Chapter 15
Italy: A Tale of Successful Resistance?

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15.1 The Basic Rule About Cost Shifting and Its Exceptions

Like most continental European systems, Italy falls into the first category defined in the General Report, that of "major shifting" systems. Actually, the basic rule concerning cost and fee allocation set by the code of civil procedure is that the losing party has to reimburse *all* his or her opponent's expenses: court costs, lawyer fees, and other expenses such as those incurred by taking evidence.[1]

As to lawyer fees, they are determined according to an official tariff. But it should be noted that this does not mean absolute predictability of the costs that the loser will have to pay. In fact, the tariff has some flexibility because it establishes a minimum and a maximum fee for each procedural step that can be remunerated. Therefore, the actual amount of lawyer fees in a given case will depend on two variables that cannot be predicted at the outset: the number of procedural acts performed, and the amount chosen within the permitted range.

The exact sum to be awarded to the victorious party is determined by the court, on the basis of an itemized bill submitted by each party at the end of the proceeding. The court has the power to check the fees and exercises discretion regarding their determination, albeit within the limits set by the fee scale. As a result, the court may not award all the fees claimed, so that the successful party may have to pay *some* fees to his/her lawyer in excess of the amount awarded by the court.

But what happens more frequently is that the court decides that each party bears his or her own costs in whole or in part. This may happen in case of a split outcome or if there is another "good cause".[2] While the first

[1] Art. 91, paragraph 1 of the Code of Civil Procedure.

[2] Art. 92, paragraph 2 of the Code of Civil Procedure.

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hypothesis is common to most countries, as the General Report points out, the exception based on the existence of a so-called "good cause" is more peculiar and gave rise to some problems.

The origin of these problems does not lie in the fact that the provision confers discretion on courts, but in the position of our Court of Cassation. The Court has recognized such wide discretionary power that the lower courts do not even have to state explicitly what the good cause was.[3] As a result, the decision to let each side bear its own expenses did not require a justification and could not be reviewed by the appellate courts. Over time, the recourse to this exception has become more and more frequent, so that, notwithstanding the will of the legislator and the general opinion of the public, it has turned into the actual rule.

In order to limit judicial discretion and restore the loser pays all rule, the relevant provision was changed twice in the last five years. In 2005, an amendment to the relevant code provision introduced the requirement to state explicitly the "good cause" in the decision.[4] But this amendment only provided for a formal requirement that, at worst, could be satisfied by the use of a standard phrase, thereby leaving the question of the disproportionate use of the exception to the loser pays all rule almost untouched. This may be part of the reason for a new legislative intervention on the same provision just a few years later, in 2009,[5] when the "good cause" condition was replaced with the more stringent "serious and exceptional reasons" requirement. Both amendments were well received because they tackled what was largely perceived as a problem by scholars and practitioners, and the general public as well. Still, any attempt to predict their effectiveness would be premature.

15.2 The Emergence of Instrumentalist Considerations: Access to Justice v. Abuse of Process

As in the majority of the systems covered by the General Report, in Italy the justification for the cost-shifting rule is based on considerations of fairness to the winner: as a result of litigation, the successful party should be put in

[3] See, e.g. Cassazione civile, sezione I, decision no. 8540 of April 22, 2005, *Giurisprudenza italiana* (2006) Part 2 336. Some examples of the reasons why Italian courts declined to award all or part of the costs are given in Andrew Colvin and Vincenzo Vigoriti, *Transnational Civil Procedure in Italy*, *Civil Justice Quarterly* 23 (2004) 38 at 51.

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

[5] Law No. 69 of June 18, 2009, art. 45, paragraph 11.

the same situation as he or she would have been if the other party had not brought or defended the claim. However, there are signs of a growing awareness of the possibility to use the rules governing cost and fee allocation to influence party behaviour, in order to strike a balance between the right of access to justice and the prevention of frivolous litigation and abuses of process.

In the Italian civil procedural culture, "access to justice" is generally understood to mean "access to a court". This is an individual right protected both by Article 6 of the European Convention on Human Rights[6] and Article 24 of the Italian Constitution.[7] The meaning of this constitutional guarantee can be understood in the light of the basic philosophy prevailing in the nineteenth century and still widespread today among many scholars and most practitioners. This philosophy has been rightly described as a "strictly adversarial approach providing parties' lawyers with virtually absolute powers over the development of procedural options and strategies".[8] As a consequence, civil justice was and still is conceived by many as a means intended only to protect individual rights: the proceedings entirely belong to the parties who are completely free to exercise their rights of action and of defence and to use all possible procedural devices to pursue their interests.

The emergence of the notion of abuse of process is one of the major trends currently affecting Italian civil justice. In fact, while the notion of abuse of a substantive right is well known in Italy, the idea that parties could abuse process is of recent vintage. It is the result mainly of the 1999 constitutional amendment that for the first time explicitly introduced the principle of reasonable length as one of the elements of a fair trial.[9] Obviously, this principle was not unknown in our system, but its explicit provision in the Constitution, followed by the enactment of a statute introducing the possibility of lodging a complaint with the Italian courts in respect of excessively long proceedings and obtaining compensation for the resulting loss,[10] brought the notion of a fair trial more to the fore. According to this notion, while civil justice is still conceived as a means to protect

[6] *Case of Golder v. The United Kingdom* of 21 February 1975 (Series A no. 18).

[7] Article 24: "Everyone is entitled to go to court for the protection of his rights and legitimate interests. Defence is an inviolable right at every stage and instance of the proceedings." See N. Trocker, *Civil Procedure as a Part of the Constitutional Project: The Fundamental Guarantees of the Parties*, in M. De Cristofaro, N. Trocker (eds.), *Civil Justice in Italy* (Tokio 2010), p. 55 ff., 56.

[8] A. Dondi, *Abuse of Procedural Rights: Regional Report for Italy and France*, in M. Taruffo (ed.), *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (The Hague/London/Boston, 1999), p. 109 ff., 115.

[9] Art. 111 of the Italian Constitution as amended by Constitutional Law No. 2 of November 22, 1999.

[10] Law No. 89 of March 24, 2001, known as the "Pinto Act".

individual rights, it is also true that each party is not completely free to determine the progress of the proceedings, but must base his or her conduct on principles of fairness and good faith.

As far as cost and fee allocation is concerned, this trend is reflected, for example, in an alternative justification of the cost-shifting rule that has recently been suggested: the obligation to reimburse the opponent's expenses is precisely a sanction for an abuse of process.[11]

The emergence of the notion of abuse of process has also led to a re-evaluation of article 96 of the Code of Civil Procedure. According to this provision, on application by the victorious party, the opponent may be ordered to pay for damages caused by bringing or defending a claim "in bad faith or with gross negligence, in addition to reimbursing costs and fees. In some cases (e.g. if the claim on which the party obtained and enforced a provisional remedy was unfounded) the provision only requires that the unsuccessful party acted "without normal prudence". Until recently, this rule, obviously aiming at punishing but also preventing unlawful behaviours, has been strictly construed and scarcely used. Currently, however, judicial recourse to this provision as a means of preventing abuses of process is reportedly increasing, and such a trend meets with civil procedure scholars' approval.[12]

Moreover, the legislature also showed its intent to enhance cost sanctions against abuse of process. In fact, the Law No. 69 of June 18, 2009 added a new paragraph to article 96 that confers on courts the power to order the losing party to pay to the other side a further amount besides the costs, even on their own motion and without proof of actual damage.[13]

This new provision was widely criticised by legal scholars for several reasons. The first problem rests with the possible infringement of the right to be heard, considering that the judge can act on his or her own motion. Furthermore, there is some ambiguity because it is not clear whether the measure has a compensatory or a punitive nature. Then – and this is probably the main problem – there is the vagueness of the provision since it says nothing about the conditions that should be satisfied in order for the court to use this power, nor does it set any limits to the amount that the sanctioned party may be ordered to pay.[14] This flaw seems even more serious if one compares the provision with a similar one that was introduced in 2006

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

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

[13] Law No. 69 of June 18, 2009, art. 45, paragraph 12.

[14] See e.g. Andrea Proto Pisani, *La riforma del processo civile: ancora una legge a costo zero* (*note a prima lettura*), *Foro italiano* (2009) Part V 221, column 222.

by the Legislative Decree that reformed the procedure before the Court of Cassation. In fact, the 2006 amendment vested the Supreme Court with a similar power, but established that the amount of the sanction could not be more than twice the maximum court costs and required at least gross negligence.[15] As the legislature clearly intended the 2009 provision to replace and generalize the 2006 provision (which was therefore abrogated), it could be expected that requirements of this sort were retained.

The risk is that, given these flaws, the new provision will not be used much. The courts, however, are showing a certain willingness to use this tool in order to sanction (and possibly prevent) abuses of process.[16] Actually, in the first reported decisions applying the rule the courts seem to make wise use of this power, adequately explaining the reasons why they ordered the losing party to pay the further sum besides costs (usually the party's bad faith or gross negligence), and the factors taken into consideration in deciding its amount.[17]

The 2009 law has also amended article 91 of the Code of Civil Procedure in order to introduce a further exception to the loser pays all rule. If the victorious party fails to obtain a judgment more advantageous than a conciliation proposal which she refused without good reason, the party will bear all the fees and costs incurred after the proposal was made.[18] Similarly, though less stringent, provisions already exist for specific types of disputes – namely labour[19] and corporate[20] cases. Furthermore, this same mechanism has been provided also by the Legislative Decree No. 28 of March 3, 2010, that for the first time contains a comprehensive and detailed regulation of mediation in civil and commercial disputes.[21]

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[15] Code of Civil Procedure, art. 385, paragraph 4 added by Legislative Decree No. 40 of February 2, 2006.

[16] See the opening speech delivered at the beginning of this year by the First President of the Court of Cassation, Ernesto Lupo at 33–34 http://www.cortedicassazione.it.

[17] See the decisions annotated by Giuliano Scarselli *Il nuovo articolo 96, 3° comma, c.p.c.: consigli per l'uso* and Paolo Porreca *L'art. 96, 3° comma c.p.c., tra ristoro e sanzione*, *Foro italiano* (2010) Part I 2229; the three decisions by the Tribunale di Verona annotated by Giuseppe Finocchiaro, *Accessi infondati alla giustizia e abusi del rito: nel mirino della nuova responsabilità aggravata*, *Guida al diritto* (2010) issue 49–50, December 18, 18; the decision by the Tribunale di Piacenza annotated by Giuseppe Buffone *Estesa al processo sommario di cognizione la condanna per aver agito in mala fede*, *Guida al diritto* (2011) issue 3, January 15, 46.

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

[19] Article 412 of the Code of civil procedure as amended by the Law No. 80 of March 31, 1998. After the very recent reform of labour law made by the Law No. 183 of November 4, 2010 this provision moved to article 411 of the Code of Civil Procedure.

[20] Legislative Decree No. 5 of January 17, 2003, arts. 16 and 40, respectively abrogated by the Law No. 69 of 2009 and the Legislative Decree No. 28 of March 3, 2010.

[21] Arts. 10 and 13.

These provisions are a clear sign that the legislature intends to use the allocation of costs as a tool to encourage the parties to accept reasonable conciliation proposals. This should reduce the workload of ordinary courts and deter dilatory behaviour amounting to an abuse of process. Although the effectiveness of these measures is far from certain, the trend is likely to continue.

15.3 Lawyer Fees Between Liberalization and Resistance

As in most continental European systems, in Italy lawyer fees are set by an official schedule tied to the amount in controversy and to the level of the court in which the case proceeds. The schedule provides for two kinds of fees: *diritti*, for single procedural acts (e.g. service, attending a hearing), and *onorari*, for the services performed (e.g. study of the controversy, preparation of the claim or the defence). *Diritti* are predetermined by the decree and are binding, but they represent the lesser element of lawyer fees. As for *onorari*, which are by far the most important heading, only a minimum and a maximum amount are set, together with the criteria to be followed in the determination of the sum due in the single case. If the particular characteristics of the case require it, it is possible to go beyond the maximum, although this requires a special leave by the Local Bar Council.[22] Instead, until recently, the minimum was binding.

The binding minimum fee was traditionally founded on the need to protect the "dignity" and "decorum" of the profession together with its financial independence. Recently, however, it has come under attack as a barrier to free competition and to the free circulation of lawyers within the EU. According to its opponents, binding minimum fees prevented or at least impeded young lawyers' entry to the market, because they could not charge lower fees despite being less experienced. Furthermore, the existence of this limit was seen as a barrier for foreign lawyers willing to practice in Italy, because they could not charge a fee below the minimum although in their country of origin such a limit did not exist.[23]

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

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

Deciding the joined cases C-94/04 *Cipolla* and C-202/04 *Macrino*, *Capodarte*, on December 2006[24] the European Court of Justice established that

> legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyer's fees such as that at issue in the main proceedings for services which are (a) court services and (b) reserved to lawyers constitutes a restriction on freedom to provide services laid down in Article 49. EC. It is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives.[25]

In order to implement these very EU principles and to promote greater competition in the market for professional services, the Decree Law No. 233 of July 4, 2006,[26] abolished minimum (but not maximum) fees and established that within January 1, 2007 all codes of ethics were to be amended in order to comply with the new regulation. This occurred even before the ECJ decided the two cases just mentioned.

The same Decree Law No. 233 of 2006 also repealed the traditional prohibition on contingency fees provided by article 2233 paragraph 3 of the Civil Code. That provision was replaced with the requirement that all agreements concerning fees be in writing. Apart from this formal requirement, no other regulation is provided by the law, such as a percentage cap, limits on the type of cases where contingency fees are allowed, or informational duties for lawyers. The code of ethics, by contrast, only provides that in any case lawyer fees should be "proportional to the work done"[27] (which, by the way, is illogical, since the contingency fee is agreed *before* the litigation begins, and conflicts with the very nature of a contingency fee that by definition is proportional to the *result* achieved for the client[28]). The lack

[24] [2006] ECR I-11421. See Martin Illmer, *Lawyers' Fees and Access to Justice – The* Cipolla *and* Macrino *Judgment of the ECJ* (*Joined Cases C-94/04 and C-202/04*), *Civil Justice Quarterly* 26 (2007) 301. This decision was confirmed by the Order of the Court (Seventh Chamber) of 5 May 2008 in the case C-386/07 *Hospital Consulting Srl and Others v Esaote SpA and Others* [2008] ECR I-67.

[25] Paragraph 70.

[26] Converted into law and amended by the Law No. 248 of August, 4, 2006. It is usually referred to as the "Bersani Decree Law", after the name of its proponent.

[27] Codice deontologico forense, art. 45, as amended on June 12, 2008. The Code of Ethics is available on the site of the Consiglio Nazionale Forense www.consiglionazionaleforense.it.

[28] Lotario Dittrich, *Profili applicativi del patto di quota lite*, *Rivista di diritto processuale* (2007) 1141 at 1150–1152.

of regulation of contingency fees is rightly criticized by many scholars.[29] Perhaps more importantly, the legal profession seems determined to resist this liberalization and to fight for a return to the traditional regime. Actually, the most probable reason for the current lack of ethical regulation of contingency fees is the Bar's opposition to them *tout court* – and the hope to have them abolished.

This opposition to the liberalization of lawyer fees is typically explained by the need to protect clients against unscrupulous behaviour and to preserve the quality of the services provided by lawyers.

One can get the impression that this is mainly rhetoric. As the General Report points out, the trend towards liberalization of lawyer fees is general, and contingency fees already exist in practice in some areas (e.g. for labour disputes)[30]; they are apparently not causing particular problems. Furthermore, if consumer protection were the real aim, an explicit regulation providing some limits and safeguards – especially a maximum percentage that lawyers may charge by way of a contingency fee, or detailed informational duties – would be a much better solution.

In a recent decision regarding a case regulated by the pre-2006 provisions, our Court of Cassation seemed to endorse the bar's argument, at least as far as binding minimum fees are concerned. Actually, this decision takes into consideration the *Cipolla* and *Macrino* judgment of the European Court of Justice and explicitly maintains that binding minimum fees do not infringe free competition and the free circulation of lawyers. The Court opined that since the Italian market is characterised by an extremely large number of lawyers, a tariff imposing minimum fees avoids excessive competition and prevents lawyers from offering services at a discounted rate, which may lead to deterioration in the quality of the services provided.[31]

To be sure, the large number of lawyers in Italy is undisputable,[32] but the Court of Cassation does not offer any proof of a causal link between

[29] See e.g. Ugo Carnevali, *Compenso professionale e autonomia privata: il patto di quota lite: problemi civilistici*, in Remo Danovi, a cura di, *Compenso professionale e patto di quota lite* (Milano 2009) at 2–3, 5–7; Matteo Lupano, *Compensi "speculativi" e patto di quota lite*, *Rivista trimestrale di diritto e procedura civile* (2009) 323 at 343–346; Lotario Dittrich, *Profili applicativi del patto di quota lite*, cit., at 1148–1150; Piero Schlesinger, *Liberalizzazione e avvocati*, *Corriere giuridico* (2006) 1337.

[30] See Alexander Layton and Hugh Mercer, eds., *European Civil Practice Vol. 2*, 2nd ed. (London 2004) at 331.

[31] Cassazione civile, sezione lavoro, decision no. 20269 of September 27, 2010, *Foro italiano* (2010) Part I 3301 at 3306.

[32] Actually, according to the 2010 Report of the European Commission for the Efficiency of Justice (CEPEJ) Italy is among the Council of Europe member states with the highest number of lawyers per 100,000 inhabitants. European Commission for the Efficiency of Justice, *Edition 2010* (*data 2008*)*: Efficiency and Quality of Justice*, Strasbourg, 2010, at 237–239. Available at www.coe.int/cepej. And the data of the National Bar Association show that this number is increasing at a significant rate, now being well over 200,000.

the setting of minimum levels of fees and the attainment of adequate quality standards of legal services, nor does it determine whether other professional rules suffice to protect consumers and to ensure the proper administration of justice. As these very points were questioned in the *Cipolla* and *Macrino* case by the Commission,[33] it seems that the issues raised by the judgment of the European Court of Justice remain still unanswered.

There is another argument against the abolition of binding minimum fees that is based on the reported experience under the regime established by the 2006 measure. As the tariff sets the minimum fees at a rather low level, in practice lawyers have seldom agreed to fees below the minimum. More importantly, they have done so only with "big clients", such as banks or insurance companies, who have always been in a stronger bargaining position because they can guarantee large amounts of work. In other words, only repeat players – who already enjoyed a preferential treatment – have benefitted from the abolition of this lower limit, not ordinary consumers.[34]

While we thus have some idea of how mandatory minimum fees work, we do not have any information regarding the experience with contingency fees after their liberalization. This may be an indication that the bar's resistance against them is so strong that they are seldom used.

Actually, the legal profession's resistance seems so strong that the legislative trend towards liberalization of fees is likely to be reversed. The occasion for such a reversal is the ongoing attempt to reform the whole regulatory framework of the legal profession, which is presently still contained in the Royal Decree Law No. 1578 of November 27, 1933. The bill for the reform of the statute regulating the legal profession was passed by the Senate on November 23, 2010 and is presently pending before the Chamber of Deputies. It explicitly re-establishes binding minimum fees and the prohibition on contingency fees.[35]

As was to be expected, the restoration of binding minimum fees is one of the bill's aspects that have been criticized by the Italian Competition Authority,[36] which in general is in line with the European Commission. It is noteworthy, however, that the support for this leap backwards is bipartisan. Both the government and the opposition introduced two bills on this subject, which shared the same restrictive attitude towards lawyer fees,

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[33] See Cases C-202/04 *Macrino*, *Capodarte* and C-94/04 *Cipolla* [2006] ECR I-11421 paragraph 63.

[34] See, e.g., Guido Alpa, *Accorpamento e semplificazione degli onorari per assicurare al cliente una scelta consapevole*, in *Guida al diritto* (2010) issue 46, November 20, 11.

[35] Camera dei Deputati, XVI Legislatura, Progetto di legge (Bill) No. C3900, art. 12, available at www.camera.it.

[36] The report of the Autorità Garante della Concorrenza e del Mercato on the Bill for the reform of the statute regulating the legal profession of September 16, 2009 can be read at http://www.agcm.it.

although to different degrees. This may seem odd, considering that the proponent of the measure providing for the liberalization of lawyer fees is the present leader of the parliamentary minority. The common attitude of both majority and opposition is undoubtedly prompted by the powerful lobby of the National Bar Association, which actually draw up the bill introduced by the government. Therefore, there is reason to believe that, short of early elections, the present bill is likely to pass and thus reverse the trend towards liberalization of lawyer fees in Italy.