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Recent Developments in US Case Law on Pleading Requirements in Civil Proceedings

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Abstract: The Author investigates recent US case law on pleading requirements in civil proceedings through the analysis of two US Supreme Court decisions which seem to give way to a review of the standards applied by claimants when qualifying the claim in their introductory pleadings. Leaving its traditional approach of "minimal singling out requirements" of the claim, the US Supreme Court seems to require claimants to enclose, in their introductory pleadings, facts sufficient for the claim to be held "plausible"; moreover, the Court seems to suggest that failure to enclose such facts would bring the impossibility, for claimants, to access the pretrial discovery and, ultimately, the rejection of the claim. The analysis of US federal case law then becomes an opportunity to make a comparison among legal systems on how function and content of introductory pleadings are understood, as well as their relationship with further stages in proceedings, in the context of the ever-present trade-off between access to justice and judicial efficiency.

Keywords: introductory pleading - specificity - claim - access to justice - judicial efficiency

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1. Introduction

Introductory pleadings have always been a focus of attention throughout all legal systems. As the instrument which establishes both the claim and initial moment in any legal proceeding, the study of introductory pleadings provides an insight into the understanding of civil procedure as a whole. Analysing a country's pleading rules and structure makes it possible to understand how its legal system conceives and applies civil procedure[1]. Indeed, pleading rules always reveal an underlying and inevitable balance of opposite interests as, for example, access to justice against efficiency of the judiciary system[2]. In regard of the aforesaid, each legal system, in establishing what should be contained in introductory pleadings, is presented with the necessary choice between overly simplified or highly specific pleading requirements, both in fact and in law. Overly simplified pleading requirements define the claim is defined at a later stage in proceedings, thus facilitating access to justice, sometimes at the expense of judicial efficiency; whilst highly specific pleading requirements restrict access to justice and favour judicial efficiency through immediate definition of the claim, strike-out mechanisms for inadmissible or unfounded claims and clarification from start of the extent of judgment[3].

The choice between these two options is never a neutral one, as the historical and cultural background in which a legal system develops influences the organisation and structure of its proceedings[4]. For renown historical and cultural reasons, *Civil Law* systems have embraced, although with some internal differences, a pleading structure which requires the claimant to indicate precisely (both in fact and in law) what the claim is about; this method allows pleadings to measure from start (in an usually unalterable way) the matter brought before the Court and,

[1] On this point see CERINO CANOVA, *La domanda giudiziale ed il suo contenuto*, in *Commentario al c.p.c.* (directed by Allorio), II, 1, Torino, 1980, 9, according to whom the study of introductory pleadings calls for speculations regarding the whole theory of civil procedure, finally focusing on the complex relationship between substantial and procedural law; CONSOLO, *Domanda giudiziale*, in *Dig. disc. priv., sez. civ.*, II, Torino, 1993, 59 ff.

[2] On this matter see CERINO CANOVA, *op. cit.*, 135 ss.; BÖHM, *Die Ausrichtung des Streitgegenstandes am Rechtsschutzziel*, in *Festschrift für Kralik*, Wien, 1986, 83 ss., 84; HOFFMAN, *Burn Up The Chaff With Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, in *88 Boston University Law Review*, 2008, 1217, 1218 ff.

[3] The choice becomes relevant in disputes where presuming the claimant's full knowledge of the facts of the claim would be unreasonable. From here stems the possible choice between simplified or specific pleading requirements, which can be diversified depending on the type of dispute.

[4] On this matter CERINO CANOVA, *op. cit.*, 12, underlines how, considering the existing structural differences which characterise introductory pleadings in all legal systems, it would be impossible to theorise introductory pleadings and their content by means of absolute criteria.

ultimately, the outcome of the final judgment[5]. All the above considered, *Civil Law* systems have shifted their attention on a claim's identifying criteria, therefore on the content of introductory pleadings. In particular, *Civil Law* systems have been (and still are) arguing on what should be the role and concrete extent of the "groundings" of a claim brought before the court in identifying such claim, especially with regard to the validity of factual and legal requirements in pleadings[6].

Although adopting a different approach in force of their different cultural background, *Common Law* systems have also been facing the issue of function and content of introductory pleadings, coming to solutions which are converging on the one hand, but on the other hand diverging from *Civil Law* traditions.

Within the framework of the above considerations can be brought a new line of thought from the Supreme Court of the United States, which, focusing once more its attention towards the content of introductory pleadings in civil proceedings, has been moving against consolidated case law.

In consideration of the continuing interest towards pleadings (and also considering the growing need for guaranteeing efficient and effective legal proceedings) it is now appropriate to focus on the recent US case law on pleadings. Indeed, a comparative perspective (even though extended to a legal system so different from the Italian one) could suggest and promote new considerations not only on the contents of pleadings, but also, taking a wider point of view, on the structure and aim of civil proceedings.

[5] The choice of specificity in indicating the facts, and eventually the law to be applied, constituting the claim brought before the court can be retrieved in the pleadings rules of various *Civil Law* systems: in Italy art. 163 co. 3 nn. 3 e 4 c.p.c.; in Germany § 253 2 Nr. 2 ZPO; in Austria v. § 226 Abs. 1 ZPO and in Spain art.399, co. 3 e 4 LEC. On the relationship between the claim contained in introductory pleading, proceedings and final judgment in Italy see: CONSOLO, *op. cit.*, 64 ff.; MENCHINI, *Regiudicata*, in *Dig. disc. priv.*, *sez. civ.*, XVI, Torino, 1997, 428 ff.

[6] Reference is made to two theories of German descent, the "theory of substance" (*Substanzierungstheorie*) and the "theory of the identification of the claim" (*Individualisierunsgtheorie*), which claimed, respectively, that pleadings should indicate all relevant facts or that they should identify the law applicable to the claim. For a definition of the two theories, with regard to the historical reasons for their rise and conflict see esp. SCHMIDT, *Die Klagänderung*, Leipzig, 1888, 147 ff., and subsequently WACH, *Vorträge über die Reichs-civilprozessordnung*, Bonn, 1986, 20 ff; LENT, *Die Gesetzeskonkurrenz im bürgerlichen Recht und Zivilprozess*, II, Leipzig, 1916, reprinted Aalen, 1970, 359 ss. On the influence of these theories on Italian doctrine and, in particular, on the "factual" and "legal" interpretation of the claim see CERINO CANOVA, *op. cit.*, 44 ff.; and CONSOLO, *op. cit.*, 64 ff., 70 ff.; MENCHINI, *op. cit.*, 428 ff.

2. The US Supreme Court brings the focus back to introductory pleadings: towards a higher degree of specificity for claims

Introductory pleadings have recently made a comeback, becoming a core issue in US case law[7]. The reason of the renewed attention on introductory pleadings is a series of recent US Supreme Court decisions (culminating, in May 2009, with *Ashcroft v. Iqbal*), which seem to have opened towards a re-shaping of the standards of specificity required to claimants when describing the claim in their introductory pleadings[8].

With the new millennium, the US Supreme Court has been carrying on a reversal as regards to the opinion prevailing in the'40s and'50s, moving towards a tightening in contents of the claimant's introductory pleadings (*complaint*). In particular, the Supreme Court seems to offer a new interpretation of the *Federal Rule of Civil Procedure 8(a)(2)*, which requires, in each pleading, "a short and plain statement of the claim showing that the pleader is entitled to relief"[9].

Today, by abandoning its traditional approach of "minimal identification requirements" of the claim, in fact the Supreme Court thrusts upon the claimant to enclose with their pleadings enough facts as to allow the judge to value whether the claim is "plausible"[10]. If the claimant fails to enclose such facts, or if the facts enclosed are not sufficient, the consequence would be (subject to a motion from the defendant) impossibility for the claimant to access the pretrial discovery, thus rejection of the claim[11].

The new trend developed by the US Supreme Court has immediately provoked numerous and widespread reactions in both the judicial and academic sides of the US legal world, which have

[7] For a description of the current judicial and academic debate on pleadings in the US see BONE, Twombly, *Pleadings Rules, and the Regulation of Court Access*, in 94 *Iowa Law Review*, 2008-2009, 873-875.

[8] See *Ashcroft v. Iqbal*, 129 S. Ct., 1937 (2009); and before that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed2d 929 (2007). Although they have been object of considerable attention in the US, the decisions have passed almost unnoticed by the Italian academic world; the only exception is the commendable comment on the *Twombly* decision by DONDI, Case Law and *filosofia degli atti introduttivi negli Stati Uniti*, in *Riv. trim. dir. proc. civ.*, 2008, 529 ff.; as well as ID., *Alegaciones iniciales de las partes en el proceso civil estadounidense: un reciente cambio en la jurisprudencia federal* (tr. by Alvaro Gutierrz Berlinches), in *Revista de Derecho Procesal*, 2007, 283 ff.

[9] In the US legal system, a complaint is defined as the claimant's pleading, which introduces proceedings and which can be followed by the defendant's pleading, called answer to a complaint: *FRCP 7(1)(a)-(b).* As regards to *FRCP 8(a)(2)*, the claimant is there specifically asked to indicate in their complaint *"a short and plain statement of the claim showing that the pleader is entitled to relief*". On the introductory stage of US proceedings from the Italian academic point of view see DONDI, *Introduzione della causa e strategie di difesa. I. Il modello statunitense*, Padova,1991, *passim.*

[10] This way of describing the traditional approach of the US Supreme Court has been created after the coming into force of the 1938 *FRCP* ID., *op. ult. cit.*, 75 and *ivi* nt. 23.

[11] Here is summarised the rule applied by the US Supreme Court in *Ashcroft* and *Twombly* cases (see the previous nt 8).

been investigating both the general meaning and the practical spin-offs of these recent decisions. From here stems the need for a closer examination of these decisions, with the aim not just to understand their (still debated) innovative extent in the US legal system, but also to investigate (by widening the research to a comparative dimension) whether the new trend, where confirmed by successive case law, can be read as a US coming close towards anglo-saxon or continental legal systems.

In order to understand the context these decisions come into, it is necessary to first examine the historical developments which brought to *FRCP 8 (a) (2)* and to its further application by US courts.

3. The preambles of FRCP 8(a)(2). Affirmation of the notice-pleading *theory*

The current *FRCP 8(a)(2)* is a pivotal rule as regards to introductory pleadings in US civil proceedings and is the result of a complex historical development. This *Rule* came into force in 1938 as part of the new *Federal Rule of Civil Procedure*, laid down by the US Supreme Court (implementing the *Enabling Act* del 1834) to rule civil proceedings before federal courts.

The rule, strongly influenced by Charles E. Clark's theories, came as an open reaction to the two pleading systems then used by US State Courts: *common law-pleading* and *fact-pleading*, both characterised, although in their diversity, by a tight and exasperate formalism which reached (too often) ritual conclusions rather than examining the merit of the claim [12]. On the one hand, the *common law system*, based on the English *forms of actions*, punished the wrong choice of action with a ritual dismissal of the claim; on the other hand, the *fact-pleading system* sanctioned pleadings failing to enclose a detailed explanation of the cause of action and facts of the claim

[12] On *FRCP 8 (a) (2)* as an answer to previous pleading systems, see, in general FRIEDENTHAL, *Civil Procedure*, St.Paul-Minnesota, 2005, 267 ff.; JAMES-HAZARD-LUEBSDORF, *Civil Procedure*, New York, 2001, 187 ff.; MARCUS-REDISH-SHERMAN-PFANDER, *Civil Procedure. A Modern Approach*, St. Paul-Minn, 2009, 125 ff. For a more detailed analysis of the development of pleadings see SHERWIN, *The Story of* Conley*: Precedent by Accident*, in CLERMONT (edited by), *Civil Procedure Stories*, 2008, New York, 295, 299 ss.; BONE, *op. cit.*, 891. For an Italian outlook see DONDI, *Introduzione della causa e strategie di difesa* cit., 35b ss. On the personal and decisive contribution by Charles E. Clark to *FRCP*, considering his pre-eminent academic (as *Dean* of the *Yale Law School*) and political status (as member and *reporter* of the *Advisory Committee* called to lay down the new *FRCP* implementing the 1934 *Enabling Act*), see SUBRIN, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in *Judges Charles Edward Clark*, 1991, New York, 115 ff.

with ritual closure of proceedings[13].

From here, when the *FRCP* were laid down, stemmed the decision to formulate *FRCP 8(a)(2)* in generic terms, requiring any pleadings intended to address a claim to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief".

However, clear the *ratio* of the new rule (that is, to value the merit of a claim, thus overcoming the previous hyper-technical pleading system), *FRCP 8(a)(2)* rose a heated academic debate. In consideration of its generic wording, the issue was on what introductory pleadings should concretely contain, more precisely, what the defendant should be informed of with such pleadings.

Opposite opinions clash on this point. Conservatives, following a traditional approach requiring introductory pleadings to contain a precise indication of the type of claim brought before the court, were opposed by liberals, who favoured a generic interpretation of the *Rule*[14]. In particular, liberals considered *FRCP 8(a)(2)* as part of the whole *corpus* of the new *FRCP*, which valued the functional link (in the pretrial stage) between pleadings and discovery. Therefore, the claimant's introductory pleading would have only functioned as notice to the defendant with regard to the existence and nature of the claim, with no further information provided[15]. The precise outlining of the case (both in fact and in law, so-called *establishment of the case*) would have instead taken place during a further stage in proceedings, in particular the *pretrial discovery*, which became the claimant's instrument for seriously proving their claim.

Liberals finally prevailed over conservatives, with consequent affirmation of a new notion of pleading: the so-called *notice-pleading*.

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[13] On the *common law-pleading*, as a pleading system imported from England see MARCUS-REDISH-SHERMAN-PFANDER, *op. cit.*, 114 ff.; SHERWIN, *op. cit.*, 296-297; on the *fact-pleading* as adopted by the State of New York with the 1848 *Field Code* (and successively acknowledged by most of the United States) see (for a critical perspective) C.E. CLARK, *The Complaint in Code Pleading*, in *35 Yale Law Journal*, 1926, 259 ss.; ID., *Handbook of The Law of Code Pleading*, II ed., St. Paul-Minnesota, 1947 *passim*.

[14] For a critical opinion on *FRCP 8(a)(2)* see O.L. MC CASKILL, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, in *38 American Bar Association*, 1952, 123 ff.; and LASKY, *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2)*, in *13 Federal Rules Decision*, 1953, 253, which expressly pushed towards a reform of *FRCP 8(a)(2).*

[15] For a liberal outlook see C.E. CLARK, *Handbook* cit., 62; ID., *The Code Cause of Action*, in *33 Yale Law Journal*, 1924, 817, 831; C.E. CLARK-TRUBEK, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, in *71 Yale Law Journal*, 1961, 255, 263-75.

4. Case Law on FRCP 8(a)(2): from notice-pleading *to* highly specific *pleading requirements*

As did academics, Federal Courts also found difficulties in applying *FRCP 8(a)(2)*, precisely in establishing the degree of specificity required to the claimant when identifying their claim by means of an introductory pleading. To this regard, court decisions have been so variegated in time that support must be given to the theory which (with effective imagery) described *notice-pleading* as a "chimera"[16].

On the eve of the coming into force of the *FRCP*, federal case law embraced an extremely liberal interpretation of *FRCP 8(a)(2).* The main example of this choice of interpretation is the decision *Conley v. Gibson*, where the US Supreme Court was called to decide on a plea of dismissal of a claim for claimant's failure to enclose sufficient information in their pleading (the so-called *motion to dismiss the case for failure to state a claim*)[17]. The S. C. there established that no claim shall be dismissed in force of such a plea unless it appears beyond any doubt that the claimant could not have proved any set of facts alleged in support of their claim[18].

So, as did liberal academics, courts also confirmed that claimant's introductory pleadings shall only provide minimum information, thus underlining the tight connection between pleadings and pretrial discovery[19]. Overly simplified introductory pleadings were justified by a blind trust in the instrument of discovery, with the result that specification was postponed to a further stage in proceedings, thus creating a progressive claim definition mechanism[20].

Notice-pleading was based on an unconditional trust in the pretrial discovery and in its proper use. However, doubts on admissibility of overly simplified introductory pleadings started to show as courts started to realise that such discovery lacked efficiency. Starting from the '70s (partly in force of an increase in litigation), *discovery* showed its failures, becoming the instrument too often (ab)used for lengthening times and raising proceedings costs so to induce the counter-

[16] MARCUS, *The Revival of Fact Pleading Under The Rules of Civil Procedure*, in *86 Columbia Law Review*, 1986, 433, 451.
[17] *Conley v. Gibson*, 355 U.S., 41 (1957), anticipated, on the same line, by *Dioguardi v. During*, 139 F.2d, 774 (2d Cir. 1944). On the impact of the *Conley* decision in case law and academia see espec. SHERWIN, *op. cit.*, 318.
[18] *Conley v. Gibson*, 355 U.S., 45-46.
[19] On stages and instruments of proceedings used for better defining the case in comparison with the mere notice provided in the claimant's introductory pleading see *Conley v. Gibson*, 355 U.S., 48, nt. 9. On the trust in discovery as a crucial instrument in the discovery and ascertaining of the facts of the case see also the earlier case *Hickman v. Taylor*, 329 U.S., 495, 550-501 (1947).
[20] On this point see DONDI, *Effettività dei provvedimenti istruttori del giudice civile*, Padova, 1985, 161-162.

party into expensive transactions, even when the claim lacked grounds. This gave rise to the need to re-shape pleadings, in particular through the introduction, starting from the introductory pleading, of a higher degree of specificity in the facts of the claim. This would have been the only way to avoid parties (in particular defendants) to take on costly, and sometimes useless, pretrial discoveries.

The first move in this direction came from lower Federal Courts, which (more or less openly) extended the application of *FRCP 9(b)* by requiring parties to provide a higher degree of specificity when defining the claim. *FRCP 9(b)* deals with claims in contract for fraud or mistake; indeed, such rule is a departure from *FRCP 8(a)(2)*, as it requires parties to provide details of such fraud or mistake in their pleadings.[21]. Lower Federal Courts thus applied the higher degree of specificity required by *FRCP 9(b)* to cases other than fraud or mistake, such as antitrust litigation, civil rights actions or discrimination cases[22].

The US Supreme Court reacted to federal case law in a wave-like manner.

Decisions which favoured introductory pleadings with a high standard of specificity in defining the claim (*heightened pleading standard*) were opposed by other decisions openly denying the possibility of a departure from *FRCP 8(a)(2)* unless stated by law[23]. Once more, this lack of certainty brought up the existing strain between two opposite interests: favouring the claimant lacking a detailed knowledge of the facts of the claim or protecting the defendant from costly discoveries due to an insufficient introductory pleading? The recent *Twombly* and *Iqbal* decisions came back to this issue.

5. Recent case law from the US Supreme Court: the Twombly case

The case *Bell Atlantic Corp v. Twombly* showed a first departure from the *simplified pleading standard* traditionally envisaged in *FRCP 8(a)(2)*: this is an antitrust class action brought

[21] On *FRCP 9(b)* see FRIEDENTHAL, *Civil Procedure* cit., 271 ff.; MARCUS-REDISH-SHERMAN-PFANDER, *op. cit.*, 158 ff., with particular attention on federal case law on this issue.
[22] For a detailed study of case law on this issue see FAIRMAN, *The Myth of Notice Pleading*, in *45 Arizon Law Review*, 2003, 987, *passim.*
[23] Against an extended application of *FRCP 9(b)* see spec. *Leatherman v. Tarrant County Narcotics and Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz v. Sorema, N.A.*, 534 U.S., 506 (2002); of an opening towards a higher degree of specificity for factual enclosures in introductory pleadings beyond the literal interpretation of *FRCP 9(b)* v. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S., 336 (2005).

by Twombly against several telecommunication companies[24]. Twombly, representing the customers of a local telephone company, claimed against the defendants in order to obtain compensation for the damage caused by the company's anti-competitive behaviour towards consumers. In particular, the claimant claimed breach of *§1 Sherman Act*, which forbids any contract, trust or conspiracy damaging the free market. In their introductory pleading, grounds for the claim were that the defendant companies had agreed to act in an anti-competitive manner. However, the introductory pleading, even though mentioning the companies' conspiracy, did not provide any concrete facts proving the existence of an effective and continuing anti-competitive agreement.

The defendants raised a *motion to dismiss the case* for insufficient information according to *FRCP 12 (b)(6)*, arguing that such pleading failed to establish a claim suitable for relief. According to the defendants, the introductory pleading did not provide facts sufficient to prove conspiracy, which is essential to a claim under *§1 Sherman Act*.

Approved in first instance, then dismissed in appeal, the defendants' motion finally gained the attention of the US Supreme Court, which decided to re-examine the case in point of law (*certiorari granted*). The result was an unexpectedly remarkable decision on pleadings.

In the *Twombly* case, the Court openly criticizes its previous decision *Conley v. Gibson* and ultimately offers a new interpretation of *FRCP 8(a)(2)* [25]. Unlike what it did in *Conley*, the Court here states that where *FRCP 8(a)(2)* calls for "a short and plain statement of the claim showing that the pleader is entitled to relief", it refers to the claimant's duty to enclose in their pleadings the "reasons" which are grounds to their claim. Such reasons cannot be mere statements or formal recitals, but should enclose substantial circumstances of fact.

However, the Court does not deem sufficient an introductory pleading with some factual enclosures, which brings the matter further. Indeed, the Court states that the claimant should enclose in their introductory pleading the facts that, once assumed as true, allow the judge to consider the existence of the claim as plausible[26].

In *Twombly*, the Court investigates the issue of plausibility in an antitrust case, and

[24] *Bell Atlantic Corp. v. Twombly*, 550 U.S., 544; 127 S.Ct. 1955; 167 L.Ed.2d 929. For an Italian academic analysis of such decisions see DONDI, Case Law *e filosofia degli atti introduttivi* cit., 529 ff.
[25] ID., 550 U.S., 561, spec. 563. On the facts and reasons for the decision see DONDI, *op. ult. cit.*, 530 ss.
[26] ID., 550 U.S., 556.

specifies the criteria a judge should follow in assessing a claim under *FRCP 8(a)(2)*. In particular, a judge could deem such claim (compensation under the *Sherman Act*) plausible only when the facts enclosed, once assumed as true, bring them to consider more likely for the defendant to have acted in conspiracy rather than to have acted legally[27].

Clear are the reasons, according to the Court, for the claimant's duty to enclose facts in their introductory pleadings and for the consequent duty to infer the plausibility of the claim: such reasons would be not just to avoid bringing the parties (especially the defendant) into costly (and sometimes unfair) discoveries, but also to prevent the defendant from undergoing into expensive transactions, even when the claim is unfounded, for fear of costly pretrials[28].

Made against tradition, the *Twombly* decision captured the attention of US case law and academia. Quoted from start in numerous decisions from both Federal and State Courts, it also engaged academics, in particular with the issue of understanding the US Supreme Court's position[29].

The *Twombly* decision, notwithstanding the efforts made to interpret it, still left an important question open: that is, whether the new pleading requirements were a criteria to be used only in complex claims or whether they ought to be used in any civil claims[30]. Such question has received, if not a definitive answer, at least a first temporary confirmation in the *Ashcroft v. Iqbal* decision.

6. Further developments in the Iqbal *case*

With the uncertainty generated by *Twombly*, lower Federal Courts immediately showed

[27] ID., 550 U.S., 564 ff. From the Court's reasoning it is understood that, for a pleading to survive under the *Sherman Act*, the claimant should enclose all facts and circumstances that, once assumed as true, render more likely the defendant being responsible rather than not. According to the Court, the judge, in deciding whether the facts enclosed are sufficient as to hold the *Sherman* conspiracy as plausible, can find guidelines in antitrust case law and in renown commentaries.

[28] ID., 550 U.S., 558-59. Underlines the link made in *Twombly* between *pleadings* and *discovery* DONDI, *op. cit.*, 533 ss.

[29] *Twombly case's* extensive commentary work can be divided into two main lines of opinion: one considers such case as the end of the *notice pleading* era: see SPENCER, *Plausibility Pleading,* in *Boston College Law Review*, 2008, vol. 49, 431; DODSON, *Pleading Standards After Bell Atlantic Corp. V. Twombly*, in *93 Viriginia Law Review*, 2007, 121 ff.; another, instead, diminished *Twombly's* innovative extent: see BONE, Twombly cit., *passim*; and BRADLEY, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, in *102 Northwestern. Univerisity Law Review*, 120; IDES, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, in *243 Federal Rule Decisions*, 2007, 604, 625-32, which consider the decision in the light of antitrust litigation only.

[30] An Italian view on the issue is given by DONDI, *op. cit.*, 536 ss.

difficulties in interpreting the new position taken by the US Supreme Court, to the point of wishing for a further intervention on the issue of pleading requirements[31]. Such need for clarity received some attention by the Supreme Court in the recent *Ashcroft v Iqbal* decision, a case of compensation for breach of the I and V Amendment of the U. S. Constitution focusing on the violation of the claimant's civil rights for reason of race, religion and nationality[32].

In first instance, Javaid Iqbal, a Pakistani muslim, claimed against the General Attorney John Ashcroft and other federal agents for having brutally confined him and other middle-eastern muslims for reason of their race, religion and nationality.

Indeed, following the 9/11 attack, he had been arrested and imprisoned for over 150 days in a maximum security prison and there he had been subject to treatments against human rights.

In their defense, the defendants argued that the claimant's introductory pleading was not to be considered sufficient, as the facts enclosed, once assumed as true, were not enough to consider the claim plausible. In particular, the claimant's introductory pleading did not enclose facts sufficient as to determine the plausibility of a causal link between racial discrimination and the treatment applied to the claimant[33].

Rejected in first and second instance, the *motion* came under the attention of the US Supreme Court, which granted *certiorari* on the case[34]. The *U.S. Supreme Court* decision on the point, released in May 2009, opposed the ones given by the lower courts.

Indeed, the Court's majority opinion, laid down by Justice Kennedy, came to demonstrate the insufficiency of the claimant's introductory pleading. Proceeding in such direction, the Court recalls its precedent *Twombly* and expressly declares it applicability to all civil proceedings[35]. Consequently, in recognising the importance, in introductory pleadings, of statements identifying the claim, the Court also confirms the need to enclose from start enough facts as to allow the judge to infer a "facial plausibility" of the claim and, thus, the claimant's entitlement to relief.

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[31] Regarding the different interpretation of the US Supreme Court case law given by lower Federal Courts after *Twombly* see: *Tomayo v. Blagojevich*, 526 F.3d 1074 (VII Circ. 2008); *Phililips v. County of Allegheny*, 515 F.3d 224 (III Circ. 2008); and *Iqbal v. Hasty*, 490 F.3d 143, in which it is observed how US Supreme Court decisions on pleadings are unclear and in need of being reconsidered.

[32] *Ashcroft v. Iqbal*, 129 S. Ct., 1937 (2009).

[33] ID., 129 S. Ct., 1944.

[34] The decision on which the US Supreme Court granted *certiorari* is the already quoted *Iqbal v. Hasty*, 490 F.3d 143.

[35] *Ashcroft v. Iqbal*, 129 S. Ct., 1953, where the Court states that, whereas *FRCP* apply to all civil proceedings, the *Twombly* interpretation should not be confined to antitrust proceedings only but should also apply to discrimination cases.

In regard of that, in fact, the claimant could not rely on the discovery, as the use of such instrument is not to be considered enough for a sufficient pleading.

The Court, once established the introductory pleading requirements, gives details about the standard and method to be applied in assessing whether a claim subject to a *motion to dismiss for failure to state a claim* is to be held plausible.

About the standard of plausibility to be required, the Court, in line with its precedent *Twombly*, confirms that the facts enclosed in introductory pleadings shall allow the judge to infer not just the mere probability of a defendant's responsibility, but its likeliness. In case of the contrary, indeed, the claimant would allege but not "show", as *FRCP 8(a)(2)* states, to be entitled to relief[36]. More explicitly here than in *Twombly*, the Court makes clear that, in inferring a claim's plausibility, the judge shall rely on their experience and on common sense[37].

In the light of such considerations, the Court hence holds that the introductory pleading thereby analysed was not sufficient. Indeed, with regard to the claimant's argument that detention was applied for discriminatory reasons only, the introductory pleading would not have enclosed facts sufficient for the claim to pass the threshold between "conceivable" and "plausible"[38]. For these reasons, therefore, the Court reviewed the decision, remitting it to the Court of Appeals. The Court of Appeals should now examine the possibility of remitting the decision to the court of first instance in order for them to allow the claimant to amend the introductory pleading so that it can reach the plausibility threshold[39].

7. The impact of the Twombly *and* Iqbal *decisions on the US procedural system: isolated cases or* reviremant *of the* notice-pleading*?*

After a close examination of the *Twombly* and *Iqbal* decisions, some considerations can be made on the new trend embraced by the US Supreme Court. On the one hand, with regard to the future impact that the *Twombly* and *Iqbal* decisions could have on the US procedural system; on the other hand, taking a wider, comparative approach, with regard to the possibility that such

[36] ID., 129 S. Ct., 1950.
[37] ID., 129 S. Ct., *ibidem*, where the Court underlines that the evaluation of a claim's plausibility shall be done on a case-by-case basis, so that the judge has to rely on their personal experience and common sense.
[38] ID., 129 S. Ct., 1950 ff., an argument on the need to pass the threshold from conceivable to plausible.
[39] ID., 129 S. Ct., 1954.

decisions may represent, for the U. S. legal tradition, a step closer to the *Civil Law* systems or, at least, to other *Common Law* systems.

With regard to the consequence of the *Twombly* and *Iqbal* decisions in US case Law, the new pleading standard established by the US Supreme Court could bring, if it is agreed that it should apply to all civil claims, to a review of the *notice pleading* system. With *Twombly* and *Iqbal*, indeed, the acceptance of mere notice pleadings gives way to a standard for assessing the plausibility of the claimant's allegations (*plausible pleading standard*) which finds its grounds in the need to avoid the excessive costs of a pretrial discovery not really justified by the facts enclosed in the introductory pleading.

However, welcomed as an attempt to avoid useless and costly discoveries, the *Twombly* and *Iqbal* decisions leave open the issue of an equal access to justice. In particular, they do not seem to give enough attention to cases that need a "looser" threshold in evaluating introductory pleadings, such as cases where there is an "information asymmetry" between parties[40]. With regard to the knowledge of the facts of the case, there are, indeed, cases where there is an inevitable lack of balance between parties, and only access to discovery can concretely re-equilibrate such lack of balance[41].

The *Twombly* and *Iqbal* decisions not only forget about such cases, but they seem to have been made where an information asymmetry beween parties could be presumed, therefore denying access to discovery in types of claim (antitrust and discrimination cases), where defendants could well bear the costs of a pretrial. From here stems a suspicion that the *Twombly*

[40] On information asymmetry see DODSON*, op.cit.*, 124 ss. e SPENCER, *op. cit.*, 459 who underline that although it is true that there are cases in which the claimant can easily access the information required by the plausibility test (for example in negligence claims), this does not apply to more complex cases such as discrimination and conspiracy claims. In such cases, therefore, the claimant would need the discovery in order to implement their introductory pleading so to allow a more precise definition of the claim through enclosure of relevant facts. In Italy, the claimant's duty to enclose all the facts of the case in their introductory pleadings presumes their complete knowledge of every aspect of the claim; see CERINO CANOVA, *op. cit.*, 135, who refuses such duty and considers the aforementioned opinion on proceedings as too naive to be given any credit.

[41] On the importance of the discovery as an instrument essential to the claimant in enclosing facts which are not in their knowledge when the claim is lodged see also MARCUS-REDISH-SHERMAN-PFANDER, *op. cit.*, 114, 127, 344. For a comparative investigation on the usefulness of the discovery for this purpose see GIDI, in MATTEI-RUSKOLA-GIDI, *Schlisinger's Comparative Law. Cases-Text-Materials*, New York, 2009, 756 ss., spec. 762-765 e770-73 , where the Author underlines, on this point, the different approach taken by the *Common Law* (mostly US) and by the *Civil Law*, traditionally reluctant in establishing means of discovery even in cases of information asymmetry between parties. Italian academics denounce information asymmetry in particular types of cases, such as company law cases, which would therefore need, in favour of the claimant and against the company, more assertive means of discovery: CONSOLO, *Le prefigurabili inanità di alcuni riti commerciali*, in *Le grandi opzioni della riforma del diritto e del processo societario*, Minutes from the Study Conference (Padova – Abano Terme, 5-7 June 2003), Padova, 2004, 381 ff., 390.

and *Iqbal* decisions could just be expressing a disfavour from the Supreme Court towards the carrying on of antitrust and discrimination cases.

The true and general innovative extent of the recent Supreme Court case law seems therefore in need of further confirmation[42]. Only further confirmations will indeed confirm or deny the intent of the US justice system to change their approach on pleading requirements[43].

8. A comparative perspective on the Twombly *and* Iqbal *decisions: coming closer to* Civil Law *systems or to the English system after the* Woolf *reform?*

In the wait for future support or dissent from further case law, the *Twombly* and *Iqbal* decisions deserve attention from a comparative point of view, so to underline any similarity of approach with other legal systems.

As discussed above, the two recent US Supreme Court decisions state that introductory pleadings shall enclose facts relating to the claim, but shall also pass a preliminary assessment of fact based on the facts enclosed (made by the judge on instance of the defendant) on the plausibility of such claim. From a *Civil Law* perspective it therefore seems that, according to *Twombly* and *Iqbal*, the American judge must take, in examining the claimant's introductory pleading, a rather assertive evaluation. Indeed, the judge should make, on the base of the facts enclosed, a type of assessment which brings together two evaluations which are, in *Civil Law*, conceptually and temporally distinct, that are the one on conclusiveness and the one on groundings[44].

[42] On the perplexities brought from the fact that the plausibility standard had been set in cases where the claimant most needed a discovery to counter-balance their information asymmetry with the defendant see *Justice* Steven's dissenting opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S., 586, 596, where he drastically supports that the real scope of such decision was the interest in protecting from discovery defendants which however, in antitrust cases, happen to be the richest companies in US economy.

[43] However, a future consolidation of the new approach embraced by the US Supreme Court seems uncertain, attention must be given to the considerable eco such decisions have produced in the US legal world. On this issue see LIPTAK, *9/11 Case Could Bring Broad Shift on Civil Suits*, in *The New York Times,* 20 July 2009, which reports how, two months after its issue, the *Iqbal* decision had been quoted over 500 times by lower courts.

[44] Seems to be embracing this interpretation also that part of U. S. academics who consider the *Twombly* and *Iqbal* decisions, with their new plausibility standard, as bringing forward into the introductory stage the evaluation which the judge should do in case the defendant, after discovery, raises a *motion for summary judgment*, that is, a motion where the defendant asks the judge to make a decision in their favour, without going to trial, as the claimant did not produce proof sufficient as to consider that a jury would decide for them (*FRCP 56*): v. EPSTEIN, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgements*, in *25 Washington University Journal of Law & Policy*, 2007, 61 ff.

In *Civil Law*, the conclusiveness assessment of a claim is defined as an abstract evaluation that the judge takes on the base of the facts enclosed in the introductory pleading. More precisely, once the introductory pleading has been presented, the judge has an immediate duty to evaluate, in abstract terms, whether the facts there enclosed are fit for obtaining the relief the claimant claims for[45]. Only once such evaluation proves positive the judge will move on to assess (usually after assuming proof) the groundings of the claim[46]. With such assessment the judge will establish whether the facts enclosed by the claimant are to be considered true or not.

Reading the *Twombly* and *Iqbal* decisions through the eye of the *Civil Law*, it seems that the American judge (unlike the continental European one) must immediately evaluate, on the base of the introductory pleading and of its factual enclosures, not only the conclusiveness, but also the likely groundings of the claim. It therefore seems that, after *Iqbal* and *Twombly*, the American legal system has opted for pleading requirements even stricter than the ones imposed by the *Civil Law.*

Avoiding referral to the abstract concepts of *Civil Law*, not suitable for the American legal and court system, it becomes indeed clear what the real aim of the *Twombly* e *Iqbal* decisions is. Unlike the past, today the US Supreme Court simply wants to impose to the claimant to enclose, still from the introductory pleading stage, an effective enclosure of the facts of the claim[47]. More precisely, in requiring the claimant to enclose in their introductory pleading such facts as to pass the plausibility assessment, the Court would align itself to the trend (all continental European) of the necessary enclosure, in the introductory pleading, of the facts called, in *Civil Law*, "principal

[45] The need for conclusiveness of a claim (defined "*Schlüßigkeit*") finds confirmation in German Law (§ 331, II). The judge issues a judgment on the conclusiveness of a claim by way of an evaluation on whether the concrete facts enclosed in the introductory pleading fit with the general and abstract law applicable in order to obtain the relief sought by the claimant. MUSIELAK, *Grundkurs ZPO*, München, 2007, 246.

[46] On the fact that the groundings of a case can be evaluated only on condition that the conclusiveness threshold is passed see ID., *op. cit.*, 247.

[47] The "stickiness" of the words used in US decisions when describing the current pleading requirements of an introductory pleading could be seen as a degree of uncertainty in distinguishing two different elements: on the one hand, the identification of the claim, on the other hand, the enclosure of facts which are not strictly necessary in order to identify the claim. On such distinction see clearly CERINO CANOVA, *op. cit.*, 133 ff., which makes a difference between qualification (in the introductory pleading) of the *res in judicium deducta* which can be done by indicating, when necessary, the facts useful to identify the claim; and enclosure (which can take place after their introductory pleading) of the facts which are not necessary in order to identify the claim. The assessment on the claimant's effective identification of the claim would be one of admissibility, whilst the one on the congruence of the facts enclosed with the relief asked for would be an assessment on the groundings of such claim.

facts" and "secondary facts" to the existence of the right enforced[48].

For a more complete investigation, it is beneficial to explain what is meant in *Civil Law* with principal facts and secondary facts. In *Civil Law*, every statutory rule identifies an abstract and general fact-type, to which an effect in law is attached[49]. Principal facts to a claim are the ones which come into the abstract fact-type of the rule applied to the concrete case[50]. Secondary facts to a claim are the ones which, even if they do not come into the general and abstract fact-type of the rule, can anyway be useful in proving the principal facts to the claim[51].

The new plausibility assessment, as described in the *Twombly* e *Iqbal* decisions, seems to ask the claimant to enclose in their introductory pleading, as it happens in *Civil Law* systems, principal and secondary facts in support of the claim. From here stems the idea of the U. S. legal system apparently coming close to the continental European ones.

The wording used by the Supreme Court, anyway, sets aside American *Commom Law* and *Civil Law* by being, from a continental European point of view, still too vague. The US Supreme Court, describe the facts to be enclosed in the introductory pleading as "conceivable", "suggestive" and "plausible"[52]. This words are still far from the systematic constructions used by the *Civil Law*, which, instead, speaks of principal or secondary facts according to their relationship with the abstract fact-type set in the rule applicable to the claim.

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[48] In favour of this interpretation it is noticed that the Supreme Court does not ask the claimant to give proof in the introductory stage of proceedings, as it happens when the *motion for summary judgment* is evaluated (see previous note) , but just to enclose fact in support (plausibly) of the claim. It therefore seems, at least from a *Civil Law* point of view, that where the Court mentions the plausibility assessment it is actually setting out a parameter for claimants to refer to when enclosing facts which, according to the *Civil Law,* would be principal or secondary.

[49] On the structure of te rule in *Civil Law* and, in particolar, in the Italian legal system see FALCON, *Lineamenti di diritto pubblico*, Padova, 2008, 21 ss.

[50] On this point see BALENA, *Elementi di diritto processuale civile. I. I principi*, Roma, 2008, 71 ff. An example from Italian law: where the claimant acts in compensation for damages deriving from a car accident, art. 2043 codice civile applies, according to which "anybody who, intentionally or negligently, causes damage to others, is liable to pay damages to such others". The principal facts to the claim will be the ones which come into the abstract fact-type of the rule, that is, in our case, the defendant's conduct, the unlawful damage suffered by the claimant, the causal link between conduct and unlawful damage, the defendant's intent or negligence.

[51] On this point, see. ID., *op. cit.*, 74. In the example seen in the previous note, secondary fact would be the length of the line left on the tarmac by the brakes. Such fact is not principal (it does not, on its own, prove that the defendant was going over the speed limit), but it is anyway a fact which, if proved, can help in determining that the defendant was negligently driving over the speed limit.

[52] Such words, as seen above, often recur in the motivation of *Bell Atlantic Corp. v. Twombly*, 550 U.S., 544, esp. 555 ff., and in *Ashcroft v. Iqbal*, 129 S. Ct., 1947 ff., where the Supreme Court, in trying to best describe the new plausibility requirement, repeats that the facts enclosed in the introductory pleading must be suggestive enough as to render plausible the existence of the right claimed, meaning that they have to pass the threshold between merely conceivable claim and plausible claim. It is evident how such standards of assessment are rather loose from a strictly legal point of view.

Therefore, although excluding a potential coming close of US case law towards *Civil Law*, one must notice how the *Twombly* e *Iqbal* decisions, where confirmed by successive case law, mark, at least, a possible step forward in *US Common Law* towards the acceptance of the model introductory pleadings in civil proceedings proposed by ALI/UNIDROIT *Principles of Transnational Civil Procedure*. According to *Rule 12.1* of such *Principles*, indeed, the introductory pleading should always contain an indication of the facts grounding the claim[53].

Such coming close of US case law towards the ALI/UNIDROIT *Principles* is not surprising, considering that the other *Common Law* countries have progressively aligned to the model introductory pleadings there proposed. Although with differences, indeed, all such countries now require introductory pleadings to enclose such facts as to outline the fundamental elements of the claim, and sanction failure to do so with an integration order or even with the rejection of the claim. First of all, the English legal system has been moving in this direction, especially after the coming into force of the *Civil Procedure Rules* in 1998. According to the English *CPRs*, indeed, the claimant shall notify to the defendant not just the introductory pleading (*claim form*) containing a brief outline of the claim (*statement the case*) (*CPR 16.2*), but also, contextually or within 14 days from the day of its notice, another statement (*particulars of claim*), expressly aimed at providing a concise enclosure of the facts which are ground to the claim (*CPR 16.4)*[54]. The other *Common Law* countries have then started to follow the English example, thus starting to move in the same direction[55].

[53] The *Principles of Transnational Civil Procedure* and the relative *Rules* are the result of the work of the *American Law Institute* (ALI) and of the *Institute for the Unification of Private Law* (UNIDROIT) with the intent of creating uniform procedural rules applicable to International commercial litigation matters: see ALI/UNIDROIT *Principles of Transnational Civil Procedure*. New York, 2006. In order to avoid the ever present doubt which raise when lodging a claim in another country, ALI e UNIDROIT have laid out a series of *Principles* and *Rules* which may become the pivotal point of each country's internal procedural rules. With regard to introductory pleadings, reference is made to *Rule 12.1.* quoted in the text and, for completeness, to *Rule 12.3.*, which establishes that factual enclosures shall detail, as long as it is within the claimant's reasonable knowledge, time, space, persons involved and events.

[54] On the fact that, according to the new *Civil Procedure Rules* the claimant must enclose concise but sufficiently precise facts on each fundamental element of the claim see LOUGHLIN, *Civil Procedure*, London-Sydney-Portland, Oregon, 2004, 177 ss.; and O'HARE, *Civil Litigation*, London, 2005, 235 e ZUCKERMAN, *Zuckerman on Civil Procedure, Principles of Practice*, London, 2006, 167, who indicate an integration order or even the rejection of the claim as sanctions for failing to enclose reasonable grounds to the claim. As exposed by the reformer Woolf (see. ID., *Access to Justice. Final Report*, London, 1996, 271), aim of the new *CPR*s was just to eliminate the excessive formalities and useless prolongations which defined party procedural documents before the reform, but not to deprive them of their function of giving to defendant and judge the facts necessary to identify the claim; in this sense, see the decision *McPhilemy v. Times Newspaper Ltd* 3 All E.R., (1999), 775, by Woolf himself.

[55] For example, see, in Scotland, HENNESSY, *Civil Procedure and Practice*, Edinburgh, 2005, 41 ff.; in Australia CAIRNS, *Australian Civil Procedure*, Sydney, 2005, 167 ff.; and in New Zealand BECK, *Principles of Civil Procedure*, Wellington, 2001, 123 ff.

In the light of the *Twombly* and *Iqbal* decisions, also US federal case law, where confirming such decisions, will, in the future end up with aligning to the other *Commom Law* countries, which today are closer to the European-continental model[56].

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[56] Considering that the new US Supreme Court trend, *Comment R-12A* to *Rule 12* of the aforementioned ALI/UNIDROIT *Principles of Transnational Civil Procedure*. (2006), which underlines how pleading requirements are part of most *Civil Law* and *Common Law*, but not of the US legal system, which still tends to apply a *notice pleading standard*, may be outdone.

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