure in terms of more direct costs and benefits. Even if Professor Langbein's results demonstrate German efficiency in terms of direct cost and benefits, he also concludes that the non-adversarial structure for evidence-taking has a powerful impact on the accuracy of the decisions, thus reducing error costs. In other words, Professor Langbein's analysis uses the abovementioned alternative economic model proposed by Judge Posner (cost-minimization), although he obtained different results.

Professor Langbein sketched his analysis by comparing the adversarial aspects of evidence-taking in the U.S. justice system and the non-adversarial elements of German civil procedure. He found that the differences between the German and U.S. systems in evidence-taking are mainly that the court, rather than the lawyers, assumes the main responsibility for taking and selecting evidence, although the lawyer exercises control over court work. According to Professor Langbein, the structure of adversarial evidence-taking positively impacts the accuracy of the decision by avoiding error costs.[145] He finds the judicial examination of witnesses and experts a crucial point for increasing the accuracy of the decision. He considers cross-examination at trial (and the relevant witness coaching preceding it) as a method of distortion of

143. Langbein, *supra* note 1, at 826–30.

144. Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 738–39 (1987) (Professor Gross accepts Professor Langbein's descriptive accounts as accurate but he argues that Professor Langbein has overvalued efficiency as a virtue in litigation. Thus, Gross's work is based on another theoretical defense of the adversary system).

145. *Id.* at 833–41.

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evidence. On the contrary, in the German system (as in other Continental systems of justice), there is a clear distinction between witnesses and parties after the parties' nomination of witnesses. Indeed, the method of the court questioning witnesses using a set of questions prepared by the lawyers but selected by the court avoids the distortions of the partisan coaching and examination practice. In this sense, Continental civil procedure preserves parties' interests in evidence-taking, leading to a more accurate outcome. The same happens with experts. In the German system (as in other Continental systems of justice), the experts are mainly judges' aids instead of witnesses. Contrary to the U.S. system where the parties use experts as witnesses by choosing and instructing them, the experts are selected, commissioned, and questioned by the court in the German or Italian tradition. For this reason, the experts' results do not suffer partisan manipulation and remain a valuable resource for technical issues. The essence of this structure is that the expert should be a neutral party without any stake in the lawsuit. Nevertheless, the litigants are protected too because they have rules for consultation, confrontation, and rebuttal of the experts' results, like the possibility to appoint their own experts for stimulating contradictory debate with the court-appointed expert. Moreover, lawyers' actively engaged in abusive discovery is time-consuming and represents an excessive direct cost of adversarial evidence-taking, which is minimized in Continental systems, where coaching of witnesses is banned.

Some scholars have laid down a severe critique of Professor Langbein's findings.[146] They argue, among other things, that some direct costs Professor Langbein elaborates on are incorrect mainly because coaching witnesses or experts represents a private cost that the parties deliberately choose to spend on the litigation.[147] Moreover, the structure of the Continental courts appears to be much more bureaucratized than the U.S. court structure. Thus, it resembles the U.S. agencies that are well-known for developing biases and failing to respect individuals' rights.[148] Besides, Professor Langbein's argument regarding distortion of witnesses and experts has been considered speculative since there is no data on the issue that supports it. Furthermore, the critiques also emphasized how evidence-gatherer judges may influence testimony and delegate the decision to the court-appointed expert.[149]

The mentioned critiques misrepresent the substance of Professor Langbein's findings. They seem to disregard that he did not present two pure systems; instead, by bearing in mind that both Continental and U.S. systems are adversaries in nature in civil procedure, he outlined the

146. Allen et al., *supra* note 121.
147. *Id.* at 709–11.
148. *Id.* at 714–15.
149. *Id.* at 727–45.

efficiency of a system where judges may have the responsibility for taking evidence at trial.[150] Moreover, Continental civil procedure is full of rules that deter the sort of judicial misconduct suggested by the Professor Langbein's critics. For instance, rules on the relevance of evidence, the transcript of the testimonies, the presence of adversaries at evidence hearings, liberal appellate review, and possibilities to challenge the court-appointed expert's report. These thoughts show that in light of the difficulties in finding a notion of efficiency applicable to evidence taking, the more fruitful method, in the law of evidence field, appears to be the cost minimization approach, elaborated by Judge Posner. However, since Professor Langbein's analysis is based on specific elements of the real structure of civil procedure, instead of abstract arrangements, it achieved more pragmatic and genuine findings.

As mentioned, the Continental system is less adversarial than the U.S. one, especially in the evidence-taking function. Even if the lawyers have the power to identify legal issues and sharpen legal analysis in both systems, the Continental structure for evidence taking, which reflects Continental tradition, avoids delays, costs, manipulation of evidence, and uncertain results by assigning evidence-taking to the judge. Thus, it positively impacts cost minimization and, overall, the efficiency of civil lawsuits.

B. *The Impact in the Efficacy of Civil Procedure*

What does the concept of efficacy mean in the context of civil procedure? Efficacy within legal contexts generally refers to the capacity of legal norms to realize the goals for which they were produced or enforced.[151] Hence, the discussion about the efficacy of procedural models entails investigating the views on the goals of adjudication, with the aim of understanding the impact of such views on the allocation of procedural control.

Many believe that the mission of the civil process is exclusively to resolve conflicts.[152] In the common law culture, the conflict-solving image of adjudication had a powerful impact on the rules of civil procedure. In the context of nineteenth-century liberalism, the "individualistic" thought carried out the idea that civil lawsuits are solely an extension of private transactions or dealings within the court. A prominent example of this line of thought is the adversarial approach to both criminal and civil justice, which is still leading in the United States'

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150. John H. Langbein, *Trashing the German Advantage*, 82 NW. U. L. REV. 763, 763 (1988).

151. Efficacy has different meanings within legal discourse. It may, e.g., refer to the capacity of legal norms to produce legal effects (e.g., rights, duties, liabilities, etc.) or to their capacity to realize the goals for which they were produced or to the fact that their addressees actually behave as they require of them.

152. *See* DAMAŠKA, *supra* note 13, at 110.

legal culture. The main idea of the adversary system is that the most appropriate way to solve disputes is to leave the parties' lawyers to compete with each other without constraints: the so-called *sporting theory of justice*.[153] The judge, therefore, is merely entrusted to decide the outcome of the competition. The conflict resolving objective also impacted Continental civil procedure where fact-finding must be carried out within the boundaries of the litigation set by the parties. The first conclusion is that if the aim or function of justice is exclusively to solve disputes, the adversarial model is the most effective.

However, the conflict-solving image of adjudication focuses on only one function in the process. As Professor Taruffo emphasized, there is no correlation between a resolved conflict and the fairness of the adjudication.[154] An unfair adjudication may be effective in terms of conflict solving (the conflict is essentially solved) while a fair decision may not end a dispute.[155] Instead, if the goal of the adjudication is solely to solve conflicts, the possibility that the adjudication may be unfair is *de facto* irrelevant. Hence, as a conflict may be resolved by an unfair decision, it may be solved through an erroneous factual inquiry. Therefore, the value of truth in adjudication is denied, and the process gets a high level of efficacy if it enforces its prominent function to solve disputes correctly, regardless of the accuracy of the decision. These assumptions suggest how, on the contrary, finding the truth may be another aim or function of a trial.[156] In this regard, it may be helpful to review what rules govern the introduction of the lawsuit, with the relevant delimitation of claims and facts and what rules regulate the methods for evidence taking.

1. Forcing the Litigants to Show Their Cards Suddenly as a Truth-Searching Tool

In the previous section, we analyzed how pretrial devices induce parties to settle. However, this may raise doubts about the fairness of this mechanism in lawsuits when the plaintiff commences a meritless or

153. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404 (1906) (the phrase was unquestionably a cliché when the Author used it in 1906. Nonetheless, this cliché has the quality of referring to a widely known issues which regards the drawbacks of the adversarial culture).

154. MICHELE TARUFFO, LA SEMPLICE VERITÀ: IL GIUDICE E LA COSTRUZIONE DEI FATTI [THE SIMPLE TRUTH: THE JUDGE AND THE CONSTRUCTION OF FACTS] 107 (2009).

155. *Id.*

156. *See* DAVID W. PECK, THE COMPLEMENT OF COURT AND COUNSEL 9 (1954) (noting "truth and . . . the right result" as not merely "basic" but "the sole objective of the judge"); *see also* Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 567 (2013) ("We begin with a simple, but oft-neglected, observation: The coin of the legal realm is truth."); Frankel, *supra* note 3, at 1032 ("our adversary system rates truth too low among the values that institutions of justice are meant to serve").

specious lawsuit. Discovery costs might thus force the defendant to settle, even if adversarial claims are weak. This result is entirely consistent with a process geared only to solving conflicts. This conflicts with a process aimed at seeking a just decision. A counterbalance to this drastic consequence is provided by the rules governing the formulation of claims. Such rules are substantially similar in many legal systems.[157] In the United States' structure, pleadings allow parties and the judge to understand the controversy through an exhaustive set of facts. Indeed, pleading after the landmark Supreme Court cases of *Twombly*[158] and *Iqbal*[159] is founded on factual sufficiency, with the aim of screening out meritless cases that otherwise might impose useless discovery costs on defendants.[160] More specifically, *Twombly* imposes "plausibility" standards on factual allegations that, according to *Iqbal*, judges should assess by focusing their "judicial experience and common sense."[161] Moreover, *Iqbal* provides that courts must consider whether a factual allegation is conclusory or nonconclusory for purposes of pleading requirements.[162] In short, if an allegation is nonconclusory, the court must accept it as true. However, if an allegation is conclusory, the court does not have to accept it as true. Then, the court must examine the nonconclusory allegations together to determine whether they show a plausible entitlement to relief.[163] Therefore, the claim must always be strongly supported by factual details alleged by parties in the complaint. This means that the complaint must demonstrate to stand on its own

157. *See generally* Cesare Cavallini, *Determination of the U.S. Pleading from the Civil Law Perspective*, 21 WASH. U. GLOB. STUD. L. REV. 155 (2022) (discussing the role of pleading between civil and common law countries following landmark Supreme Court cases *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*).

158. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

159. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

160. Rosenberg & King, *supra* note 98, at 589. *See generally* Stephen N. Subrin, *Fishing Expedition Allowed: The Historical Background of 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

161. *Iqbal*, 556 U.S. at 679. The literature on the meaning of plausibility is massive. *See, e.g.*, Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. 135, 137–38 (2007); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008); Robert. G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 864–65 (2009). *See generally* Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451 (2010); Scott Dodson, *New Pleadings, New Discovery*, 109 MICH. L. REV. 53 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologist*, 60 UCLA L. REV. 1710 (2013); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 287 (2013).

162. *Iqbal*, 556 U.S. at 678–80.

163. *See* Dodson & Klebba, *supra* note 2, at 6.

allegations.[164] Then, after having passed the sufficiency standard, the party that has pled specific facts will be required to disclose the specific evidence on which it intends to rely concerning these allegations (documents, witnesses, and experts). In this respect, the combination of strict rules of pleading and compulsory disclosure reduces the further exchange of evidence. A party must show its cards suddenly, so to speak. The approaches to pleading involve trade-offs between several values.[165] For instance, there could be a system that does not require any scrutiny at the pleadings phase, instead performing the merit screening function in some other pre-trial phase.[166]

For the purposes of this section, the first question is whether American pleading, as formulated after *Twombly* and *Iqbal*, is a good tool for screening meritless claims. Firstly, it must be noted that pleading's role and content after the abovementioned landmark cases might seem to be even less adversarial than a civil law system. It indeed enhances an intense and discretionary evaluation by the court to eventually dismiss the case.[167] Nevertheless, even with the non-adversarial features we sketched, American pleading does not betray the distinctive structure of the United States' procedural civil justice, namely the comprehensive pretrial devices. On the contrary, it affirms these devices as the plausibility screening may be passed with evidentiary support at the pleading stage.[168] It could allow the court to inquire at the introductory stage whether the plaintiff has sufficient evidence to prevail on the merits.

Twombly explained that the screening mechanisms are required to protect defendants from discovery costs since judicial supervision, control of discovery, and summary judgment have proven to be largely ineffective. Without this standard of sufficiency, "the threat of discovery expense will push cost conscious defendants to settle even anemic cases."[169] In this respect, the factual sufficiency standard is a good proxy for meritless claims, and it thus helps in achieving both fairness-related goals, other than for the reduction of discovery costs. However, these standards may bring unfair results related to information asymmetry issues. Not all plaintiffs will have all facts in hand and inevitability lose against a defendant's motion to dismiss, but they may be unable to bear

164. *Twombly*, 550 U.S. at 557.

165. Scholars defined several purposes of pleadings like notice-giving, process-facilitating, and merits-screening. *See, e.g.*, Richard Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1755–56 (1998); Spencer, *Plausibility Pleading*, *supra* note 161, at 431; Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554–57 (2002).

166. *See* Steinman, *supra* note 161, at 1348.

167. *See* Cavallini, *supra* note 157, at 155.

168. *See* Steinman, *supra* note 161, at 1350.

169. *Twombly*, 550 U.S. at 559.

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the costs of getting information without formal discovery.[170] A possible solution to this asymmetry issue could be found in a classic non-adversarial device, the managerial role of the judge. In other words, judges might use the tools that the Federal Rules already give them for managing the discovery process,[171] by restricting discovery in the pretrial phase, for example. By relying heavily on judicial experience and common sense, this approach avoids the guillotine of the dismissal that would definitely deny access to discovery while mitigating the cost of pointless discovery.[172] Concerning these adjustments, the strict truth-oriented aim seems to be reflected by the new plausibility standards. In this respect, the plausibility of the claim rests on strong evidentiary support at the pleading stage to show the judge that the alleged facts are to be considered true. To continue the pretrial phase, the judge must test the pleading's factual allegations as to plausibility (and, thus, as true). This drives the process to the purpose of reaching a (fair) decision on the merits and quickly as in the case of unmeritorious claims. An eloquent author highlights how "truth in pleading means, of course, the existence of a reasonable basis in fact."[173]

Consequently, in the path towards fair adjudication, the pretrial phase plays a central role. Every issue at stake in the trial involves both sides' contradictory assertions that may not be true. Therefore, since the leading role of pretrial is to ascertain before trial what issues need to be tried, it represents a preliminary moment of examination of the evidence that the

170. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076–78, 1085 (1984) (observing that settlement may be unfair if the litigants have unequal resources and that it prevents the generation of precedent); Dodson, *supra* note 161, at 67 ("not all plaintiffs will be fortunate enough even to have these facts in hand. Often, they will either be unable to bear the cost of prefiling investigation or be unable to get the information at all without formal discovery. Though they may have actually suffered cognizable harm, these plaintiffs will not be able to survive a motion to dismiss without formal discovery and will not be able to get access to formal discovery without surviving a motion to dismiss."); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 589 (noting that a strict pleading standard "risks screening out meritorious cases when investigation costs are too high for plaintiffs to obtain the necessary information before filing"); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1263 (2008) ("because of information asymmetries, when a heightened pleading standard is imposed, some meritorious cases will not be filed and, further, some that are filed will be dismissed (or settled for marginal value).").

171. *See* FED. R. CIV. P. 16(c)(2)(F) (authorizing the court to "take appropriate action on . . . controlling and scheduling discovery"); FED. R. CIV. P. 26(b)(2) (authorizing the court to order limitations on discovery).

172. *See* Steinman, *supra* note 161, at 1353; *see also* Dodson, *supra* note 161, at 86–88 (providing several solutions to asymmetry issue, e.g., by relying on evidence, he proposed allowing pre-suit discovery in case of plausibility defects, meaning allowing the use of limited discovery either before suit or before dismissal).

173. Edson R. Sunderland, *Growth of Pre-Trial Procedure*, 44 COM. L.J. 406, 407 (1939).

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parties have at their disposal.[174] Indeed, by pretrial discovery, each party can test the substantial basis for the positions asserted by their adversaries. Thus, such a system brings each party to circumscribe and select the fundamental points of controversy.[175] If this selection does not result in dispute settlement, it will nonetheless supply a basis for the elimination of issues that are so insubstantial as to deserve no consideration at the trial. Information obtained after the pretrial phase reveals the actual contested points of the controversy, helping to prepare the trial judge and counsel on each side for the best possible trial on such issues. Thus, pretrial conferences enables the judge to ensure that "neither surprise nor technicalities win the battle."[176] To this end, a judge adequately informed of the issues on which they will be called on to rule has the desirable effect of decreasing errors of law and minimizing appeals.[177]

In conclusion, a system that provides compulsory disclosure in an introductory stage, along with strict rules of pleading and a judge to properly govern pretrial discovery, appears oriented to carefully ascertain the truth. Despite the structural differences between the adversarial and civil law systems, shared goals in these opposed structures may be gathered by studying each feature of the two systems and, subsequently, the effort to reduce disparities. This confirms how opposite procedural arrangements are not irreconcilable.

2. Judge as Evidence-Taking Director

Among those who support the idea that truth is a necessary condition of justice, some scholars believe that the adversarial procedure for evidence-taking is the most effective way for an accurate and truth-oriented factual inquiry.[178] Divergences for evidence-taking regard mainly the selection, preparation, examination, and cross-examination of witnesses and experts. To this effect, cross-examination, which is the most competitive procedural rule for examining witnesses (or experts) and the hallmark of the adversarial system, is considered the most effective way of finding the truth.[179] This is because, on the one hand,

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174. *Id.*

175. *Id.*

176. Clarence L. Kincaid, *A Judge's Handbook of Pre-trial Procedure*, 17 F.R.D. 437 (1955), *reported in* SHELDEN D. ELLIOT & DELMAR KARLEN, CASES AND MATERIALS ON PLEADING AND PROCEDURE BEFORE TRIAL 322, 342 (1961).

177. HANS ZEISEL ET AL., DELAY IN THE COURT 141–54 (1959).

178. *See, e.g.*, TWINING, *supra* note 119; WIGMORE, *supra* note 119.

179. 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIALLY APPLIED TO ENGLISH PRACTICE 212 (1827) ("Against erroneous or mendacious testimony, the grand security is cross-examination . . . ."); Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 96 (1981) (in 1857 an American

parties' stakes in finding a high quantity of evidence favor the search for truth. On the other hand, since humans are fallible, adversarial procedures, stimulating the discussion of different opinions on the same fact (being true or false), represent a more reliable method than non-adversarial ones to find the truth.[180]

However, other scholars believe that mitigation of parties' powers for fact-finding may overcome adversarial distortion or manipulation of the evidence and result in a more effective search for truth.[181] According to this view, one of the partisan factual inquires may not necessarily be true; and therefore, choosing the most appropriate inquiry may not imply a truth-oriented decision. As one United States judge stated, the adversary process "often achieves truth only as a convenience, a byproduct, or an accidental approximation."[182]

Moreover, adversarial procedures commonly lead to distortion of evidence, especially by the lawyer's coaching of witnesses and partisan experts, as outlined in a previous section.[183] In this respect, the judge should not represent, even in a trial by jury, a mere moderator but "the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."[184] Thus, the effective and just intervention by the trial judges in the adversarial fight over the facts does not mean a betrayal of their impartiality. The gathering of facts and the taking of evidence represent two different stages of the process. In this sense, while there is no doubt that the investigative power of the judges cannot cover the selection of facts, this does not mean that their role in managing the taking of evidence is not desirable.

But there is more. Allocating to the parties all responsibilities for evidence-taking brings the need to assure fairness in their procedural interaction.[185] Thus, the emphasis must shift from the problems of cognition to the concern that parties and their counsel abide by the rules

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commentator called cross-examination "'at once the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity of mortals'" (quoting *Of the Disqualification of Parties as Witnesses*, 5 AM. L. REG. 257, 263–64 (1857))); WIGMORE, *supra* note 119, at 1367 ("[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.").

180. Allen et al., *supra* note 121, at 705 (criticizing The German Advantage and favorably comparing U.S. civil procedure to that of Germany); John C. Reitz, *Why We Probably Cannot Adopt The German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 988 (1990) (offering a less aggressive criticism of The German Advantage).

181. *See, e.g.*, Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 729 (2007); Susan Haack, *Truth and Justice, Inquiry and Advocacy, Science and Law*, 17 RATIO JURIS 15, 15–26 (2004).

182. Frankel, *supra* note 3, at 1037.

183. *See supra* Section II.A.2.

184. Quercia v. United States, 289 U.S. 466, 469 (1933).

185. DAMAŠKA, *supra* note 13, at 121–24; *see also* Langbein, *supra* note 1, at 843.

concerning a fair dispute. In other words, every epistemically optimal evidence-taking system is acceptable only insofar as it does not compromise the ultimate goal or function of justice: equity. To this effect, one of the most troublesome aspects of adversarial practice is the "inequality of counsel" issue, i.e., the disparity in quality of legal representation. Indeed, the fairness of adversarial contradictory debate is inevitably dependent upon reasonable equality of arms between the parties. Hence, the adversarial procedure favors the party with the stronger and more talented lawyers. It implies parties' formal equality, but it fails to achieve goals of substantive equality. From our perspective, this equity issue may not be prevented merely with an improvement of education and certification of lawyers, as suggested by a prominent author.[186] In other words, this is not a matter of a lawyers' good or bad training but an inevitable and inborn distortion of an adversary system. Even if all lawyers were excellent and qualified ones, the absence of control by an impartial third party will result in the lower quality lawyers losing, regardless of whether or not his or her statements are truth-seeking. It is also merely illusory to think of the education of lawyers as truth searching oriented. The advocate must not lie—it is an essential professional rule. Nevertheless, this rule does not mean that the lawyer must search for the truth of facts. Indeed, in this sense, aiming for a lawyers' reconstruction of the facts aimed more at seeking the truth than at defending the client could construct a breach of professional etiquette as privilege is indispensable for effective representation. Therefore, the duty to pursue the truth must rest with the judge. However, the only way by which judges can pursue this duty without becoming case investigators and, therefore, without affecting their impartiality is only by controlling (and conducting) the taking of evidence. The remedy to the drawbacks of the adversarial system, such as distortion of evidence or inequality issues, may not be the introduction of an unusual duty on lawyers (the search of truth), but instead to impose the typical duty of the judge (the duty to issue a fair decision).

The lawyers' adversarial drawbacks might be prevented by rules that assign to the judge duties for directing the evidence-taking process. These rules, typical of the Continental civil procedure, entrust the judge with the duty of admitting the evidence presented by the parties if it is relevant to the adjudication. Moreover, they allow the judge to conduct the evidence-taking process with some procedural techniques, like the court's examination of the witnesses, the preclusion for the lawyers from having previous contact with their witnesses, and the possibility of a neutral expert whose duty is to aid the court in finding the truth.

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186. Frankel, *supra* note 3, at 1055.

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Elsewhere, reforms in England and other common law countries have confirmed these findings by moving the procedural system away from the traditional adversarial system.[187] Examples are the abolition of the jury for civil cases; the virtual abolition, for civil cases, of the rule against hearsay evidence; the possibility for judges to dispose summarily of a case, on their own initiative, if they consider that the claim or defense has no real prospect of success; judges' power to give directions on the issues on which they require evidence; judge's devices for persuading the parties to resolve their disputes outside of court.

The reduction of the parties' control over the evidence by no means deprives the parties of their right to determine the substance of their dispute or devise a procedure equivalent to that of the police officer. Instead, it means that rather than assume complete judicial control of the case, a managerial judge, might limit distortions in evidence taking, thus reducing the negative impact of these distortions on the truth of the inquiry and the fairness of the adjudication.

C. *Some Preliminary Conclusions*

The preliminary phase assumes a different role in Continental civil procedure than that played in Anglo-American systems. In non-adversarial systems, it does not function as a comprehensive stage for discovering all facts. On the contrary, that is the function of the preliminary phase in adversarial structures where the parties' discovery arguments assume a prominent role. In the latter, according to Judge Posner's analysis, the preliminary phase, affects the litigant's incentives and favors settlement (or another way to reach the final decision quickly). For this reason, a preliminary phase, left to parties' struggle over facts, appears a good tool for seeking efficiency.

Nevertheless, a preliminary phase of a lawsuit where the evidentiary material must be collected and a general duty of comprehensive disclosure is provided for does not necessarily mean a division between pretrial and trial. In other words, the efficient role of a comprehensive preliminary phase (i.e., to induce the parties to settle or find another way to reach a final decision quickly, and ascertain before trial what needs to be tried) may also be exercised in a continuous process. In this respect, as the last reform of the Italian system shows, the crucial distinction between the discovery and taking of evidence phases, typical of an adversarial system, is not irreconcilable with a proceeding that works in different installments, as a classic non-adversarial procedure might.

Instead, in a Continental non-adversarial scenario, judges have powers over evidence-taking during the trial, interrogating witnesses, for instance. There, we tried to support that judicial powers over evidence

187. Jolowicz, *supra* note 118, at 286–89.

collection may thus avoid or, at least, limit the drawbacks of party control of the evidence-taking process in the adversarial system. To do so, we used the cost minimization model elaborated by Judge Posner, but we supported different conclusions drawn by Professor Langbein. We figured out how some non-adversarial features regarding evidence-taking may impact the efficiency of the civil administration of justice positively by minimizing both direct and error costs. They indeed avoid, delays, costs, manipulation of evidence, and uncertainty of adversarial evidence-taking.

However, early disposition or conflict solving goals are not always consistent with other values of the relevant substantive law: searching for truth and ensuring substantive justice. Most civil disputes concern matters of fact. For this reason, the focus on eliminating untrue facts from trial must start from the introduction of the lawsuit. In this regard, the search for truth starts with the screening tools for pleadings, which brings down a dismissal hatchet on specious claims. Another moment of focus on the truth occurs during the pretrial stage that aims at delineating the boundaries of the dispute. This stage constitutes the first moment of examination of the evidence by the judge, who must save only those necessary. In this initial search for the truth, the judge plays a crucial role, aimed on the one hand at avoiding distortions brought about by information asymmetries, thus preventing an unfair dismissal, and on the other hand, at limiting unnecessary costs of discovery through tools that the Federal Rules already give them for managing the discovery process. Furthermore, since searching for truth and ensuring substantive justice are aims and functions of justice, a procedure that places less emphasis on the freedom of the parties in the taking of evidence at trial avoids the distortions caused by the adversarial techniques for evidence-taking, like the preparation and examination of witnesses and experts. Thus, a managerial judge in evidence-taking may reduce the negative impact of these distortions, allowing truth-oriented and fair decisions and enhancing the efficacy of the adjudication overall.

III. Towards a Semi-Adversarial Model: The Italian Reform of Civil Procedure

A. *The Italian Civil Procedure Reshaped: Reasons and Purpose*

The compelling National Recovery and Resilience Plan (NRRP), requested by the EU and drafted by the Italian Government to obtain funds for responding to the COVID-19 pandemic crisis,[188] acknowledges

188. On May 5, 2021, Italy presented the National Recovery and Resilience Plan (NRRP) as part of the Next Generation EU (NGEU) program, namely the 750 billion Euro package that the European Union negotiated in response to the pandemic crisis. The main component of the NGEU

the civil justice reform as one of the main strategic tools.[189] The inclusion of the civil justice reform in the NRRP objectives is justified by the inefficiency of the justice system, whose lengthy proceedings hurt businesses. The Italian civil justice inefficiency in terms of time to issue a final decision is not a new issue.[190] To remedy this, since the last decade of the past century, the Italian legislature issued several reforms, mainly by amending the Code of Civil Procedure as it was framed in 1942.[191] This long-reforming, affected many parts of the Code of Civil Procedure,

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program is the Recovery and Resilience Facility (RRF), which has a duration of six years, from 2021 to 2026, and a total size of 672.5 billion Euro interest loans. The NRRP, envisages investments and a consistent reform package. *See National Recovery and Resilience Plan*, ITALIAN GOV'T, https://www.governo.it/sites/governo.it/files/PNRR_0.pdf [https://perma.cc/4B4Y-UJ44] (last visited Mar. 14, 2023) [hereinafter *Official NRRP*]; *see also National Recovery and Resilience Plan (NRRP)*, MINISTRY ECON. & FIN., https://www.mef.gov.it/en/focus/The-National-Recovery-and-Resilience-Plan-NRRP/ [https://perma.cc/PTB6-FUWF] (last visited Mar. 14, 2023).

189. *See Official NRRP*, *supra* note 188, at 44 (amongst the reforms, the NRRP provides a justice reform to reduce the length of legal proceedings, especially civil proceedings, and the heavy burden of backlogs).

190. *See generally* Cavallini & Cirillo, *supra* note 139, at 40–44 (for a discussion on the matter, along with empirical data).

191. Reference is made, e.g., to Legge 26 novembre 1990, n.353, *in* G.U. Dec. 1, 1990, n.281 (It.), that introduced, among others, a rigid system of time-limits (the so-called "preclusioni") to litigants' defensive activities and the compulsory conciliation attempt by the judge at the hearing of parties' first appearance (the so-called "tentativo di conciliazione obbligatorio"). Then, the Decreto legislativo 7 gennaio 2003, n.5, *in* G.U. Jan. 22, 2003, n.17 (It.), created a new model for Company and Commercial Proceedings (the so called "rito societario"), oriented to a high adversarial system. This model provided that the lawyers might define the exact boundaries of the dispute without any judge's control and, only after this activity, requested the judge to fix the first hearing. The *rito societario* failed in practice. Therefore, the Italian legislator opted for a mixed solution. The competition law (*Legge competitività*), i.e., Legge 14 maggio 2005, n.80, *in* G.U. May 14, 2005, n.111 (It.), strengthened the powers of the judge but also gave the parties the possibility to choose the *rito societario* for every type of case. The latter reform reunited also the hearing of the first appearance of the parties and the hearing for the first discussion of the case and reinforced the system of preclusions previously provided. Then, it deserves to be mentioned again that L. n. 80/2005 (It.) repealed the compulsory conciliation attempt. Several years later, Legge 18 giugno 2009, n.69, *in* G.U. June 19, 2009, n.140 (It.), repealed the *rito societario* and introduced relevant amendments to the C.p.c. More specifically, L. n. 69/2009 (It.) confirmed a much less adversarial imprint and conferred other powers to conduct the dispute. The preclusions introduced with the 1990 reform remain unchanged, as the system of three pleadings, and has also been strengthened in some respects. It also provided the calendar of the process for the management of the preliminary stage, based on the French model, and a new type of proceeding (so-called "rito sommario di cognizione") to simplify the process for certain types of disputes. Some reforms also restricted the judicial review procedure (before the Court of Appeal and the Supreme Court). Between 2005 and 2009, the terms to challenge the decision have been restricted and certain discovery preclusions in the process before the Court of Appeal have been enhanced. Then, Legge 7 agosto 2012, n.134, *in* G.U. Aug. 11, 2012, n.187 (It.) imposed the so called "filters" during the Court of Appeal and the Supreme Court proceedings ("*filtri in Appello e in Cassazione*") apt to block unfounded or unjustified requests of review.

as they were, for instance, the introduction of a strict preclusion system for parties' activities and some restrictions of paths for judicial review. However, the legislature never addressed, at least with respect to the reforms after those in 1990, the comprehensive structure of civil proceedings in such a revolutionary way. Indeed, the 1942 Italian Code of Civil Procedure, even revised many times, has always conformed to the traditional (and Continental) framework due to a judge-centered system that governs the parties' activities from the preliminary hearing (after the introductory acts of the lawsuit). More specifically, before the reform under discussion, the delineation of the *thema decidedum et probandum* (i.e., the issues to be decided and proved) occurred through a long temporal sequence, following the first hearing and usually by means of three pleadings, with notable judicial power and control. Thus, this delineation occurred at a time when the judge (and his governing powers) had already and actively taken control of the case.[192]

Nonetheless, the reality soon changed for several reasons. On the one hand, the growing number of civil disputes, often complex and multiparty, the economic evolution, and the continuous increasing of new litigation matters resulted in the explosion of the number of claims brought before the courts. On the other hand, the preservation of the judiciary's structure, especially in terms of the small number of judges and the lack of successful reinforcement with alternative dispute resolution tools, unavoidably carried out the progressive increase of inefficient results and the tangible decrease in the quality of decisions.

Things change again. While the main reason for the last reform remains the increasing inefficiency of the judiciary system, the purpose was formally to achieve a forty percent reduction in the current duration of legal proceedings within five years.[193] With the Law passed on November 25, 2021, number 206[194] and the relevant implementing decrees, i.e., Legislative Decrees No. 149/2022, 150/2022, and 151/2022 (hereinafter, the "Reform"), the Italian Government dealt with the just mentioned daunting task through several measures. The approach to civil justice reform undoubtedly requires measures on many fronts, starting with reorganization of the judiciary and implementation and renewed

192. Reference is made to those rules governing the first instance before the 2021 reform, i.e., Law Number 206/2021. Legge 25 novembre 2021, n.206, *in* G.U. Dec. 9, 2021, n.292 (It.) , and the relevant implementing decrees, i.e., Legislative Decrees No. 149/2022, 150/2022, and 151/2022 [hereinafter Reform]; *see also* discussion *supra* note 33.

193. *See Official NRRP*, *supra* note 188, at 95.

194. This Law is an enabling act (Legge Delega). This legislative tool consists in the Parliament's delegation of the exercise of the legislative function to the Government by fixing specific and clear principles and criteria to which the Government must adhere.

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access to the legal professions, especially for lawyers.[195] Moreover, it requires a structural reform of civil proceedings providing, in particular, a new role for the lawyers and the judge in the process. These changes should influence both the incentives for settlement of the dispute and the quality of decisions (in other terms, impacting both the efficiency and the efficacy of civil proceedings).

The great virtue of the Reform is that it has defined measures for affecting both aspects, i.e., the structure of the judiciary system[196] and the structure of the civil proceeding.[197] However, our attention focuses on the structural amendments on the civil proceeding pattern and, in particular, rules affecting the definition of facts and evidence to show how its final results resemble a revolutionary approach in procedural structure in a global context.

B. *The Semi-Adversarial Model as a Challenging Choice*

The Reform builds a scheme of civil proceedings entirely new and away from the traditional Continental framework. For this Article, it is worth noting that one of the main features of this Reform is implementing a semi-adversarial model, impacting mainly three related aspects. First, a new approach to dispute management among parties and their respective attorneys emerges. Secondly, the judges' different approaches and commitment since their first appearance on the scene arises. Finally, the usual practice of the first hearing as something meaningless has been refused. This practice traditionally focused the first hearing only on issuing the judges' order for granting the time limits for the determination of the *thema decidendum et probandum*, that is, for filing the three pleadings thereby finalized.[198]

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195. *See* Cavallini & Cirillo, *supra* note 139, at 43–44 ("a possible reform of the civil justice will be identified in the rules that regulate the framework of the civil judiciary system. More specifically, the rules that regulate the job and the career of lawyers and judges, as well as the incentives to settle for litigants (affecting their stakes in disputes rather than forcing them to settle).").

196. Among the rules regarding the structure of the judiciary system, a significant new feature is the Office of the Trial (Ufficio del Processo). This is a structure aimed at the improvement and technological innovation of the justice service. In particular, the Office of the Process consists of an increase in administrative personnel with different backgrounds and information tools aimed at assisting the judge in several activities.

197. The rules regarding the structure of the civil proceeding regards mainly (i) a revision of the fact-gathering norms; (ii) the prominent use of ADR methods, (iii) a more efficient discipline of arbitration, (iv) the discipline of review before the Court of Appeal, (v) a simplification of the enforcement proceeding, (vi) more effective use of telematics tools in the process, (viii) the reform of proceedings in the field of personal and family rights and a new specialized court for persons, minors and the family.

198. C.p.c. art. 183 (the period of time to file the three pleadings began, before the Reform, on the date of the first hearing); *see also* discussion *supra* note 33.

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For the sake of establishing context, we will start by delineating the new role of the first hearing. In this respect, the Reform moves toward a new preeminence of the first hearing as the primary tool to quickly address the dispute toward various types of final dispositions, only one of which is the traditional adjudication. The first hearing may now play this new role since the boundaries of the facts and evidence are fixed before this hearing. In other words, at the first hearing, the *thema decidendum et probandum* has already been established. Following the Reform, indeed, the plaintiff's complaint must contain clearly and specifically the object of the claim, the description of the factual and legal grounds of the claim and the relevant conclusions, the non-documentary evidence requests and the filing of the documentary evidence.[199] Then, the defendant's complaint requires a clear and specific statement of the defendant's answers to each claim asserted, along with the non-documentary evidence requests and the filing of the documentary evidence.[200] Then other pleadings may be filed where (i) with the first pleading, the plaintiff may file claims and objections to challenge defendant's complaint; may specify and modify its claim and conclusion already filed, and may file additional documents or non-documentary requests; (ii) with the second pleading, the defendant may specify and modify its claim and conclusion already filed and may file additional documents or non-documentary requests; (iii) with another pleading, both parties may reply to the claims and objections raised by the counterparty and may indicate the evidence in rebuttal.[201] After the filing of these pleadings, the first hearing takes place and the judge enters the case.

One immediately appreciates the evident detachment from the previous model. In the previous model, following the introductory complaints (the plaintiff's pleading and the defendant's answer), there was the first hearing where the judge entered the case and exercised the following powers. First, the judge highlighted the formal defects of the dispute. Secondly, the judge asked for the necessary clarifications and indicated the issues she or he may decide, *sua sponte*, that need to be addressed. Finally, the judge decided whether to grant, at the parties' request, three pleadings for each party which had the scope of defining the *thema decidendum et probandum*, whose time for filing began to elapse after the first hearing. Now, the latter pleadings, in a reduced number, take place before the first hearing.[202] Moreover, the Reform imposed a duty on the parties to appear personally at the first hearing. This duty is justified by the re-establishment of the judge's compulsory

199. Reform, *supra* note 192, § 1, ¶ 5, (b)–(c).
200. *Id.* § 1, ¶ 5, (e).
201. *Id.* § 1, ¶ 5, (f).
202. *See* discussion *supra* note 33.

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conciliation attempt at the first hearing,[203] which was previously repealed in 2005.[204] A party's failure to personally appear at the hearing without justified reasons may be evaluated by the judge negatively and, more specifically, as circumstantial evidence.[205]

The solution brought by the Reform allows for a comprehensive first hearing and a more well-informed discussion between the parties. If the subject matter of the dispute, the documentary evidence, and the non-documentary requests for evidence are straightforward and specified at the first hearing, without any possibility of amendments or additions, this hearing assumes essential functions.

First, the judge continues to have the power to dismiss the case for formal reasons, including for incomplete pleadings.[206] However, differently from the old model, this power is exercised on a clearer basis, since the judge has at their disposal other pleadings in addition to the introductory complaints. This power will be inevitably more pervasive.

Secondly, the first hearing could play a successful role in settling the dispute. The new compulsory conciliation attempt cannot be compared to the previous one, which was repealed because it was unsuccessful. The repealed compulsory conciliation attempt occurred at a stage that was the first hearing when the parties had not yet revealed their cards fully. Consequently, it soon became a mere unsuccessful formality. The Reform provides the parties with a clear picture of the claims and evidence presented and requested by the other party at the new first hearing. The possibility of adding new evidence, requesting new non-documentary evidence, or defining their claims having elapsed. This may meaningfully affect the parties' incentives to settle the dispute. In this sense, by relying on the Posnerian model we described in section II.A.1, a compulsory conciliation attempt thus structured, depending on

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203. Reform, *supra* note 192, § 1, ¶ 5, (i)(1).

204. For a brief description of the legislative path of the compulsory conciliation attempt *see* discussion *supra* note 191.

205. Reform, *supra* note 192, § 1, ¶ 5, (i)(1); *see also* C.p.c. art. 116(2), *translated in* GROSSI & PAGNI, *supra* note 50, at 161 ("the judge may infer circumstantial evidence from the answers that the parties give to him, pursuant to the following article, from their unjustified refusal to consent to the inspections that he ordered and, in general, from the parties demeanor during the proceeding").

206. In particular, Italian law focuses on the case of incomplete pleading, allowing the judge to require additional allegations of facts. *See* C.p.c. art. 164, *translated in* GROSSI & PAGNI, *supra* note 50, at 190 ("(4) The complaint is null also where the [requirement] under number 3 of Article 163 [i.e., the indication of the object of the claim] lacks or is completely uncertain, or if the description of the facts under number 4 [i.e., the description of the factual and legal grounds of the claim and the relative conclusions] of the same article lacks. (5) The judge, [having] . . . assessed the nullity of the complaint pursuant to the previous paragraph, assigns to the plaintiff a final time limit for renewing the complaint or, if the defendant has appeared before the judge, a time limit for [supplementing] the claim. The waivers [that] occurred, and the interests vested before the renewal or the integration shall be saved.").

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the dispute, is likely to increase the defendant's maximum offer or decrease the plaintiff's minimum offer, thus increasing the likelihood of settling the dispute.[207] If a settlement is not reached, the renewed first hearing could result in one of the following outcomes. The judge may issue decisions on the non-documentary requests, prepare the subsequent trial calendar, and set a hearing to take evidence within ninety days.[208] However, after the taking of evidence, or at the first hearing if the case can be decided without any taking of evidence, the judge has two further alternatives. The judge may schedule a hearing to discuss the case and issue the decision at the outcome of that hearing.[209] Otherwise, the judge could decide to proceed by the traditional decisional method (by ordering the filing of closing pleadings and then issuing a decision).[210] Nonetheless, the reform confirmed that until the judge remands the case to the decisional phase, she or he may formulate a proposal of conciliation to the parties.[211]

Thirdly, if initial pleadings with a high degree of sufficiency on the set of facts and a comprehensive first hearing do not bring settlement, they nevertheless have positive effects in terms of efficacy in the administration of justice. More specifically, the precise circumscription of the subject matter of the dispute, as we described in section II.B.1., helps to remove from the process the facts that are not valuable to the controversy. In this way, they properly orient the judge to make a just decision.

Finally, since the judge conducts the first hearing with a clear understanding of the boundaries of the dispute, to the extent of being able to provide for the decision of the case, the Reform strengthens the respect for the principle of concentration. In other words, the comprehensiveness of the new first hearing binds with the principle of concentration we outlined in section I.C. In this regard, the Reform expressly states that amendments to the ICCP will have to be adopted to "ensure simplicity, concentration and effectiveness of protection, and the reasonable duration of the process."[212]

We are now ready to highlight the other two aspects of the Reform we listed at the beginning of this section. The first aspect is the new approach to dispute management among the parties and their respective attorneys. In discussing the U.S. judge's role as more similar to that played in a non-adversarial process, a prominent author spoke about "managerial

207. *See supra* notes 123–25.

208. Reform, *supra* note 192, § 1, ¶ 5, (i)(2).

209. *Id.* § 1, ¶ 5, (*l*)(1).

210. *Id.* § 1, ¶ 5, (*l*)(2). The Reform provided also some amendments to the traditional decision-making model. However, these amendments are not relevant for our purposes.

211. *Id.* § 1, ¶ 5, (m).

212. *Id.* § 1, ¶ 5, (a).

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judges."[213] After the Reform and concerning Italian lawyers, civil jurists could speak of "managerial lawyers." The Reform gave a much more adversarial feel to the process. The role of lawyers in defining the boundaries of the dispute before any interaction with the judge is remarkable. In this sense, then, the battle over fact-gathering is entirely left to the parties' lawyers, albeit through written pleadings.

The second aspect of the Reform pertains to the confirmed and renewed judges' role in controlling the case. The Reform renounces unrealistic ambitions of a dispute with a mere passive judge, reiterating their essential role in the first hearings. Moreover, a judge's total passivity would also be counterproductive if we refer to the drift of the information asymmetries we discussed in paragraph II.B.1. The judge still assumes the role of removing the evidence from the trial that is not necessary for the dispute, decides how to conclude the dispute, and can even propose the terms of an agreement. Moreover, in line with the entire Continental tradition, the judge continues to be the protagonist in the taking of evidence. That is, for example, in the questioning of witnesses and the possibility of calling an expert. On this last aspect, the Reform has made no change. The last consideration is in line with the efficiency and efficacy of the Continental evidence-taking methods we discussed in sections II.A.2 and II.B.2.

To speak now about a spitting image between the Italian and American structures would not be entirely correct primarily because the new Italian civil proceeding's model does not know—nor has it ever known as any Continental system—the trial by jury as institutionally and technically provided by the Federal Rules of Civil Procedure. The institutional difference is confirmed also by the different evidence-taking methods. For this reason, we think it is appropriate to coin the expression semi-adversarial procedure. Nonetheless, the model of procedure designed by the Italian reform seems to recall the pretrial model of the Anglo-American civil process (the United States, in particular). The new first hearing imposes procedural responsibilities on both the parties and the judge, very different from those that the law and, even more, the forensic practice had assigned before the recent reform. While the similarity with the American pretrial phase is clear, the revolutionary Italian civil proceeding's model opens the door to further reflection, and to considering long-debated issues grown in a massive U.S. literature and jurisprudence, as we will now discuss in the following section.

213. Resnik, *supra* note 23.

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C. *The Transition: The Exciting Pattern for a Renewed Debate on the Adversarial System in U.S. Law*

The third model, which we have called semi-adversarial, brought about by the Reform, helps us reflect on some issues intensely debated in the United States regarding the adversarial system. More specifically, these issues relate to the managerial role of the judge in litigation, the validity of the plausibility pleading doctrine, the meaning of the principle of concentration, and, finally, the efficiency and efficacy of the pretrial phase.

Even following the revolutionary Reform oriented towards a new semi-adversarial model that narrows the facts and evidence before the first hearing, the judge's managerial role at the first hearing has been well-preserved. Following the parties' definition and clarification of facts and evidence requests, the judge may indeed issue a motion of dismissal, curtail the superfluous evidence, structure the decision phase, and even make a settlement proposal. This framework confirms how a highly adversarial system in defining facts and evidence is entirely compatible with a judge's managerial role, a role highly debated in U.S. literature as inapposite in the adversarial structure.[214] On the contrary, we showed how the judge's managerial role restrains the drawbacks of a system entirely left to the battle between the parties by limiting the facts and issues only to those relevant for the final verdict, sanctioning the abuse of discovery and the lack of parties' cooperation in discovery activities, curtailing superfluous and unnecessary discovery requests, and facilitating the resolution of the case on the merits and encouraging the settlement,.

The semi-adversarial civil proceeding continues to grant the judge, in every case, the power to dismiss the case for formal reasons, including in cases where pleadings are incomplete.[215] However, this power is exercised on a more straightforward basis since the judge has not only the introductory complaints at their disposal but also the other pleadings. Who cannot glimpse a substantial convergence with the plausibility pleading doctrine set forth by *Twombly* and *Iqbal*?[216] Furthermore, indeed, to the arguments established by the Supreme Court, mainly those related to avoiding abuse of discovery and the so-called fishing expedition?[217] The Reform's choice confirms how the combination of strict pleading and compulsory disclosure rules appropriately prepares the trial judge and lawyers for the best possible trial on the debated issues. What is more, a judge adequately informed of the issues on which they

214. *See supra* Section I.C and notes 13, 96–99.

215. *See supra* note 206.

216. *See supra* Section II.B.1 and sources cited *supra* notes 158–59, 161, 170.

217. *See* sources cited *supra* note 160.

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will be called on to rule has the desirable effect of decreasing errors of law and minimizing appeals, which appears more oriented to careful ascertainment of the truth.

Moreover, the Italian choices comply with the

principles of concentration. The essence of this principle is indeed strictly related to a well-prepared preliminary conference (or first hearing, referring to Italian structure). Thus, concentration means that all the parties' activities (allegations of facts and presentation of evidence) are organized within a consequential period, as short as possible but respecting the right to be heard. In this way, the judge should have a clear and complete view of the case. Therefore, we noted how the essence of concentration is changing. This change moves the judge towards a crucial managerial role with powers conferred to summarize the relevant facts, evidence, and legal arguments.[218] Since the new role of the U.S. pretrial conference (as only directed to settlement) and the U.S. judge's new role in conducting lawsuits, this change fits the U.S. debate on this principle perfectly.[219] Thus it shows what the principle of concentration means in the current civil proceeding structure and how the legislature and the judiciary could manage things, leaving the outdated idea of its identification with the "day-in-court" behind.[220]

Finally, and generally speaking, the revolutionary Italian civil proceeding's model opens the door to further reflection on the efficiency and efficacy of discovery and evidence-taking models. In other words, in light of the long-debated issues detailed in a massive body of American literature and jurisprudence on the matter,[221] the challenging Italian choice to frame a semi-adversarial civil proceeding's structure allowed us in discussing if and how the preliminary phase and evidence-taking might be crucial in pursuing efficiency and the efficacy of civil justice. We concluded how a comprehensive preliminary phase, organized as the United States structures it, favors settlement, and it is apt to search for the truth. On the contrary, a judge's central role in evidence-taking may impact the efficiency of the civil administration of justice positively in terms of minimization of both direct and error costs. Moreover, it reduces the negative impact of adversarial distortions, allowing truth-oriented and fair decisions.

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218. *See supra* Section I.B.

219. *See* sources cited *supra* notes 65–66.

220. *See supra* note 77.

221. For the debate regarding efficiency see *supra* Section II.A and accompanying notes. Instead, for the debate regarding efficacy see *supra* Section II.B and accompanying notes.

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CONCLUSION

The U.S. model made inroads into a civil law system to the extent that we can speak of a shared semi-adversarial model. This model appears stimulating for several reasons.

In the first place, it allows us to answer the questions we posed at the beginning of our discussion. We posited that an initial stage (in the form of pretrial or preliminary phase) with comprehensive fact-gathering, left to partisan battle typical of an adversarial structure favors settlement by affecting the litigant's incentives. For this reason, it appears a good tool for creating efficiency. Nonetheless, in this initial search for the truth, the judge should play a crucial role that helps in avoiding the distortions brought by this battle. It reduces the impact of information asymmetries by preventing an unfair early dismissal and limits costs of unnecessary evidence by managing the discovery process. The judge's managerial role helps in searching for truth and ensuring substantive justice, thus also achieving efficacy goals. In partial contrast then, we described how strong judicial power over a strict evidence-taking phase during the trial, that is questioning witnesses, selecting expert witnesses, and banning the preparation of witnesses and experts, impacts the efficiency and efficacy of the civil administration of justice positively by minimizing both direct and error costs. It avoids delays, costs, manipulation of evidence, uncertainty, unfair results stemming from inequality counsel in adversarial evidence-taking. The pattern we sketched shows how it is possible to reconcile the non-adversarial model with an initial phase typical the adversarial system. We demonstrated that an initial phase of a lawsuit where the evidentiary material must be collected and a general duty of comprehensive disclosure is imposed does not necessarily mean a division between the pretrial and trial phases. In other words, the efficient role of a comprehensive preliminary phase as we outlined may also be exercised in a continuous process. Moreover, we showed how a preliminary phase left entirely to parties is not irreconcilable with a system where the judge plays a prominent role in conducting the lawsuit, especially concerning evidence-taking methods. The most striking aspect of the Reform is indeed to move towards a comprehensive first hearing as in strongly adversarial system. The boundaries of the facts and evidence are fixed before the first hearing without any involvement from the judge. Nonetheless, at the first hearing, the managerial role of the judge becomes again crucial.

In the second place, the perspective traced by this Article adds some new arguments to the unresolved discussions of U.S. scholars concerning the dichotomy at issue. We reflected on some issues intensely debated in the United States. More specifically, these issues are the managerial role of the judge in litigation, the validity of the plausibility pleading doctrine, the meaning of the principle of concentration, and, finally, the efficiency

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and efficacy of the pretrial phase. Our crucial conclusions regarding these issues confirmed how wise use of the judge's managerial powers is not incompatible with an adversarial procedure left to the parties, and it is essential to resolve the evidentiary distortions of their battle. In other words, we support the positive effects of the United States' migration away from adversarial drawbacks.

Finally, times are ready to open the door to a new way of thinking about a traditionally domestic and country-specific matter of law within a globalized context. Indeed, on the one hand, mitigation of adversarial structures by ensuring a role for the judge that is not merely passive seems to have been brought forward in the United States. However, this new role did not betray the traditional adversarial structure of the Anglo-American proceeding, still focused on the lawyers' battle, even if controlled by the judge. On the other hand, the new role of lawyers in their autonomous management of the preliminary phase, prior to the judge's entry in the process has now emerged in a typical Continental non-adversarial system. However, this new framework did not abandon the judge's role in conducting the lawsuit. Instead, it moved the judge's involvement to a subsequent stage and made it take on different shapes. It seems that a new system we call semi-adversarial has come to light, confirming the reconcilability of the two different systems.

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