ITALIA

ORAL AND WRITTEN EVIDENCE IN ITALIAN CIVIL PROCEDURE LAW

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I. SHORT INTRODUCTION

The aim of this report is showing the reasons why writing is overcoming oral system in taking evidence in Italy. After a presentation of the rules about taking evidence in Italian Civil procedural code (*codice di procedura civile*, from now on c.p.c.)[1], the report will point out the fields where judgments are more frequently delivered after written evidence only. At the end, two short paragraphs will deal with the perspectives of the European rules and informatics under the point of view of the issue in discussion.

It should be noted immediately that the main difference in the field of evidence deals with the role played by the judge in the search of proof. On the one hand, documentary evidence needs no effort of the judge, who receives the papers (or the objects) on his table and has only the task to distinguish the relevant and the not relevant materials. On the other hand, the measures of enquiry include all the situations, where the judge makes an activity in order to achieve evidence. In some cases, this work leads to oral evidence; in other cases, it leads to get written documents. The three possibilities (activity for oral evidence; activity for written evidence; documentary evidence) are to be considered separately.

II. ORAL EVIDENCE IN ITALY

Italian Code takes into consideration some different forms of oral evidence.

No deposition by the parties as witnesses is possible in Italy[2]. Yet, the judge may freely interrogate the parties, whose answers don't bear proof, but can only orient the conviction of the judge (so called *argomenti di prova*: art. 116 c.p.c). It should be observed that personal appearance of the parties, once compulsory, is now possible in ordinary proceedings only if all parties agree on it (art. 185 c.p.c.).[3]

This change in procedural law, introduced by the recent Italian reform in 2005, depends on the fact that in judicial praxis frequently all parties agreed not to

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[1] For a general survey about evidence in Italy, see, inter alia, COMOGLIO, L.P., *Le prove civili*, Turin, 2004; VERDE, G., *Prova – Teoria generale e diritto processuale civile*, in *Enciclopedia del diritto*, Milan, 1988, p. 579 ff.

[2] See CAPPELLETTI, M., *La testimonianza della parte nel sistema dell'oralità*, 2 volumes, Milan, 1974; DITTRICH, L., *I limiti soggettivi della prova testimoniale*, Milan, 2000.

[3] Personal appearance of the parties is still compulsory in labour proceedings (art. 420 c.p.c.)

appear personally and only lawyers were present at the hearing[4]. This also shows little trust in the oral management of the case.

The debate on the (oral and personal) participation of the parties at the hearing is still open in Italy. The idea is rather widespread, that the judge might obtain useful information from the parties by means of a direct interrogatory, while generally statements prepared by the lawyers hide truth behind well built arguments. Two objections contrast this position. In the first place, the role of lawyers is that of presenting the case, from the opposite points of view of the parties and the task of the judge is to carry out a confrontation of the two (or more) positions: the weak points of each party come out more through the statements of the counterpart than looking for discrepancies between a party and its lawyer. In the second (and, perhaps, more effective) place, direct interrogatories of the parties could achieve some results, if before the judge had studied the case carefully, which often is not possible, because of the overload of the Italian judges, in connection with the general problems of the judicial organization.

When the matter of the case consists in disposable rights, each party may get an oral declaration of the counterpart, in the form of an oath (*giuramento*)[5] or a confession (*confessione*)[6], by submitting specific questions to the counterpart, who is compelled to answer personally and not by means of the representation of the lawyer. If a party admits issues of fact, which are object of such measure of evidence, the judge is bound to the contents of these declarations. In the case of oath (which is very rarely present in Italian proceedings), the declaring party achieves the goal to make ascertained the issues which it has stated and favourable to it; in the different case of confession, on the contrary, there are ascertained the issues admitted by the party, unfavourable to its interests[7]. In both cases, the general rule of free conviction of the judge is broken: the reason of that depends on the power of the party on its disposable rights.

Evidence by witness is much more frequent[8]. Deposition by witness is always oral (save what will be pointed out in the following paragraphs). Witnesses are called to answer about specific issues of fact which are to be investigated, already fixed by the judge after the statements of the parties. Further questions may be asked by the judge or the representatives of the parties, through the judge, since lawyers are not allowed to interrogate witnesses directly.

Usually, the names of witnesses are pointed out by the parties and the judge admits those, whose knowledge of the issue seems to be relevant in the case. In some cases, the judge may call witnesses of his own motion (f.i., arts.

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[4] About the Italian reform, see BALENA, G., *Elementi di diritto processuale civile*, 4th ed., II, Bari, 2007, p. 21 ff.

[5] About oath, see BALENA, G., *Giuramento*, in Digesto delle Discipline privatistiche, sezione civile, IX, Turin, 1993, p. 105 ff.

[6] About confession, see COMOGLIO, L.P., *Confessione – diritto processuale civile*, in *Enciclopedia giuridica*, VIII, Rome, 1988.

[7] See arts.

[8] See TARUFFO, M., Prova testimoniale (dir. proc. civ.)., in Enciclopedia del diritto, XXXVII, Milan, 1988, p. 729 ff.

281-ter and 421 c.p.c.). Any way, the witness, once called in the proceedings, becomes common to the parties: if one party should give up the hearing of the witness that it has indicated, nevertheless the counterpart could insist on hearing the deposition.

Witness testimony may not be freely admitted. Besides the evaluation about the probable relevance or not of the witness' answers for the decision of the case, the judge must take into account some limitations introduced by the civil code (i.e., by the substantial law), based on the lack of trust of the legislator about witnesses. The main limitation is referred to the exclusion of oral witnesses if called to state the existence of agreements, contrasting to clauses included in written contracts (art. 2722 of the civil code)[9].

III. ORAL SYSTEM, WRITING & MEASURES OF ENQUIRY

Italian civil procedure code also considers some measures of enquiry, which suppose the taking of evidence by an activity of the court, but whose result (directly or indirectly) is a written document.

First, the judge may appoint an expert with the task to prepare a written report about some issues relating to the proceedings, where technical experience and knowledge are needed (see arts.191 ff. c.p.c.) As a matter of fact, experts' reports are gaining more and more importance in modern proceedings and some further considerations will be made about this argument later.

Secondly, the judge may order a party to exhibit in court specific documents or even material objects (art. 210 c.p.c). With more caution, the same order may be given to a third subject, not party at the proceedings (arts. 210-211 c.p.c.). Italian procedural law doesn't include any form of discovery or fishing expedition[10]; yet, the search of truth often suggests to purchase documents, which are not available to the party, who has the burden of the proof of the issue, whilst the counterpart has no interest in exhibiting them spontaneously. Such an order is possible, under some limitations (art. 118 c.p.c), which have the purpose to avoid damages to the counterpart or the third subject: the searched documents should be deemed absolutely necessary to a just decision, their exhibition should not cause a huge damage (of course, losing the case because of the exhibition is not a damage) and they should not be confidential[11]. For the purpose of this report, it is easy to remark that this measure of enquiry goes towards the direction of written evidence.

In third place, the power of the judge to order an inspection of places, things or people (art. 118 c.p.c.) is to be considered. During the inspection, the judge (who may be assisted by an expert) may order to take photographs or to make copies of documents or even to hear witnesses (arts. 258 ff. c.p.c.).

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[9] See MONTANARI, M., *Il principio di prova per iscritto*, Turin, 2005.

[10] The question is opened, whether a foreign order for discovery might be enforced in Italy or not. See TROCKER, N., "Il contenzioso transnazionale e il diritto delle prove", in Rivista trimestrale di diritto e procedura civile, 1992, p. 475 ff.

[11] See GRAZIOSI, A., *L'esibizione istruttoria nel processo civile italiano*, Milan, 2003; RUFFINI, G., "Produzione ed esibizione dei documenti", in *Le prove nel processo civile*, Atti del XXV Convegno nazionale, Milano, 2007, p. 303 ff.

Therefore, the exit of this judicial activity may go in the sense both of oral and (but more frequently) written evidence.

Lastly, the court has always the power to make a request for information or the exhibition of documents to any public body (art. 213 c.p.c.)[12]. The use of this kind of measure (which of course consists in written evidence) seems to become growing, above all on the ground of antitrust cases, where the European rules[13] state forms of exchange of information between courts, Commission and national antitrust authorities.

IV. DOCUMENTARY EVIDENCE

Any party at the proceedings has the right to produce documents. No previous control is made by the court: only at the end, when deciding the case, the judge will distinguish between relevant and not relevant materials[14].

Any kind of document may be brought to the judge. Yet, the civil code makes some important distinctions for what concerns the efficacy of documents in the court's evaluation. Italian law distinguishes some kinds of documents, which bind the judge to the facts ascertained therein (so called *prove legali*) and therefore admit no free evaluation. This peculiar force is reserved to two categories of documents: documents under the seal of a public officer (*atti pubblici*: arts. 2699 ff. c.c.) and private writings (*scritture private*). It should be added, from the point of view of the efficacy, that the binding force of *atti pubblici* is limited to the truth of some exterior events recorded in the document (such as the date of a contract or the physical presence of a person), whilst private writings bind the judge only about the provenience of the document from the party who has signed it.

As Francesco Carnelutti taught, document is any form of representation of reality[15]. The question of binding efficacy should not mislead the interpreter: only few documents are binding (in the sense quoted above), but a lot of documents may be produced by parties and they are submitted to the free evaluation of the court. For instance, an exchange of e-mail may give evidence about some issues at

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[12] See LUISO, F.P., "Richiesta di informazioni alla P.A.", in Enciclopedia del diritto, XL, Milan, 1989, p. 483 ff.

[13] Above all, Ec Regulation n.1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC treaty (arts. 11, 12, 15, 18, 19, 20). See, inter alia, NAZZINI, R., Concurrent proceedings in competition law. Procedure, Evidence and Remedies, Oxford, 2004; NEGRI, M., Giurisdizione e amministrazione nella tutela della concorrenza, Padova, 2005; BONATTI, R., "La libera circolazione della prova nel nuovo regolamento europeo sulla concorrenza", in Rivista trimestrale di diritto e procedura civile, 2006, p. 193 ff.; BUTTAZZI, B., "Il regolamento comunitario n. 1 del 2003 e le sue ricadute sui processi nazionali", in Rivista trimestrale di diritto e procedura civile, 2005, p. 183 ff..

[14] See RUFFINI, G., "Produzione ed esibizione dei documenti", in Rivista di diritto processuale, 2006, p. 433 ff.

[15] See CARNELUTTI, F., "Documento e negozio giuridico", in Rivista di diritto processuale civile, 1926, I, p. 181 ff.; ID., *Istituzioni del nuovo processo civile italiano*, Rome, 1941, p. 138.

discussion[16], even if it goes outside the space of application of *atti pubblici* and *scritture private*. Perhaps, it is even superfluous to quote other frequent kinds of documents, such as telecopy and telex.

A new scenario is opened by the informatic documents[17]. In these notes, it is not possible to discuss the remarkable question of the efficacy of such documents: yet, it must be underlined that a new, important class of written evidence comes on the stage of civil proceedings.

V. THE PREVALENCE OF WRITING IN TAKING EVIDENCE IN ORDINARY PROCEEDINGS

Thinking that oral and written evidence are actually located at the same level would lead the observer out of reality. Indeed, in most cases evidence in Italy is nowadays written evidence. In next lines, there will be explained the main reasons of this phenomenon and described the fields where judgments are more frequently made after written evidence only.

The first reference has to be made to the organization of civil justice in Italy. As everybody knows, the duration of proceedings in first instance may reach four-five years and, in case of more complex litigation, even a longer time. The words of witnesses are conserved in the official record of the proceedings, which is formally kept by the registrar, but usually hand written by one of the lawyers at the hearing, even under the control of the judge[18]. This situation (which one cannot but deplore) brings about two consequences. On the one hand, lawyers are very careful in playing their game on future oral testimonies: time passes, witnesses forget most particulars, their references become often uncertain. If a witness remembers facts too exactly after many years, the judge has good reasons not to trust in him too much. On the other hand, it is also frequent that a long time may divide the day of the hearing, when witnesses are heard, from the day of the sentence (not to speak of the judgments of appeal). In the meanwhile, it is possible that a new judge has taken the place of the former one: the latter will decide the case only through the hard reading of an old record and almost none of the perceptions which the first colleague might have received in the oral confrontation with the witness will arrive at him. The sum of these factors makes oral evidence little suitable to win a case.

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[16] See JORI, M.G., "L'efficacia probatoria dell'e-mail", in Giurisprudenza italiana, 2005, p. 1028 ff.

[17] See, inter alia, VERDE, G., "Prove nuove", in Rivista di diritto processuale, 2006, p. 35 ff.; GRAZIOSI, A., "La nuova efficacia istruttoria del documento informatico", in Rivista trimestrale di diritto e procedura civile, 2003, p. 53 ff..; DE SANTIS, F., "Documento informatico, firma digitale e dinamiche processuale", in Rivista di diritto civile, 2001, p. 247 ff.

[18] It may be interesting to remember that a recent proposal for the reform of Italian civil procedure code stated that parties were allowed to examine witnesses without the judge, even if in contradiction. As one may easily see, here the common praxis of Italian courts (i.e., records written by lawyers) was to be transformed into law. The proposal has been hardly criticized by literature and it has been abandoned.

A second point of weakness of oral evidence is the growing need of scientific proof[19]. Whenever the judge appoints an expert to describe facts and places, or to find out causes, or to determine the amount of damages, the conclusions of the expert's report are generally able to bind the choices of the court: if not in theory, often in practice. The judge is obviously free to review the expert's conclusions, but he should be able to give a convincing motivation, which is very difficult to do, exactly because of the lack of technical knowledge of the judge, that explains the appointment of the expert.

In these cases, in the hands of the judge there remains a written report, perhaps with the allegation of photographs, designs, maps. The party who aims at challenging the conclusions of the expert should put her chances in another report, which might insinuate doubts into the judge's mind: in any case, further written materials come in. It is important to bear in mind that a remarkable part of Italian literature and the prevailing case law of Italian High court (*Corte di Cassazione*) share the opinion that expert's report is not a measure of enquiry, but only helps the judge in making his idea on the case, by furnishing him technical elements[20]. On the contrary, my personal and not lonely opinion is that usually expert's reports have the task of taking evidence (as it is fully acknowledged in other European countries)[21]. But the theoric dispute has little importance: practice shows that such a report always has strong influence on the decision. And there is no doubt that here one deals with written and not oral evidence.

The traditional Italian way to testimony is oral evidence, as it has been said above. But the experience of foreign countries, such as France and England, is leading Italy too towards some forms of written testimony. This is the case of art. 816-ter c.p.c., in matter of arbitration[22]. According to this rule, arbitrators may ask a person to appear before the panel and answer to some questions, may visit the witness at its domicile and may also put the witness some written questions, to which the witness is allowed to answer in writing. For what I know, the rule is sometimes (although not very often) applied.

Moreover, it should be observed that much litigation is not very fit for oral evidence, because of its structure: and that seems to me especially important in the field of the so called "new rights". For instance, a claim for mass damages (recently introduced in Italy and now ruled by art. 140-bis of the Consumers'

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[19] See DENTI, V., "Scientificità della prova e libera valutazione del giudice", in Rivista di diritto processuale, 1972, p. 415 ff.; TARUFFO, M., "Le prove scientifiche nella recente esperienza statunitense", in Rivista trimestrale di diritto e procedura civile", 1996, p. 238 ff.; LOMBARDO, L., "La scienza e il giudice nella ricostruzione del fatto", in Le prove nel processo civile, Atti del XXV Convegno nazionale, Milano, 2007, p. 127 ff.

[20] See MANDRIOLI, C., *Diritto processuale civile*, II, 19th ed., Turin, 2007, p. 195 ff.

[21] See DENTI, V., "Perizie, nullità processuali e contraddittorio", in Rivista di diritto processuale, 1969, p. 404 ff.; PROTO PISANI, A., "Appunti sulle prove civili", in Foro italiano, 1994, V, c. 71 ff.; recently AULETTA, F., *Il procedimento di istruzione probatoria mediante consulente tecnico*, Padua, 2002.

[22] See RICCI, G.F., "Art. 816-ter. Istruzione probatoria", in CARPI, F. (editor), *Arbitrato*, 2nd ed., Bologna, 2007, p. 407 ff.

code) might hardly be founded on oral testimonies: usually, the proof of the breach of antitrust rules or the selling of defective ware has to be given by means of documents or experts' reports and not through many depositions, relating to individual facts[23]. Indeed, testimony is fitter for small litigation, where the topics of the case concern individual issues, than for complex litigation, whose weight in our society is nevertheless more and more growing. Whenever the case involves the examination of macro-issues, written evidence achieves greater importance.

The last point – somehow, the most interesting one, in the view of the debate about the efficacy of oral and written evidence – is the question of the so-called atypical evidence (*prove atipiche*). This phenomenon includes a number of cases, where evidence is achieved in a different way, from the normal one established by the procedural rules. Testimonies should be heard orally, in contradiction between the parties, before the judge (arts. 252 ff. c.p.c.). Should the witness write a letter, where he speaks about the issues of the case, a rigid interpretation of the code would lead not to admit such a declaration in the proceedings. Such a letter would not be a true document, because it would not be a representation of facts, but a written testimony, not allowed by the code[24]. Yet, many authors think that such an information might not be lacking of validity at all, and that the judge should take it into account, even if without the force of full proof, but with a lower level of conviction[25].

Cases of atypical evidence are, *inter alia*, those of evidence examined in other proceedings between the same parties, or evidence achieved in discontinued

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[23] The European Commission has been studying the problems of access to evidence in antitrust cases and in damage actions for breach of the Ec antitrust rules very carefully: above all, see the Commission staff working paper, made in Brussels on December 2005 (SEC (2005) 1732), annex to the Green paper on the matter (COM (2005) 672 final). The conclusions of this paper are very interesting. In the first place, most attention is given to the disclosure of documentary evidence and to the prevention of destruction of evidence. Oral testimony comes out only with reference to the possibility of calling parties and their representatives as witnesses: according to the Commission, "these limitations can constitute an obstacle to obtaining evidence, especially in antitrust cases where the statements of representatives of the companies involved can provide significant and important information" (Commission staff working paper, point 68).

[24] Of course, under the point of view of the Italian law. As everybody knows, most European legal systems have a strongly different position on this issue and also Ec procedural law deems written statements coming from a third person able to give proof of the facts, described therein. For what I know, such a written statement is not considered as a witness statement only in Estonia, Finland, Portugal, Slovenia and Sweden, besides Italy. See CHIARLONI, S., "Riflessioni sui limiti del giudizio di fatto nel processo civile", in Rivista trimestrale di diritto e procedura civile, 1986, p. 819 ff.

[25] See RICCI, G.F., *Le prove atipiche*, Milan, 1999; TARUFFO, M., "Prove atipiche e convincimento del giudice", in Rivista di diritto processuale, 1973, p. 389 ff.; ID., "Il diritto alla prova nel processo civile", in Rivista di diritto processuale, 1984, p. 101 ff. A different approach in CAVALLONE, B., "Critica della teoria delle prove atipiche", in Rivista di diritto processuale, 1978, p. 679 ff. and doubts in CARRATTA, A., "Prove e convincimento del giudice nel processo civile", in Rivista di diritto processuale, 2003, p. 27 ss.

proceedings. A party could have no witness to bring before the judge (for instance, the witness lives abroad and his address is now unknown), but it could have the record of a precedent hearing (for instance, in a criminal case), where the witness gave his testimony about the issues, now discussed before the civil court. The care for truth leads the courts not to stop at the formal stage of inadmissibility, but to take this kind of evidence somehow into consideration.

Now, in the perspective of our topic (oral vs. written evidence), that means that a piece of paper (even if not a document, strictly speaking) takes the place of an oral testimony. Therefore, atypical evidence plays in favour of writing.

VI. Oral and written Evidence in Summary Proceedings

Up to now, these notes have dealt with ordinary proceedings[26]. Yet, too long duration of civil cases in Italy makes more and more important all the kinds of summary proceedings, which (under different names and with unequal features) try to let parties achieve a judicial statement in a quicker time, before or without the beginning of ordinary proceedings[27]. The main rules to be now taken into consideration are those referring to interim proceedings[28].

When the judged is called to order an interim measure, where urgency is real and no delay is admissible, the problem of evidence has a peculiar shape. First of all, here the conviction of the judge supposes a *prima facie* evidence. Should the judge be compelled to carry on a long enquiry, the urgency itself would be inexistent. Italian rules deal with a general power of the judge to take on information (the reference is to art. 738 c.p.c., in matter of chambers proceedings)[29]. According to the prevailing opinion, the judge might take evidence, using the normal measures: so, the court could hear witnesses or appoint an expert. This position deserves to be shared, but it should be noted that usually time limits suggest the judge to reach its conviction through written documents only.

Therefore, most of the wide field of summary proceedings is ruled without any enquiry and evidence – so far as it is necessary – is sought by documents.

VII. A Glance at Europe

Even if this report deals with Italian procedural law, one cannot but give a quick glance to the rules of the European Union, referring to civil evidence.

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[26] Labour proceedings in Italy (so-called *rito del lavoro:* arts. 409 ff. c.p.c.) are actually featured with a greater use of oral system than in common civil proceedings. Yet, it must be said that the original purpose of the legislator (i.e., quick and oral proceedings, which might arrive at the judgment in just one hearing) has been often neglected by the praxis of the courts.

[27] About recent developments of the issue, see MENCHINI, S., "Nuove forme di tutela e nuovi modi di risoluzione delle controversie: verso il superamento della necessità dell'accertamento con autorità di giudicato", in Rivista di diritto processuale, 2006, p. 869 ff.

[28] Especially, art. 669-sexies c.p.c.

[29] See CAPPONI, B., "Le "informazioni" del giudice civile", in Rivista trimestrale di diritto e procedura civile, 1990, p. 911 ff.

The rules of procedure before the Court of justice of the European Communities and the other European courts at Luxembourg include both oral and written evidence, and specifically the personal appearance of the parties, a request for information and production of documents, oral testimony, the commissioning of an expert's report and an inspection of the place or thing in question. Yet, the practical experience shows that written evidence is absolutely prevailing and the most used measure of enquiry is the request for information and production of documents[30].

The EC regulation n. 1206/01, on cooperation between the courts of the member States in the taking of evidence abroad, tries to make oral evidence easier, f.i. granting any national judge the power to hear witnesses on the ground of a different State (provided on voluntary basis) and ruling the performance of the taking of oral evidence with the presence and participation of representatives of the requesting court.[31] But the recent EC regulation n. 861/07, establishing a European small claims procedure, considers written evidence as the normal way of enquiry, and makes oral evidence possible, only under particular conditions.

It is interesting to read the wording of art. 9 of the EC regulation n. 861/07. According to the rule, "the court or tribunal may admit the taking of evidence through written statements of witnesses, experts or parties. It may also admit the taking of evidence through video conference or other communication technology, if the technical means are available". Then, the rule states that "the court or tribunal may take expert evidence or oral testimony only if it is necessary for giving the judgement. In making its decision, the court or tribunal shall take costs into account". Although all that refers to small claims, the choice of the European legislator seems to me remarkably clear.

VIII. SOME FINAL REMARKS

The reasons for prevalence of writing in taking evidence would not be complete, without considering the real organization of judicial activity in Italy. In first instance courts, each Italian civil judge has a workload of many hundreds, sometimes thousands cases. Usually, judges spend some mornings in the week on attending hearings or taking part to panels and work the other days deciding cases and drafting judgments, at office or at home. Oral evidence may require many hours for a single case, which leads to delay in the general management of justice.

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[30] See art. 45 of the rules of procedure of the Court of justice; art. 65 of the rules of procedure of the Court of first instance. In literature, if you like, see BIAVATI, P., *Accertamento dei fatti e tecniche probatorie nel processo comunitario*, Milan, 1992; ID., *Diritto processuale dell'Unione europea*, Milan, 2005. In English, see above all K.P.E. LASOK, K. P. E., *European Court of Justice. Practice and Procedure*, London, 1994.

[31] See arts. 12 and 17 of the Regulation n. 1206/01. In literature, see TROCKER, N., "Note sul regolamento n. 1206/2001 relativo all'assunzione delle prove in materia civile e commerciale", in Rivista di diritto internazionale, 2003, p. 670 ff.; BIAVATI, P., "Problemi aperti in materia di assunzione delle prove civili in Europa", in Rivista trimestrale di diritto e procedura civile, 2005, p. 425 ff.; BONATTI, R., "Sovranità nazionale e leggi processuali nell'armonizzazione del diritto delle prove in Europa", in Rivista trimestrale di diritto e procedura civile, 2004, p. 211 ff.

Of course, in many cases oral testimony or parties' appearance is unavoidable to decide the issue justly; but, as far as possible, judges try to limit oral evidence.

An important current in Italian literature, from Giuseppe Chiovenda onwards, has considered oral management of the case as the best way to justice. But this approach can't cope with the problems of judicial structure and organization and one might wonder whether Chiovenda would stress the same positions, if he lived nowadays. Any way, it is sure that problems should be faced looking at reality and coming out of any ideological cage[32].

For a long time, the debate between oral and written system in taking evidence has been put in connection with that between the adversarial or inquisitorial shape of the powers of the judge, usually establishing a double couple: oral management and active judge, on the one hand, and written evidence and adversarial proceedings, on the other hand[33]. Yet, experience shows that an active judge may search documents very energetically, order inspections, appoint experts with the task to discover written evidence; and, at the same time, that adversarial proceedings may deal with the oral testimonies pointed out by the parties. Really, written and oral system are only tools in the hand of the judge: courts will choose the more suitable to the single cases and often will opt for writing.

Is it to say, therefore, that game is over, all in favour of writing ? One cannot give a downright answer. The prevailing of writing in practice is the point of departure, which nobody could deny seriously. Yet, oral evidence still plays an important role, above all where the issues are concerning individual facts. Besides, oral system seems to be preferred under the point of view of contradiction between parties[34]: obviously, an oral witness may be, if not cross-examined, at least interrogated by the judge, after request of the lawyer of the counterpart.

But in my opinion, future will belong neither to oral, nor to written evidence: probably, the incoming of informatics in civil proceeding will have the effect to open a third way, which might be called "new oral system"[35]. Should be

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[32] See CAVALLONE, B., "Forme del procedimento e funzione della prova (ottant'anni dopo Chiovenda)", in Le prove nel processo civile, Atti del XXV Convegno nazionale, Milano, 2007, p. 29 ff.

[33] See inter alia TARUFFO, M., *Sui confini. Scritti sulla giustizia civile*, Bologna, 2002, p. 67 ff.; CIPRIANI, F., "Nel centenario del regolamento di Klein (Il processo civile tra libertà e autorità)", in Rivista di diritto processuale, 1995, p. 969 ff.; MONTELEONE. G., "Principi e ideologia del processo civile: impressioni di un "revisionista", in Rivista trimestrale di diritto e procedura civile, 2003, p. 575 ff.; TARUFFO, M., "Poteri probatori delle parti e del giudice in Europa", in Le prove nel processo civile, Atti del XXV Convegno nazionale, Milano, 2007, p. 53 ff.

[34] See the remarks of TARZIA, G., "Problemi del contraddittorio nell'istruzione probatoria civile", in Rivista di diritto processuale, 1984, p. 639 ff.

[35] In the Italian debate, see CARPI, F., "Processo civile e telematica: riflessioni di un profano", in Rivista trimestrale di diritto e procedura civile, 2000, p. 467 ff.; GRAZIOSI, A., "Parola detta, parola scritta e parola telematica", in AA.VV., *Scrittura e diritto*, Milan, 2000.

possible managing a case through a website, where claimant, defendant, lawyers and judge might act together, the information by third subjects and experts might be given in an oral (i.e., immediate) but at the same time written (i.e., immediately recordable) form. At the same time, documents or photographs could be easily inserted in the site, overwhelming the distinction itself between oral and written evidence. All that is still future, but Italy has been making experiments since a decade, and some first, although partial, results have already been achieved.