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Supreme Courts' jurisprudence as a dispute avoidance mechanism?

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Abstract: Starting from a comparative and economic perspective, this article aims to assess the efficiency of recent reforms of civil procedure, especially focusing on Italian and French experiences.

On the one hand, it underlines that convergences in European Countries regulatory actions in the field should not be overestimated: even equal reforms may end up with different outcomes, because of differences in the starting backgrounds (whether economical or cultural).

On the other hand, it casts doubts about the effectiveness of regulations imposing ADR mechanisms as a pre-condition to legal proceedings or providing for appeals selection: as Positive Law and Economics shows, mandatory mediation or conciliation

is unlikely to overcome parties cognitive bias, while side effects brought by skimming mechanisms may undermine their benefits.

Rather, starting from the assumption that parties estimates of the process outcome strongly affect their choice between settlement and litigation, it is suggested that Supreme Courts jurisprudence plays a fundamental role in determining incoming flows, and that its inconsistency increases demand inflation.

Keywords: Alternative Dispute Resolution mechanisms – Economic analysis of process – *Nomofilachia* – *Stare decisis* – Supreme Courts

Abbreviations

Cons. Stato – Italian *Consiglio di Stato*

c.p.c. – Italian *Codice di procedura civile*

CPC – French *Code de procédure civile*

c.p.p. – Italian *Codice di procedura penale*

CPP – French *Code de procédure pénale*

CPR – United Kingdom Civil Procedure Rules

COJ – French *Code de l'organisation judiciaire*

ECHR – European Convention on Human Rights

FRCP – United States Federal Rules of Civil Procedure

Loi J21 – French *Loi* n° 2016-1547 *du* 18 *novembre* 2016 *de modernisation de la justice du XXIe siècle*

ord. giud. – Italian *Ordinamento giudiziario* (R.D. 30 *gennaio* 1941, n. 12)

SC - Supreme Court

SDER – *Service de documentation, des études et du rapport* (at French *Cour de cassation*)

UKSC Rules – United Kingdom Supreme Court Rules

ZPO – German *Zivilprozessordnung*

Contents

I. CONVERGENT SOLUTIONS, DIVERGENT OUTCOMES

Convergences have long been pointed out in the regulatory actions taken by European (and not only) countries in order to contain costs and (more often) length of legal proceedings[1].

Limiting the field of investigation to Italy and France, the tendency – in both cases – is to focus on ADR mechanisms to divert the demand (upstream) and on so-called filters to appeals in order to expel proceedings started from the judicial circuit (downstream). Notwithstanding the fact the second has so far adopted a globally *less defensive* approach, Italian proceedings may take twice or three times as much as French ones[2]. It is therefore not surprising that, according to World Bank's ranking in terms of enforcing contracts, France and Italy occupy the 15th and 108th place respectively, despite their global positioning in not so wide apart (respectively, 31st and 46th place)[3].

The question thus arises as to the reasons of such a gap, but the answer is equally natural: there is no "one-fits-all solution", so that regulations successfully taken abroad *must* work in Italy too.

Such a conclusion appears even more valid with reference to the phenomenon at stake, which is affected by a large number of intertwined variables, whose different starting consistency and interaction can explain outcomes deviations, even when following similar reforms.

In spite of these considerations, however, justice is perceived to be in crisis in *both* Countries; and their common basic model of Court of Cassation could arguably be the key to understand why.

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1. Suffice here to mention the papers collected in A.A.S. Zuckerman (ed.), *Civil Justice in Crisis*, (Oxford: Oxford University Press, 1999).
2. See, for Italy, Corte Suprema di Cassazione - Ufficio di Statistica, *La cassazione civile. Annuario statistico 2017*, 10 gennaio 2018, p. 44 http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/ANNUARIO_CIVILE_2017.pdf, and Ministero della giustizia, https://giustizia.it/giustizia/it/mg_1_14_1.page?facetNode_1=0_10_37&contentId=SST1263302&previsiousPage=mg_1_14; for France, Cour de Cassation, *Rapport annuel 2017*, https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2017_8791/livre_4_activite_cour_8816/i._activite_juridictionnelle_8817/bis._donnees_statistiques_8840/1._activite_generale_8841/delai_contentieux_39620.html and Ministère de la Justice, *Les chiffres-clés de la Justice 2018,* p. 11, http://www.justice.gouv.fr/art_pix/justice-chiffres-cles-2018.pdf, last accessed on 01.11.2018.
3. Source: http://www.doingbusiness.org/en/rankings, last accessed on 01.11.2018.

In particular, while a review of the measures so far introduced (or suggested to be introduced) under the economic analysis of the process casts doubts about their efficacy, it is suggested that one of the main causes of justice demand inflation is SCs' inability to fulfil a nomophylactic function.

II. BRIEF NOTES ON ECONOMIC ANALYSIS OF LAW: RATIONAL CHOICE, BOUNDED HEURISTICS AND COGNITIVE BIAS

The analysis of the effectiveness of legislative interventions aimed at reducing the demand flow cannot overlook a brief introduction to the mechanisms governing parties choices according to the Positive Law And Economics.

In principle[4], the decision-making process behind the determination of a subject to become a plaintiff (P) in judgment, can be expressed with the elementary equation:

probability of winning x monetary value of the judgement – costs = reservation price P

Specularly, the defendant (D), who has to decide whether to resist or not in Court, will calculate:

probability of losing x monetary value of the judgement + costs = reservation price D

where reservation price P indicates, at the same time, what the plaintiff expects to gain from a judgment in his/her favour, but also the minimum sum that s/he would be willing to accept in order to settle the case; while reservation price D represents the value of the hypothetical unsuccessfulness for the defendant and, therefore, the maximum amount s/he would be willing to offer so that the plaintiff would give up the action[5]. Assuming that the transaction costs are null, it is therefore apparent that a transaction will only be possible[6] if

reservation price D – reservation price P > 0

The difference between the two reservation prices is called settlement surplus, while the range of distribution possibilities is indicated as settlement range[7].

Since the monetary value of the judgement is mostly given (as it depends on the value of the claim), and starting from the assumption that parties are able to assess their *chances* at trial, it would seem logical to infer that «[a]nything that reduces the plaintiff's minimum offer or increases the defendant's maximum offer, such as an

4. But see S. Shavell, Suit versus Settlement When Parties Seek Nonmonetary Judgments, The Journal of Legal Studies, p. 2 (1993), for cases in which the *petitum* is other than a sum of money.
5. R.A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, The Journal of Legal Studies, pp. 417 et seq (1973); R.G. Bone, Civil Procedure: The Economics of Civil Procedure, pp. 34 e 74 (New York: Thomson West, 2003).
6. R.A. Posner, *supra* note 5, p. 417.
7. R.G. Bone, *supra* note 5, p. 74.

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increase in the parties' litigation expenditures relative to their settlement costs, will reduce the likelihood of litigation»[8].

In short, rising litigation costs would seem to be the easier and – arguably – most effective way to push the parties towards an out-of-court settlement. But, apart from the fact that any excessive increase of Court fees and sanctions would contrast with the right to access to justice, the result might not be so obvious.

In fact, the mathematical formulas, however correct, can nothing when inputs are flawed; so, they must be supplemented by taking into consideration the biases and cognitive limits that can affect parties' behaviour[9]. More specifically, the effects of a cost variation may be voided by any event or information that modifies parties' estimate of their probability of winning/losing; and it is pretty sure that «trials will occur when one or both parties miscalculate [their] likely outcome»[10].

Assuming the absence of information asymmetries, this happens when the parties, misinterpreting the information at their disposal, assume divergent expectations about the likely outcome of the trial. Such an estimate can be flawed by default – so-called mutual pessimism – so that parties will be more induced to the transaction, but also by excess – so-called mutual optimism[11] –, in which case the settlement surplus is reduced, if not totally erased[12], and so the chances of settling. It seems useful right away to note that divergent expectations are not necessarily due to the real merit of the claim, but rather to the state of the jurisprudence with respect to the specific question.

Furthermore, even if the parties are able to make reliable estimates as to the outcome of the proceedings, it is necessary to take account of the so-called hard bargaining (or strategic bargaining) [13], which – it is presumed – will be all the more incentivized, the greater the amount of the settlement range. Such a phenomenon is nothing but the translation of the prisoner's dilemma into the field of settlement agreements[14]: in short, if both parties were collaborative during the negotiations, the surplus settlement would be allocated in an efficient manner (that is, through a division in equal parts), with maximum gain for the plaintiff and minimum loss for the defendant. On the other hand, if only one of the litigants adopted an aggressive strategy, it would be able to grab a larger share of the surplus: however, since parties do not know their opponent attitude, they will probably both adopt

8. R.A. Posner, *supra* note 5, p. 418.
9. R.G. Bone, *supra* note 5, pp. 103 et seq.
10. R. Korobkin - C. Guthrie, Psychological Barriers To Litigation Settlement: An Experimental Approach, Michigan Law Review, p. 109 (1994).
11. Bone R.G., *supra* note 5, p. 85.
12. Bone R.G., *supra* note 5, pp. 87 et seq.
13. R. Korobkin - C. Guthrie, *supra* note 10, pp. 114 et seq.
14. Bone R.G., *supra* note 5, pp. 79 et seq.

aggressive strategies, ending up agreeing on an inefficient allocation of the total amount at stake.

Finally, it should be emphasized that the reasoning synthesized by the two equations is not carried out one-off by the parties, but repeated whenever – following an event of the procedure – they face the alternative whether to keep on or settle. So, if it is true that the new information arising from discovery during the process may lead their expectation come close together, it should also be noted that, as the proceedings go on and the parties sustain the related expenses, the amount already paid will not be included in the new equation: it is the so-called sunk-cost fallacy, a phenomenon that makes a person «continue an endeavor once an investment in money, effort, or time has been made»[15], «often incur[ring] further losses ('throw good money after bad') or tak[ing] great risks in order to recover those losses».[16]

The consequence is that, paradoxically, if process costs are diluted during its course, the more the proceedings go on... the more it becomes convenient, for the parties, to keep on in turn. This means that, once the system has failed to divert parties from litigation, it is very unlikely that they chose to stop it without exhausting all possible appeals, because, on the one hand, costs will be re-calculated at any stage and, on the other hand, those incurred in the previous phases – if recoverable, as they usually are – will be added to the expected value of the new degree. It is thus possible to understand why even the new mechanisms of «overdeterrence»[17] hardly fulfil their function and even (arguably) *worthless causes* can come up to the SC.

III. ADR MECHANISMS AS PRECONDITIONS TO LITIGATION

The list of distortions is far from being exhausted[18]; however, the ones mentioned so far seem enough to carry out an evaluation of the legislatures imposing ADR mechanisms as preconditions to litigation.

Apart from assisted negotiation – introduced in Italy in 2014[19], drawing inspiration, but not enough, from French *procédure participative de négociation assistée par*

15. H.R. Arkes - C. Blumer, The Psychology of Sunk Cost, Organizational Behavior And Human Decision Processes, p. 124 (1985); Bone R.G., *supra* note 5, pp. 36 et seq e 91 et seq.
16. S. Issacharoff - G. Loewenstein, Second Thoughts About Summary Judgment, The Yale Law Journal, p. 113 (1990).
17. F. Auletta, L'ibridazione dell'«agire in giudizio»: «tutela dei propri diritti», «autonoma iniziativa [...] di interesse generale» e principi costituzionali di equilibrio del bilancio e di sussidiarietà, Giurisprudenza costituzionale, pp. 1557 et seq (2016).
18. See R. Korobkin - C. Guthrie, *supra* note 10, pp. 107 et seq; R.H. Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, Ohio State Journal On Dispute Resolution, p. 235 (1993).
19. Artt. 2 et seq, d.l. 12 settembre 2014, n. 132 (converted by con l. 10 novembre 2014, n. 162); see, *ex multis*, F.P. Luiso, La negoziazione assistita, Nuove leggi civili commentate, pp. 649 et seq (2015);

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avocat[20] – the reference is to mediation, firstly introduced in Italy in 2010[21] and declined in three forms: voluntary, delegated and mandatory. The latter, although declared unconstitutional (due to an excess of delegation[22], but with a judgement that seemed suggesting a certain opposition to the Council as to the use of the mechanism for deflationary purposes[23]) was reintroduced in 2013; so, in the cases referred to in art. 5, d.l. 28/2010, a mediation attempt is a precondition for taking legal action, and the inadmissibility due to non-compliance can also be detected by the Court on its own motion.

The same is provided, in France, by art. 4 *Loi* J21, with only reference to cases of «*saisine du tribunal d'instance par déclaration au greffe*», ie for disputes whose value do not exceed € 4,000; in any other cases[24], since 2015, any plaintiff before a civil jurisdiction must give account, since the application, of the «*diligences entreprises en vue de parvenir à une résolution amiable du litige*», unless s/he is able to justify his/her non-compliance because of the urgency or the particular subject at stake[25]. Such a provision recalls the one envisaged by paragraph 3(c)(d) of the UK Practice Direction – Pre-Action Conduct And Protocols, but, differently from this latter, its violation does not bring any penalty: pursuant to art. 127 CPC, in fact, non compliance only permits the Court to suggest «*une mesure de conciliation ou de médiation*».

However, since any precondition (even when mandatory) cannot bar, but only postpone the starting of a trial, it is unlikely to significantly affect the choice between transaction and litigation.

D. Dalfino, La procedura di negoziazione assistita da uno o più avvocati, tra *COLLABORATIVE LAW* e *PROCÉDURE PARTECIPATIVE,* Foro italiano, pp. 43 et seq (2015).

20. See C. Silvestri, La circolazione nello spazio giudiziario europeo degli accordi di negoziazione assistita in materia di separazione dei coniugi, cessazione degli effetti civili del matrimonio, Rivista trimestrale di diritto e procedura civile, pp. 1 et seq (2016); Id., L'esperienza francese della « elasticità » del processo civile. Un esempio per il legislatore italiano, *ivi*, pp. 741 et seq (2018).
21. D.lgs. 4 marzo 2010, n. 28; see, among others, M.A. Lupoi, Ancora sui rapporti tra mediazione e processo civile, dopo le ultime riforme, Rivista trimestrale di diritto e procedura civile, pp. 13 et seq (2016); C. Consolo, La improcrastinabile radicale riforma della legge-Pinto, la nuova mediazione ex d.lgs. n. 28 del 2010 e l'esigenza del dialogo con il Consiglio D'Europa sul rapporto fra Repubblica italiana e art. 6 CEDU, Corriere giuridico, pp. 430 et seq (2010).
22. C. Cost., 6 dicembre 2012, n. 272, Foro italiano, pp. 1091 et seq (2013), annotated by R. Romboli; Società, pp. 71 et seq (2013), annotated by F.P. Luiso, L'eccesso di delega della mediazione obbligatoria e le incostituzionalità consequenziali; Corriere giuridico, pp. 257 et seq (2013), annotated by I. Pagni, Gli spazi e il ruolo della mediazione dopo la sentenza della Corte costituzionale 6 dicembre 2012, n. 272.
23. F.P. Luiso, *supra* note 22, p. 80.
24. In addition, art. 7 *Loi* J21 introduced an experimental mandatory mediation in family matters, in some jurisdictions.
25. Artt. 56 e 58 CPC, as modified by *Décret* n° 2015-282 *du* 11 *mars* 2015.

Of course, it takes away from the parties the *chance* to evaluate the suitability to *start* negotiations – and to profit from the *jeux de signal* and *jeux de filtrage*[26] – and, by postponing the moment of the (always possible) judicial decision, it increases the cost (of time) of the process (which equates to the damage deriving from the unavailability of the amount at stake), making it less attractive; moreover, it is possible that, following the mediator's proposal, the parties recalculate their *chances* of success[27]. On the other hand, however, negotiation and mediation usually bring costs too, and the predictive effect of the conciliatory proposal depends on the calculability of the jurisprudence. In addition, and above all, the same cognitive errors that can spoil the (free) choice between the two alternatives may still affect parties' behaviour when one of the options is (temporarily) unavailable.

Italian art. 13, par. 1, d.l. 28/2010 would seem sharper, since it sets forth – similarly to Rule 68 (d) FRCP – that, when the content of the judgment is exactly the same as the one of the proposal refused by the winning party, this latter cannot recover the expenses s/he incurred after the proposal; furthermore, s/he has to reimburse those incurred by the respondent during the same period, and has to pay an additional sum to the State budget. Such a proviso, indeed, directly affects the costs estimate and, consequently, the rational evaluation of its suitability.

Yet, even in this case, the theory mismatches the practice, that cannot disregard the subjective side of the assessment: as it has been demonstrated with reference to the aforementioned Rule 68 (d), the mechanism tends to increase the settlement rate only when the parties exclusively disagree about the *quantum*, while explaining the opposite effect if the different evaluations concern the *an* and / or the *chances* of success[28].

And it is precisely with reference to this last element that the role of appeals is at stake.

IV. APPEALS SELECTION: GENERAL REMARKS

Italy and France share a traditional vision of the process, taken as a whole, as articulated in three degrees: the first judgement may be followed by up to two appeals (the first one historically posed as *novum iudicium*, while the second – to the Court of Cassation – limited to legitimacy). However, the current nightmare of the «reasonable time»[29] (art. 6, § 1, ECHR) makes it easy to understand the appeal exercised by foreign

26. See N. Chappe, Les enseignements de l'analyse économique en matière de résolution amiable des litiges, Négociations, p. 79 (2008); R. Deloche, Transaction, jugement et théorie des jeux. Evaluation et application, Revue économique, pp. 977 et seq (2001).
27. N. Chappe, Economie et Résolution des Litiges, pp. 26-27 (Paris : Economica, 2005).
28. K.E. Spier, Pretrial Bargaining and the Design of Fee-Shifting Rules, RAND Journal of Economics, pp. 197 et seq (1994); v. anche R. Deloche, *supra* note 26, pp. 980 et seq.
29. Recalling G. Verde, Il processo sotto l'incubo della ragionevole durata, Rivista di diritto processuale, pp. 505 et seq (2011)'s expression.

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models – the British system in the first place – which, on the contrary, strongly limit access to appeal degrees.

Anyway, in spite of the long-standing convergences reported in this field as well, any attempt to transplant foreign institutions seems intended to fail, when not coupled with a correct understanding of the original cultural background and with the compatibility assessment of the Country of destination[30].

Indeed, concerning the United Kingdom, it should not be forgotten that the principle of proportionality in the use of judicial resources permeates the process from the first degree [31] while, with reference to the permission to appeal before the SC, the need for efficiency[32] is entwined with the traditional deference that appeal judges show to the judgment of the lower courts[33], both in fact[34] and in law[35]. This is apparent from the wording of the UKSC Practice Direction 3.3.3, which states that «[p]ermission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the SC at that time, *bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal*»[36].

These consideration may be extended to Germany, where a filter of access to *Revision* is historically rooted, since it existed since the adoption of the ZPO, in 1879; while, when the Parliament decided to establish a barrier to the first appeal, it simultaneously proceeded – *ad instar* of the British system – to reaffirm the centrality of the first degree judgment[37].

Apart from these comparative remarks, it should be added, from an economic point of view, that the establishment of an appeals selection mechanism needs to deal with a number of factors. First of all, the idea that, in appellate proceedings, the public interest[38] must prevail over the parties', neglects the (social) function of

30. G. Verde, Questione giustizia, p. 13 (Torino: Giappichelli, 2013).
31. See CPR 1.1(2)(e). See R. Caponi, Il principio di proporzionalità nella giustizia civile: prime note sistematiche, Rivista trimestrale di diritto e procedura civile, pp. 389 et seq (2011); J. Sorabji, English Civil Justice After The Woolf And Jackson Reforms: A Critical Analysis, pp. 161 et seq (Cambridge: Cambridge University Press, 2014); A. Panzarola, Il principio di proporzionalità tra utilitarismo anglosassone e codici processuali attuali, Rivista di diritto processuale, pp. 1459 et seq (2016).
32. See UKSC *Rules* 2(2) e 2(3).
33. S. Dalla Bontà, Contributo allo studio del filtro in appello, pp. 17 et seq (Trento: Editoriale Scientifica, 2015).
34. *Smith New Court Securities v. Scrimgeour Vickers* [1996] UKHL 3.
35. *Piglowska v. Piglowski* [1999] UKHL 27.
36. Emphasis added.
37. S. Dalla Bontà, *supra* note 33, pp. 47 et seq.
38. Whether, in general, the efficient distribution of the judicial system scarce resources or, with specific reference to the last degree, the protection of the *ius constitutionis.*

reduction of the «costs of legal error», which constitutes (not the only, but) one of the necessary purposes of the appeal degree[39]. From this perspective, indeed, the «astuzia» of counting on individual interest – the one of the losing party – in order to achieve, at a higher level, the implementation of the objective law, on which Calamandrei relied[40], appears to be the happy intuition of the *economic* concept of «effect» or «equilibrium of separation», according to which the most efficient method to check on the correctness of a judgement is to leave to the parties the task of appealing it, if necessary[41].

With more specific reference to intermediate degrees, then, it has been emphasized their ability to perform a dual function for the benefit of the higher Courts: the first – temporary – occurs when a new *échelon juridictionnel* is introduced *ex novo*, because it allows «*un trasfert mécanique de charges des juridictions supérieurs vers les nouvelles juridictions*», correspondingly relieved of a part of the litigation[42]; the second – standing – relies on their skimming function with respect to the upper step[43]. And these considerations should be kept in mind not only before any proposal – whether deemed iconoclastic[44] or not – to suppress the appeal degree *tout court*, but also before any suggestion to simply limit it. In fact, filter mechanisms risk to *de facto* take away the appeal degree, while failing to achieve the time and cost savings that would result from a *de iure* abolition.

As for the skimming criterion, it has been pointed out that «[s]creening costs will be lower if the criteria are easier to apply by the parties and by the judge»[45]: this would mean, instead of a discretionary parameter (such as the one required by Italian art. 348-*bis* c.p.c.[46]), it would be preferable to limit access according to the value of the dispute; but this solution too is not totally efficient, since «[t]he minimum-amount-in-controversy approach is the equivalent of an infinite filing fee for cases below the minimum and a zero filing fee for cases above it»[47]. This is consistent with the German Illustrative Report accompanying the bill introducing the filter to appeal,

39. R.A. Posner, Economic Analysis Of Law3, p. 550 (Boston: Wolters Kluwer, 1986); S. Shavell, The Appeals Process as a Means of Error Correction, Journal of Legal Studies, pp. 379 et seq (1995).
40. P. Calamandrei, La Cassazione civile, II, in Id., Opere Giuridiche, VII, p. 137 (Napoli: Morano, 1979).
41. S. Shavell, *supra* note 39, pp. 384 et seq; B. Szego, L'inefficienza degli appelli civili in Italia: regole processuali o altro?, Mercato concorrenza regole, p. 285 (2008).
42. J.-M. Belorgey, La situation générale du temps des procédures devant les juridictions, in Coulon J.M. - Frison-Roche M.A., Le temps dans la procédure, p. 7 (Paris : Dalloz, 1996).
43. A. Proto Pisani, Il ricorso per cassazione in Italia, Foro italiano, pp. 188 et seq (2015).
44. M. Cappelletti, Parere iconoclastico sulla riforma del processo civile italiano, Giurisprudenza italiana, pp. 81 et seq (1969); Id., Doppio grado di giurisdizione: parere iconoclastico n° 2, o razionalizzazione dell'iconoclastìa?, *ivi*, pp. 1 et seq (1978).
45. M. Barendrecht - K. Bolt - M. de Hoon, Appeal Procedures: Evaluation and Reform, p. 23 (Tilburg: TILEC Discussion Paper DP 2006-031, 2006).
46. See *infra*, paragraph 5.
47. R.A. Posner, *supra* note 39, p. 547.

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which highlighted how unreasonable would have been to invariably prevent access to the appeal when the value at stake was below a given amount[48].

Finally, whatever the chosen criterion, «[l]eave for appeal leads to cost savings only if the number of cases in which appeal is not allowed is sufficiently high to compensate for the extra screening costs»[49].

If these warnings may be kept in mind while evaluating the efficiency of the selection mechanisms of all kind of appeals, it seems appropriate to analyse the first appeal and the appeal to the Court of cassation separately.

V. FIRST APPEAL

The French legal landscape has so far been lacking real skimming mechanisms: this is certainly true with reference to the civil appeal[50], although some Authors[51] have deemed to find a sort of filter in the *radiation du rôle* (*ex* art. 526 CPC), ordered by the Appellate Court when the unsuccessful party has not complied with the first judgement, unless it appears that «*l'exécution serait de nature à entraîner des conséquences manifestement excessives ou que l'appelant est dans l'impossibilité d'exécuter la décision*».

There is no doubt that such a proviso – which inverses the ordinary rule of the suspensive effect of the appeal[52] – explains a deterrent effect of unmeritorious appeals, that could have otherwise been proposed to mere dilatory purposes; but, apart from the different consequences linked to the striking out of the appeal – given the possibility of *réinscription de l'affaire au rôle* – and to the refusal of grant a *real* permission to appeal, the discretion granted to the judge in the assessment of circumstances that prevent the *radiation* appears qualitatively and quantitatively different from the one that is inherent in the appraisal of the reasonable probability of reversing the first judgement (as required by Italian art. 348-*bis* c.p.c.)[53].

48. S. Dalla Bontà, *supra* note 33, p. 49, note 5.
49. M. Barendrecht - K. Bolt - M. de Hoon, *supra* note 45, p. 23.
50. See S. Maffei, L'appello nel diritto francese e belga, in Cecchella C. (dir.), Il nuovo appello civile, pp. 345-346 (Bologna: Zanichelli, 2017); S. Dalla Bontà, *supra* note 33, pp. 30 et seq. By contrast, in criminal procedure, art. 186-1 CPP provide for a *non-admission* mechanism, which is applied by Court of appeal's *chambre de l'istruction*.
51. F. Ferrand, L'évolution récente de l'appel civil en droit français, Zeitschrift für Zivilprozess International, p. 59 (2009) ; S. Dalla Bontà, *supra* note 33, p. 36.
52. R. Perrot, Les effets de l'appel en droit français, in J. van Compernolle - A. Saletti (dir.), Le double degré de juridiction, pp. 278 et seq (Bruxelles : Bruylant, 2010). But Ministère de la Justice, *Chantiers de la Justice. Les axes de la réforme*, p. 7 (2018), http://www.justice.gouv.fr/art_pix/dp_chantiers_justice_20180308.pdf, announced its intention to «*reconna*[ître] *le caractère exécutoire de la décision de première instance pour que les décisions de justice s'exécutent rapidement*».
53. The same is true, *mutatis mutandis*, with reference to art.1009-1 CPC, regulating the *radiation du rôle* in *Cour de cassation* proceedings, when the appeal judgement is not complied with: see

In addition, if it is true that the extreme consequences to which *radiation* can lead (the *pérention de l'instance*[54], if compliance does not take place within 2 years[55]) risk to undermine the right of defense of the losing parties belonging to the weaker classes[56], it has also been correctly underlined[57] that provisional execution is granted at the risk and peril of the party requesting it, as it can be inferred from the fact that art. 517 CPC allows the judge to grant the enforceability upon condition of a guarantee «*suffisante pour répondre de toutes restitutions ou réparations*»[58]. Moreover, Appellate Courts interpretation of the exemption conditions from *radiation* must take into account the jurisprudence of the European Court of Human Rights, in the same way the *Cour de cassation* (before which the *radiation du rôle* has been introduce since 1999) does.

On the other hand, if – as already mentioned – a link must be identified between the conception of the first instance proceedings and the selection of appeals, in the sense that this latter is only admissible (or, in any case, desirable) if the first degree is assigned a central role, one of the reasons behind a past (but unsuccessful) proposal to repeal the suspensive effect of the appeal precisely relied on the fear that otherwise parties would continue to consider the first degree as an «*étape préparatoire, où l'on se met en jambe, sans grande conséquence»,* since *«la véritable instance* [à] *prend*[re] *au sérieux* [aurait été] *celle qui se déroulera devant la cour»*[59].

However, as seen, the suspensive effect stands, so as the opening of the appeal proceedings to the *nova* (art. 563 CPC), who survived the *décret* n°2017-891 *du* 6 *mai* 2017, which has instead tightened the devolutive effect of the appeal by modifying art. 561 CPC.

The situation is very different in Italy, and in both respects; but, while the introduction of the provisional enforceability of the first judgement[60] effectively had positive reverberations (albeit temporary) on the incoming flow, this has not been the case for the ban on the *nova*[61].

G. Canivet, L'organisation interne de la Cour de cassation favorise-t-elle l'élaboration de sa jurisprudence?, in N. Molfessis (dir.), La Cour de cassation et l'élaboration du droit, p. 14 (Paris : Economica, 2004).

54. Art. 383, par. 2, CPC.
55. Art. 386 CPC.
56. See, *ex multis*, P. Galliere, La justice victime de la chasse aux appels dilatoires, Gazette du Palais, pp. 6 et seq (3 *déc*. 2005).
57. C. Hugon, La radiation du rôle sanctionnant l'inexécution d'une décision judiciaire : un nouveau miroir aux alouettes ?, Recueil Dalloz, pp. 1640 et seq (2006).
58. A. Moreau, L'exécution provisoire, un avantage dangereux pour le créancier poursuivant, Recueil Dalloz, p. 524 (2006).
59. R. Perrot, *supra* note 52, pp. 279.
60. Art. 283 c.p.c., as modified by l. 26 novembre 1990, n. 353.
61. B. Szego, *supra* note 41, pp. 297 et seq.

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Art. 348-*bis*, par. 1, c.p.c., by contrast, firstly introduced – in the civil process[62] – the so called *inammissibilità meritale* (ie, based on the merits of the case), by allowing the Appellate Court to declare the appeal non-admissible if it does not have a reasonable probability of success.

Such a mechanism is aimed to expel the undeserving appeals from the queue, so as to allow the Courts of Appeal to dedicate their (scarce) resources to cases in which a reform of the first judgement is more likely[63]; but it may give rise to perplexities to the extent that it ends up ensuring a rapid definition precisely to (probably) hopeless appeals.

In fact, although such a perspective seems to underestimate the need to protect the unfairly appealed party by stabilizing the judgement's effects, the expectations in the filter could be downsized, if only one consider the parallel between this mechanism and the planning rule known – in the field of the economics applied to engineering – as «shortest operation next»[64], according to which the operations to be performed are processed in increasing order of duration; in this way, the total working time remains the same, but the individual waiting times are minimized. However, even the studies in the field warn that such a criterion should be used in combination with others[65], both because it does not necessarily lead to an optimal result, and in order to avoid incurring the so-called starvation, that occurs when «several threads that consist entirely of short jobs and that together present a load large enough to use up the available processors may prevent a long job from ever being run»[66].

Translating the concept in the field of litigation, the risk is that a generalized application without any corrective measure will end up by the contingencies of unfounded appeals paradoxically leading to an increased waiting time of the meritorious ones.

The point can be illustrated with a trivial example: given two appeals only, where A, proposed first, requires three hearings to be decided, while B (probably unfounded) needs only one hearing, the total time to exhaust both – whatever the order of treatment – will be 4 hearings.

However, following the chronological order, one would graphically have the situation for which

62. But such a category has long been known in criminal procedure: see art. 606, par. 3, c.p.p.
63. M. Pacilli, L'abuso dell'appello, *passim* (Bologna: Bononia University Press, 2015).
64. R.E. Stein, Re-Engineering the Manufacturing System: Applying the Theory of Constraints, p. 27 (New York: Palgrave Macmillan, 2003).
65. S.C. Cimorelli – G.Chandler, Control Of Production and Materials, in R. Crowson (ed.), Factory Operations: Planning and Instructional Methods, p. 216 (Boca Raton: Taylor & Francis, 2005).
66. J.H. Saltzer - M.F. Kaashoek, Principles of Computer System Design: An Introduction, p. 355 (Burlington: Morgan Kaufmann, 2009).

Hearing 1	Hearing 2	Hearing 3	Hearing 4
A	A	A	B

so, A would be decided after 3 hearings; B after 4 hearings, with a total waiting time of 3 + 4 = 7 hearings. The average duration of the proceedings would then be 7/2 = 3.5 hearings.

Vice versa, by implementing the filter, the order would be

Hearing 1	Hearing 2	Hearing 3	Hearing 4
B	A	A	A

with the consequence that A would be decided after 4 hearings; B after 1 hearing, with a total waiting time of 1 + 4 = 5 hearings and an average duration of 5/2 = 2.5 hearings.

In the first case, A's waiting time does not increase, while B suffers a delay of 3 hearings; in the second, it is only A who has to wait for a hearing more than necessary; and these data, together with those related to the average duration in the two cases, should clearly point to the solution that adopts the filter. However, this kind of reasoning in numerical terms only appears possible if the two appeals are both considered worthy of the same use of public resources; by contrast, if, as it is argued, the skimming mechanism rest on a judgment of (dis)value expressed by the law in relation to abusive appeals, it appears contradictory that their removal is accomplished at *the others* expenses.

In truth, the problem is softened by the applicability, even on appeal, of the decision model set forth by art. 281-*sexies* c.p.c[67], that *theoretically* (ie: provided that the judge has full knowledge of the file since the first hearing) allows, since 2011, a quick definition of the causes with a clear outcome (whether affirming or vacating the previous judgement); but then, there would be all the appeals that cannot be exhausted in a single hearing to be postponed, regardless of their seniority and of the merit of the arguments. And with respect to them, as long as the hearing schedule is organized according to the parallel work method[68], there seem to be no possible alternatives.

VI. FURTHER APPEAL TO THE SUPREME COURT

Contrary to appeal, the *Cour de cassation* has historically known mechanisms for the selection of appeals[69], albeit always more or less unsuccessful: suffice here to say that the *chambre des requêtes*[70], although established – in 1790 – to

67. Art. 350, last par., c.p.c..
68. On the suitability of sequential work, see D. Coviello - A. Ichino - N. Persico, Time Allocation and Task Juggling, American Economic Review, pp. 609 et seq (2014).
69. V. G. Canivet, *supra* note 53, pp. 3 et seq e 13 et seq.
70. For further information, see SDER, La chambre des requêtes (création, évolution, suppression), (2016), https://www.courdecassation.fr/IMG/54_SDER_Chambre_requetes_1116.pdf, last accessed on 01.11.2018.

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regulate the flood of appeals by checking in advance their (sole) admissibility, often ended up carrying out a thorough examination of the merit of the grievance[71]. The consequence was that any appeal that overcame the first (expensive) screening was then subject to the new (double) review of the *Chambre* in charge of the decision.

If the foregoing makes clear the reasons of suppression of the *chambre des requêtes* in 1947, it should be noted that the mechanism has to some extent been taken over by the so-called *non-admission des pourvois*[72], which entrusts to a 3-judges panel (*formation restreinte*) the task of declaring the inadmissibility of the «*pourvois irrecevables ou non fondés sur un moyen sérieux de cassation*». With a corrective, however: the *formation restreinte*, in fact, is endowed with the power of «*statu*[er] *lorsque la solution du pourvoi s'impos*[ait]» (art. 131-6 COJ[73]). This may explain the – initial – limited success of the mechanism, that led to an average one-month reduction of the definition time during 2002-2003; but the time savings have progressively decreased, to settle down, from 2007 onwards, around -0.2 / -0.5 months[74], probably because, even this time,

> *[c]ontrairement à une idée parfois répandue, la procédure de non-admission n'est pas un mécanisme de filtrage des pourvois qui priverait les parties du droit d'accéder à une formation juridictionnelle. Elle n'est pas, non plus, un mécanisme d'examen sommaire et rapide des dossiers. En réalité, l'instruction d'une affaire, qui se solde par une décision de non-admission, ne diffère pas de celle d'une affaire achevée par un arrêt motivé*[75].

In the light of these very humble results – which confirm that a selection mechanism is only suitable if applicable to a large portion of the total claims – it is difficult to agree with the recent proposal by the *Cour de cassation*, which, in advancing the introduction of a *filtrage des pourvois*, has put forth the idea of entrusting the skimming to a restricted panel set up within the same *Chambre* at whose hearing the appeals bypassing the filter should be remitted.

In fact, despite the editors of the *étude d'impact* seem to be well aware of the drifts of the *chambre des requêtes* (as they were in 2017, when the SDER stressed

71. A. Lacabarats, Le moyen sérieux, gennaio 2010, in www.courdecassation.fr; S. Sonelli, L'Accesso alla Corte suprema e l'ambito del suo sindacato, p. 148 (Torino: Giappichelli, 2001).
72. Introduced by *Loi organique* n° 2001-539 *du* 25 *juin* 2001.
73. After the repealing of art. 131-6 COJ by *Ordonnance* n°2006-673 *du* 8 *juin* 2006, see, nowadays, art. 1004 CPC.
74. J.-M. Sommer - B. Munoz-Perez, Dix ans de non-admission devant les chambres civiles de la Cour de cassation (2002-2012), p. 28 (2014), https://www.courdecassation.fr/IMG///10ansdeNAdevantleschambrescivilesCC_140307.pdf last accessed on 01.11.2018.
75. V. Vigneau, Le régime de la non-admission des pourvois devant la Cour de cassation, Recueil Dalloz, p. 103 (2010).

that «*la procédure dite de "non-admission" n'est pas un mode de filtrage*»[76]), they inexplicably connect the risk of a *déjà-vu* only to the hypothetical constitution of a special chamber[77]. Quite the opposite, it is apparent that the danger of a double check arises *whenever* the skimming formation is not also the one judging on the appeals that overcome the screening: and this, according to the same Commission's estimates, would occur in little less than half of the cases.

Indeed, the Commission identifies a «*socle minimum*» of appeals that would be predictably intercepted (54.5% of the total) by the filter, by simply adding data related to those presently given up by the *plaideur* following the denial of the benefit of the *aide juridictionnelle* (already linked to an estimate on the *presentation of moyens de cassation serieux*)[78] to the number of the current rulings of inadmissibility and manifest groundlessness pronounced with *rejet non spécialement motivé*, of inadmissibility *tout court* and rejection «*spécialement motivé* [mais] *qui ne donnent pas lieu à publication parce qu'elles ne présentent pas d'intérêt normatif*».

Of course, the calculation should ideally include even those cases in which the *illegalité* and *irregularité*, which are currently remedied, would not been corrected once the filter have raised the threshold of the required offensivity for the sanction of the defect; but the data should not be overestimated, provided that

> *en usant du deuxième critère* (intérêt pour l'unification de la jurisprudence), *les formations* ad hoc *seront attentives à permettre à la Cour de sanctionner le plus grand nombre d'illégalités et d'irrégularités affectant les décisions qui leur sont soumises*.[79]

This confirms the feeling that the filter risks ending up into a mere burden of work[80], without producing significant consequences regarding the quantity and type of appeals finally decided[81].

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76. SDER, *Rapport de la commission de réflexion sur la réforme de la Cour de cassation,* p. 262 (2017). https://www.courdecassation.fr/institution_1/reforme_cour_7109/reflexion_reforme_8630/commission_reflexion_8182/reflexion_reforme_36784.html, last accessed on 01.11.2018.
77. Commission de mise en oeuvre de la réforme de la Cour de cassation, *Volet « filtrage des pourvois ». Projet d'étude d'impact,* p. 19 (2018), https://www.courdecassation.fr/institution_1/reforme_cour_7109/mise_oeuvre_propositions_reforme_8181/reforme_traitement_pourvois_8640/impact_reforme_39002.html.
78. Art. 7, par. 3, *loi* n° 91-647 *du* 10 *juillet* 1991.
79. Commission de mise en oeuvre de la réforme de la Cour de cassation, *supra* note 77, pp. 21-22.
80. As noted with respect to German *Revision* too: see P. Gottwald, Civil Justice Reform: Access, Cost, and Expedition. The German Perspective, in A.A.S. Zuckerman (ed.), *supra* note 1*,* p. 210.
81. Indeed, the same happened elsewhere: see, for the Taiwan Supreme Court, T. Eisenberg - K.-C. Huang, The effect of rules shifting supreme court jurisdiction from mandatory to discretionary—An empirical lesson from Taiwan, *International Review of Law and Economics,* pp. 4 et seq (2012); for the Dutch *Hoge Raad*, E. Mak, Case Selection in the Supreme Court of the Netherlands - Inspired by Common Law Supreme Courts?, European Journal of Current Legal Issues (2015), http://webjcli.org/article/view/419/532, last accessed on 01.11.2018.

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On the other hand, if the proposal effectiveness is doubtful, it certainly – and despite the strong oppositions of the doctrine – does not contrast with any expressed constitutional limit.

The same conclusion would seem impossible with reference to Italy, where the art. 111, par. 7, Cost. – which entrenches the *right* to appeal to the *Corte di cassazione* (the access to which has to be granted «sempre») – is seen as a sort of handicap affecting the system's efficiency. Whether this view is shared or not, however, the constitutional proviso would seem to prevent the introduction of "filters" to the SC degree. And yet, this happened in 2009, with the introduction of a new hypothesis of *inammissibilità meritale*: according to art. 360-*bis*, n. 1, c.p.c., the appeal is not allowed when the appealed judgment is consistent with *Corte di cassazione*'s jurisprudence and the advanced grounds does not offer any reason to confirm or reverse it.

Now, even if one acknowledges the interpretation that legitimises *a* filter – but not necessarily *the one* referred to in art. 360-*bis*, n. 1, c.p.c.[82] – by virtue of a balance with the principle of equality (art. 3 Cost.)[83], the mechanism in itself appears to be economically inefficient.

In fact, it is possible to recall many of the considerations already carried out with reference to French Court's proposal and to the *chambre des requêtes*: whether the *Sezione filtro* is called to check if the appeal is affected by procedural defects (art. 375, par. 1, nn. 1 e 5, c.p.c.) or *inammissibilità meritale* (art. 360-*bis*, n. 1, c.p.c.), such an assessment does not deprive the *Sezione semplice* of the power to consider otherwise with reference to survived appeals. Thus, instead of being subject to an one-off review, all the appeals that go beyond the filter – and they seem to be many more than those estimated by the *Cour de cassation*[84] – are double-checked.

In addition, and given the already pointed out diseconomy of complicated parameters, perplexities are likely to increase if one considers that compliance with jurisprudence is often set as the parameter of the *non-admissions* of the *Cour de cassation* (in spite of the absence of any regulatory provision allowing the Court to do so); and that it certainly constituted the reason behind more than one rejection (resulting from a merit screening, presumably the same carried out by the *Sezione filtro*) of the Italian SC, even before the introduction of art. 360-*bis*, n. 1, c.p.c.

From this point of view, the express provision of the filter – with the simultaneous charge for the *Sezione filtro* – may even appear as an *involution*: if a hypothesis, for

82. In this sense, if correctly understood, A. Proto Pisani, Ancora a proposito di Cassazione civile e nomofilachia, Foro italiano, p. 265 (2018).

83. Lastly, A. Proto Pisani, Tre note sui «precedenti» nella evoluzione della giurisprudenza della Corte costituzionale, nella giurisprudenza di una Corte di cassazione necessariamente ristrutturata e nella interpretazione delle norme processuali, Foro italiano, pp. 286 et seq (2017).

84. In 2017, only 16% of total judgement ended up with a declaration of inadmissibility: see Corte Suprema di Cassazione. Ufficio di Statistica, *La cassazione civile. Annuario statistico 2017*, cit., 15.

example, of "classical" inadmissibility, albeit escaped to the first screening, may be detected by the *Sezione semplice* without much effort[85], a much higher degree of commitment is required when it comes to deny[86] the discrepancy of the appealed judgement with a «jurisprudence» which must first be *identified*.

VII. STARE DECISIS OR NOMOFILACHIA PREVENTIVA?

From a different point of view, someone saw the consecration of a «temperato» *stare decisis* in art. 360-*bis*, n. 1, c.p.c.[87]. In fact, the introduction of the rule, if possible – materially and juridically[88] – would likely prove to be an efficient choice: neglecting for a moment the common law systems, where the principle, for its longevity, does not allow comparisons between a *before* and an *after*, it is useful to think of a Country until recently unrelated to this tradition: Brazil.

Here, the *súmula* – already known since 1960s as *persuasive* «one-sentence-pronouncement of the judgments of the Court that states succinctly its interpretation of rules and of the Constitution»[89] resulting from administrative proceedings[90] – has become binding from 2004[91], moreover barring the appeal against consistent decisions. The difference with the Italian filter is striking, both with regard to the clarity of the selection criterion and to the *truly* skimming effect. By contrast, the other Brazilian proviso that subordinates the admissibility of the appeals to the *requisito da repercussão geral* did not have – as it was to be expected – significant effects[92].

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85. And without the "waste" of a double ruling, as in the cases of a prima facie order of conflict admissibility before Italian Corte costituzionale, when followed by a (certainly not precluded) judgement of inadmissibility.
86. And this happened: see, for instance, Cass., Sez. trib., 18 novembre 2015, n. 23586, Repertorio Foro italiano, voce Cassazione civile, p. 1140 (2015).
87. C. Consolo, Dal filtro in Cassazione ad un temperato "*stare decisis*": la prima ordinanza sull'art. 360-*bis*, Corriere giuridico, pp. 1405 et seq (2010).
88. For a positive assessment, see F.P. Luiso, Sulla riforma del giudizio di cassazione – Il vincolo delle Sezioni semplici al precedente delle Sezioni unite, Giurisprudenza italiana, pp. 817 et seq (2003).
89. M.A. Jardim de Santa Cruz Oliveira, Reforming the Brazilian Supreme Federal Court: A Comparative Approach, Washington University Global Studies Law Review, pp. 99 et seq (2006).
90. Because precedent selection does not take place in the exercise of jurisdictional activity, but *a posteriori*: see A.S. Bruno, Bringing Uniformity to Brazilian Court Decisions: Looking at the American Precedent and at Italian Living Law, Electronic Journal Of Comparative Law, p. 3 (2007), *http://www.ejcl.org/114/art114-3.pdf,* last accessed on 01.11.2018. The mechanism is similar to *zhidao anli* (*guidance cases* o *arrêts directeurs*) introduced by Chinese SC since 2010: see W.J. Guo, Cases as a New Source of Law in China?: Key Features of and Reflections on China's Case Guidance System, China Law and Society Review, pp. 61 et seq (2016).
91. *Emenda Constitucional* nº 45, *de* 8 *de dezembro de* 2004.
92. M.A. Jardim de Santa Cruz Oliveira - N. Garoupa, *Stare Decisis* And Certiorari Arrive To Brazil: A Comparative Law And Economics Approach, Emory International Law Review, p. 597 (2012).

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Following the recent reaffirmation and expansion of the binding effect of precedent[93], it has been suggested that it may be equated to a positive externality[94], due to its suitability to increase the predictability of judicial decisions, thus allowing the parties a better estimate of the outcome of the process[95], which – as seen – is primordial in the evaluation of the opportunity to litigate or settle.

From this point of view, the same nomophylactic function of the Italian SC – but deemed as belonging to the French one too, in spite of the absence of a legal provision similar to art. 65 ord. giud.[96] – may be seen (not only as the procedural projection of the principle of equality, but also) as a possible solution to the problem of the *encombrement* of the Courts.

This does not change the assessment of either the technique chosen by the Italian *conditores*, nor the path proposed by the *Cour de cassation*, since the *economic function* of *nomofilachia* should not arguably be pursued through a – however set – *a posteriori* remedy, but rather through mechanisms designed to grant (at least to some extent) jurisprudence's consistency.

With respect to this aim, if the legislator can little affect judicial behaviour, s/he can act upstream, by granting the quality (also in the meaning of clarity) of laws. In this framework one can think, in Italy, to the advisory function (or, better, to the *jurisdictio preventiva*) [97] carried out by the *Consiglio di Stato*, whose opinions, like SC's judgement, may improve law's clarity, by giving an *ex ante* interpretation that, in turn, smoothes Court's task[98].

Failing such mechanisms, another abstractly effective solution is to anticipate as much as possible the interpretative intervention of the SCs: here the reference is obviously to the *saisine pour avis* (*du Conseil d'Etat* and) *de la Cour de cassation*[99],

93. Artt. 926-927 *Código de Processo Civil, Lei* n. 13.105, *de* 16 *de março de* 2015.

94. J.Jr. Borges Teixeira, Reduzindo os Custos: Os Precedentes Judiciais como uma Externalidade Positiva do Litígio, Civil Procedure Review, pp. 127 et seq (2018).

95. G.A. Baggenstoss, O Sistema de Precedente no CPC/2015: a calculabilidade das decisões judiciais pátrias como segurança jurídica defendida pela análise econômica do direito, Economic Analysis of Law Review, pp. 299 et seq (2017); R.A. Posner, *supra* note 39, p. 511.

96. Stemming from art. 111-1 COJ: see L. Cadiet, L'organisation interne de la Cour de cassation favorise-t-elle l'élaboration de sa jurisprudence?, in N. Molfessis (dir.), *supra* note 53, p. 41.

97. The expression is used by Cons. Stato, sez. II, 11 giugno 1997, n. 1366, Consiglio di Stato, p. 1698 (1998); Cons. Stato, Sez. II, 09 aprile 1997, n. 129, ivi, 152 (1998).

98. L. Carbone, I pareri del Consiglio di Stato sulla riforma Madia: verso un'evoluzione delle funzioni consultive?, p. 67 (2017). https://www.giustizia-amministrativa.it/documents/20142/147937/nsiga_4385155.docx/b7cf4f21-dc68-8969-acbe-49c68fc3f25d?version=, last accessed on 01.11.2018.

99. See, *ex multis*, H.M. Darnanville, La saisine pour avis du Conseil d'Etat et de la Cour de cassation, Actualité Juridique Droit Administratif, pp. 416 et seq (2001); R. Libchaber, La saisine pour avis, une procédure singulière dans le paysage jurisprudentiel (Avis C. cass. 22 nov. 2002; Avis CE 6 déc. 2002), Revue trimestrielle de droit civil, pp. 157 et seq (2003); F. Zenati, La saisine pour avis de la Cour de cassation (loi n° 91-491 du 15 mai 1991 et décret n° 92-228 du 12 mars 1992), Recueil

which allows any Court of merit to stay the proceedings pending before it, in order to request a *non-binding* opinion from the Court on the interpretation of a provision laying down a «*question de droit nouvelle, présentant une difficulté sérieuse et se posant dans de nombreux litiges*» (art. 441-1, par. 1, COJ). The mechanism – which is obviously based on the persuasiveness of the opinion, rather than on its authority – has proven effective[100], but it was underused[101] (either because of the strict limits in which it is admitted, or due to the natural reluctance of lower judges to dismiss – symbolically if not juridically – the power to resolve the dispute). In any case, however, it has contributed to the Court's awareness of the need for «*convaincre les juridictions* [du fond] *de la justesse* [de ses] *positions*»[102] so that they can adopt them because *persuaded*.

By contrast, perplexities arise when an obligation to comply with precedents is imposed *ab externo*, as Italian legislator *seems* to have done with art. 374, par. 3, c.p.c., albeit only referred to the *Sezioni semplici* within the SC: putting aside any theoretical discussion regarding the exact scope of the *stare decisis* in the various common law systems – and without mentioning the fact that such a rule postulates a hierarchical organization of the Courts, which is alien to our legal system – it should first be remembered that, in common law models, there was the judges themselves to self-impose the obligation to follow previous decisions, (among other things) to protect legal certainty. This consideration, on the one hand, explains that such a self-restraint is held surmountable – at least by the higher Courts – when other needs so justify, and, on the other hand, induces to downsize the value of *a single* precedent.

Taking as reference point the US system – paradoxically *closer* than the British one to the continental model, as to the cogency of the principle of *stare decisis* –, it was emphasized that, when it comes to Courts of equal order, it is the subsequent judge that creates the precedent, by adhering to a previous *ratio decidendi*; furthermore, a true and proper norm – in the manner of Italian «principio di diritto»[103], which, alien to the fact as it is, is more similar to an *arrêt de règlement*[104] – can only be defined when *a plurality of judges* choose to comply with a precedent[105]. So far, nothing different than

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Dalloz, pp. 249 et seq (1992); C. Silvestri, La saisine pour avis della Cour de cassation, Rivista di diritto civile, pp. 495 et seq (1998).

100. C. Pelletier, Quinze ans après : l'efficacité des avis de la Cour de cassation, in AA.VV., Libres propos sur les sources du droit – Mélanges en l'honneur de Philippe JESTAZ, pp. 429 et seq (Paris: Dalloz, 2006).

101. This is probably the reason why the SDER had taken to issue *avis spontanés*, thus interpreting new texts of law before any *saisine* of the Court; the practice - arisen *praeter legem* - is however nowadays abandoned, given the strong perplexities raised by the doctrine as to its legitimacy: see N. Molfessis, Les avis spontanés de la Cour de cassation, Recueil Dalloz, pp. 37 et seq (2007).

102. G. Canivet, *supra* note 53, p. 19.

103. Art. 384, par. 1, c.p.c.

104. Prohibited in France by art. 5 CC.

105. W.M. Landes - R.A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, Journal of Law and Economics, p. 250 (1976).

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the Franco-Italian precedent, which is nothing but persuasive, whether horizontal[106] or vertical; and, as judicial behaviour studies show, the choice of the precedent to follow depends on the second judge's personal beliefs[107] and expected reaction of the legal community[108]. This confirms both the opportunity, for the higher Courts, to *convince*, before doing it the hard way (ie by cassation) and Picardi's intuition about judges' legitimisation, which nowadays stems from their prestige and mutual interaction[109].

But, whatever the legal system of reference, the *practical* situation is the same with reference to higher jurisdiction's precedents: the lower judge, when deciding, is *physically free* to conform or not; s/he only risks seeing his/her own dissident judgment vacated from the higher Court.

It seems, then, that the real incentive to follow precedents – either persuasive or binding – lies in the degree of *certainty of the sanction,* or, in other words, in the estimate of the probability that the judgement will be overturned[110]. And if this assessment may appear problematic when «[t]he appellate judge cannot correct all [the] "mistakes" [...] because the appellate court's jurisdiction is discretionary and many appeals are not heard»[111], it could be much less aleatory in systems where, unlike in the common law, the exhaustion of all degrees of appeal is the norm.

Provided that one could count on a uniform jurisprudence of the higher Courts.

VIII. CONCLUSIONS

If this is true, it is arguably possible to reassess – theoretically, as it still seems to clash with Italian constitutional principles[112] – the idea of the "obligation" for the *Sezioni semplici* to follow the *dictum* of the *Sezioni unite* (art. 374, paragraph 3 °, cpc), and thus to understand the paradox of providing for «*un vincolo per così dire in*

106. B. Cavallone, Sulla citazione dei «precedenti» negli scritti forensi*,* Rivista di diritto processuale, pp. 150 et seq (2018); L. Cadiet, *supra* note 96, p. 47.

107. A. Niblett - A.H. Yoon, Judicial disharmony: A study of dissent, International Review of Law and Economics, pp. 60 et seq (2015).

108. S. Harnay - A. Marciano, Judicial conformity versus dissidence: an economic analysis of judicial precedent, International Review of Law and Economics, pp. 405 et seq (2004).

109. N. Picardi, La giurisdizione all'alba del terzo millennio, p. 195 (Milano: Giuffrè, 2007)

110. R.A. Posner, The problems of jurisprudence, p. 224 (Cambridge: Harvard University Press, 1990); S. Shavell, *supra* note 39, p. 426; T.J. Miceli - M.M. Cosgel, Reputation and judicial decision-making, Journal of Economic Behavior & Organization, pp. 31 et seq (1994).

111. E. Bueno De Mesquita - M. Stephenson, Informative Precedent and Intrajudicial Communication*,* American Political Science Review, p. 757, (2002).

112. F. Auletta, Profili nuovi del principio di diritto (il « vincolo delle sezioni semplici al precedente delle sezioni unite »), in E. Fazzalari (ed.), Diritto processuale civile e Corte Costituzionale, pp. 3 (Napoli, Edizioni Scientifiche Italiane, 2006), et seq; Id., Note intorno alla prima applicazione del c.d. «vincolo delle sezioni semplici al precedente delle sezioni unite», Giustizia civile, pp. 769 et seq (2008); Id., ... il sole e l'altre stelle: è la giurisdizione quella del «sistema» dell'ABF?, Banca, borsa e titoli di credito, pp. 794 et seq (2018).

senso verticale e un vincolo assoluto in senso orizzontale»[113], which is not imposed on the lower Courts, but operates only within the same *Corte di cassazione*: while in common law systems there is only a handful of supreme judges, who consequently grant a basically coherent jurisprudence (so that the assessment of the lower Court can be based on solid elements), the plethoric formation (and production) of the Italian (and French) SC is a clear source of contrasts, which do not allow similar calculations to the Courts of merit.

Nor, upstream, to the parties: in fact, when the synchronic uncertainty is coupled to a diachronic one (due to the jurisprudence volatility), aggravated by the (too long) time necessary for a case transiting from the first degree to the one of legitimacy (and during which the wrong party could profit on a *temporary* victory, granted by a judge *persuaded* by the "wrong" precedent), it is apparent how parties' estimate of the probability of winning becomes uncertain, or otherwise distorted: absent any *lato sensu* objective data to draw their valuation from, litigants are left at the mercy of their heuristic fallacies.

So, if it is true that the settlement is always preferable to judgment; that the more parties' estimates about the likely outcome of the process are closer, the greater the likelihood of an agreement; that these assessments (whether autonomous or caused by a possible conciliatory proposal) cannot rationally be based on other than the ruling of Courts who have the last word; then, the coherence of the SCs *could be* the most effective of dispute avoidance mechanism.

The problem is that, in order to reach such a consistency, revising the code is not enough.

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113. F. Auletta, Note intorno alla prima applicazione, *supra* note 113, p. 771.

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