

PARTY DISPOSITION AND *EX OFFICIO* POWERS IN THE TAKING OF EVIDENCE. HOW TO MAKE MUTUAL COOPERATION WORK

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ABSTRACT: Although the taking of evidence relies primarily on the parties' initiative, the tendency to confer the court *ex officio* investigative powers is diffuse and shows in the last decades a growing trend. After a brief overview of this trend throughout legal systems traditionally tied to the so-called dispositive principle, the author focuses on how a court is expected to manage these powers. In this context, the Italian experience will serve as a test-bench for an analysis of the way the issue should be dealt with.

KEYWORDS: taking evidence; judicial powers of inquiry; disposition principle; principle of party initiative; *ex officio* measures of inquiry; verhandlungsmaxim; dispositivsprinzip

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1. INTRODUCTION AND SCOPE OF THIS CONTRIBUTION

In its traditional and all-comprehensive definition, principle of party disposition means that the parties only may bring action before the court, as well as the related allegations and evidence. It is, though, a well-known fact that also in civil litigation this principle reflects nowadays at most a tendency, since purely disposition principle-based proceedings are quite difficult to track down.

Although a general tendency persists to reserve to the parties the initiative of bringing and setting up the claim along with the relevant factual allegations, remarkable openings to *ex officio* judicial powers in the taking of evidence must be acknowledged in Europe and generally in the rule-of-law-based countries. In the field of the evidential initiative, we may plainly start from assuming that, as a matter of fact, reference to the principle of party disposition isn't but an index on how, in a given context, the balance between parties' initiative and judicial powers weighs in favor of the former.

It is precisely with respect to the taking of evidence that I would like to discuss the topic concerning the limits of the court's own initiative.

Contrary to the conventional score of the debate, little space will be given to the general issue of whether the court's initiative should be encouraged or prevented¹. I would rather point out that the current tendency in evidential matter is that of extending the court's initiative powers; which will be illustrated, in the first part of the essay, through a short overview of some of the legal systems traditionally based on the disposition principle.

The second part will be dealt with the main issue, which is how is the court expected to manage those powers insofar as it is endowed with. The Italian legal system will serve in this respect as a test-bench for an analysis of the way the issue should be addressed.

The analysis will be centered on the common areas of civil litigation where the parties have a significant control on whether to start proceedings and on its subject-matter (*thema decidendum*). It will not extend to those matters where public interest prevails, and the parties' control over the *thema decidendum* gives in to pervasive *ex officio* powers (e.g. vulnerable persons' protection, insolvency, in general the so-called non-contentious matters): this peculiar area of civil justice requires a distinct investigation that falls outside the scope of this essay.

¹ See on this subject, also for bibliographic references, Nieva Fenoll (2014); Taruffo (2012), spec. pp. 79 ff.; Stürner (2010); Cavallone (1991), spec. pp. 291 ff.; Cavallone (2010); Fabiani (2008); Panzarola (2019).

2. A TERMINOLOGICAL CLARIFICATION

As anticipated, significant openings to *ex officio* powers in the taking of evidence show up in many countries historically based on the disposition principle.

This trend is accompanied by the now diffused tendency to distinguish between a «principle of party disposition», here intended as a rule strictly related to the initiative of asking for judicial protection and lodging the relative statements, and a «principle of party initiative» whereby the facts must be established, as a rule, through the party's initiative consisting in alleging them and providing the related evidence. According to this distinction, the former (*Dispositionsmaxime*) is quite rigidly observed, to the effect that the court almost always prevented from bringing a lawsuit *ex officio* and generally from introduce variations in the subject/matter of the proceedings, whereas the latter (*Verhandlungsmaxime* or *Beibringungsgrundsatz*) depends on specific technical choices which may vary consistently from a procedural scheme to the other². Yet, the allegation of facts on one side, and the bringing of evidence on the other, respond to basically different *ratios*. In the context concerned, the court's powers of initiative are far more accepted as regards the taking of evidence than for the allegation of facts. The latter activity contributes to the very texture of the claim: it is therefore quite difficult, and to some extent impossible to distinguish the allegation from what is the subject of the said *Dispositionsprinzip*³, which gives rise to doubts over the consistency of such a distinction and the utility of subsuming both phenomena under the same *Maxime*. As far as terminology is concerned, I'll therefore keep using terms such as «party disposition» when I refer to the idea of a dominance by the parties over the taking of evidence.

² Starting from the German scholars, it is at present a widely accepted distinction: see for references Morell (2022), pp. 5 ff.; Kern (2016), pp. 161 ff. and 175 ff.; Taruffo (2011), pp. 447 ff. and 462 f.; Picó i Junoy (1996), pp. 208 ff. The term *Verhandlungsmaxime* was initially used in a broad sense: in his *Handbuch des deutschen gemeinen Prozess*, 1804, N.T. Gönner, to whom we probably owe the term, included in the *Verhandlungsmasime* what later has been split between *Verhandlungs- und Dispositionsmaxime*, the conceptual distinction between the two categories dating the second halfth of the XIX century; even in recent times the same term is been used in the first, extensive meaning: see for references Leipold (1982), pp. 441 ff., spec. 442.

³ See already in this sense Cappelletti (1962), p. 329. It may be of help the distinction between principal and secondary facts: the formers to be intended as those that build the inherent frame of the claim and pertain to the disposition principle, and as such to be subsumed into the *Dispositionsprinzip*; the latters, instead, as circumstantial facts allowing an indirect representation of the principal facts and serving mainly as an evidential function (see on this distinction Jolowicz, 2009, pp. 250 ff.) to be ascribed, as such, to the *Verhandlungsmaxime*. However, it should be not overlooked that such a distinction, between principal and secondary facts, is problematic, both due to the ambiguity of the terms in the common legal language and because it does not prevent an allegedly secondary fact to be set at the base of the claim and therefore to perform not only an evidential, but also the constitutive function of shaping the claim itself.

3. RECENT APPROACHES TO COURT'S POWERS OF INVESTIGATION

With a view to illustrate the said tendency, a brief overview throughout various legal systems should be of help⁴,

Reference can be made, firstly, to countries that have adopted general rules providing the court with general evidential powers of initiative.

So, in France, articles 10 and 143 of the *Code de procédure civile* grants the court power to have all the admissible evidence determined *ex officio*⁵. On its part, art. 370 of the Brazilian *Código de Processo Civil* confers the court, either of its own motion or at party's request, power to take evidence deemed necessary for the judgment on the merits⁶.

In the lack of general rules of a similar kind, other systems evolved through the progressive marginalisation of the parties' disposition in evidential matter.

So in Germany the generally accepted *Verhandlungsgrundsatz* (see previous para.) conferring such initiative to the parties, has been almost overturned as regards the court's initiative; which is positively confirmed by a wide range of provisions, to begin with the measures of inquiry envisaged in the ZPO - *Zivilprozessordnung* and notably in its §§ 142 and 143 on the exhibit of documents and of document acts; § 144 on the inspection and the appointment of experts; § 448 as for the questioning of the parties, aimed at assessing a disputed fact on which the evidence already taken isn't enough for the court to be persuaded⁷. In short, what at present remains in the parties' disposition is the witness evidence (§ 373 ZPO)⁸.

Despite a general opposite rule, other legal systems have developed an array of techniques aimed at significantly extending judicial powers of inquiry.

In Spain⁹ a general tribute to the principle of party disposition in the taking of evidence is made in art. 282 LEC – *Ley de Enjuiciamiento Civil*¹⁰ as

⁴ An overall picture of the current regulations in the EU Countries is available in the e-justice portal dedicated section: https://e-justice.europa.eu/76/EN/taking_of_evidence?SPAIN&member=1#to-cHeader1.

⁵ So, in the French *Code de procédure civile*, art. 10: "Le juge a le pouvoir d'ordonner d'office toutes les mesures d'instruction légalement admissibles" and art. 143: «Les faits dont dépend la solution du litige peuvent, à la demande des parties ou d'office, être l'objet de toute mesure d'instruction légalement admissible.» See on this topic Cadiet & Jeuland (2020), pp. 510 ff.

⁶ So art. 370 of the Brazilian c.p.c. «Caberá ao juiz, de ofício ou a requerimento da parte, determinar as provas necessárias ao julgamento do mérito», which reproduces art. 130 of the previous c.p.c. 1973. See on this provision Bedaque (2013); Nunes Silva & Pereira de Almeida (2023), pp. 230 ff., spec. 541 ff.; Cabral (2012), 55 ff., 97 ff.

⁷ See also on § 448 ZPO Huber (2023); and in an overall critical attitude towards this legal framework, see Braun (2014), pp. 87 ff., spec. 91.

⁸ Not to mention, though, the general provisions in specific areas, such as that of child protection: see §§ 151 ff. *FamFG*.

⁹ For an overall picture see Ríos López (2006), pp. 127 ff.

¹⁰ LEC, Art. 282—Iniciativa de la actividad probatoria.—Las pruebas se practicarán a instancia de parte. Sin embargo, el tribunal podrá acordar, de oficio, que se practiquen determinadas pruebas

well as implied by Art. 429.1., comma 3, LEC, whereby the court, prior to the opening of the inquiry, if considers the evidence offered by the parties as insufficient for the ascertainment of some disputed facts, will point this out to the parties, highlighting, where appropriate, the additional evidence they may resort to¹¹. The same implication is reflected by art. 435.2. LEC¹², in so far as it grants the court, in exceptional cases, power to renew a measure of inquiry when its previous execution has been unsuccessful owing to circumstances the parties weren't accountable for: it is in fact —and unlike the *Diligencias para mejor proveer* provided for in artt. 340-342 of the LEC previously in force enacted in 1881¹³— a power of second degree, depending on the fact that the taking of evidence was originally requested by the party¹⁴. Besides the formal tribute to the disposition principle, a rule such as that of art. 429.1, comma 3, LEC achieves in fact a result that goes in the opposite direction, since it is normal that an *ex officio* indication of a missing evidence prompts the interested party (i.e. the one who's more likely to take advantage of it) to act accordingly; which reduces almost to a nuance the difference between such a technique and that of allowing directly the court to proceed of its own motion to the taking of evidence¹⁵.

o que se aporten documentos, dictámenes u otros medios e instrumentos probatorios, cuando así lo establezca la ley.

¹¹ So Art. 429.1, comma 3, LEC: “Cuando el tribunal considere que las pruebas propuestas por las partes pudieran resultar insuficientes para el esclarecimiento de los hechos controvertidos lo pondrá de manifiesto a las partes indicando el hecho o hechos que, a su juicio, podrían verse afectados por la insuficiencia probatoria. Al efectuar esta manifestación, el tribunal, cifiéndose a los elementos probatorios cuya existencia resulte de los autos, podrá señalar también la prueba o pruebas cuya práctica considere conveniente.” See on this provision Chico Fernández (2006).

¹² So art. 435.2, comma 1, LEC: “Excepcionalmente, el tribunal podrá acordar, de oficio o a instancia de parte, que se practiquen de nuevo pruebas sobre hechos relevantes, oportunamente alegados, si los actos de prueba anteriores no hubieran resultado conducentes a causa de circunstancias ya desaparecidas e independientes de la voluntad y diligencia de las partes, siempre que existan motivos fundados para creer que las nuevas actuaciones permitirán adquirir certeza sobre aquellos hechos.” See on this provision Lumbreras Martín (2005).

¹³ These *Diligencias* granted direct powers of initiative, in the sense that they were independent from a previous corresponding initiative by the party. See on this legal instrument Serra Domínguez (1972), pp. 538 ff.; Ostos (1989), pp. 51 ff.

¹⁴ In a different perspective J. Nieva Fenoll (2014), pp. 967 ff., suggests an evolutive extension of this provision, so to allow the court to order measures of inquiry the parties haven't previously requested, whenever it is likely that the evidence exists.

¹⁵ What may still cause a significant difference between the two approaches is the fact that the court provides the parties with those indications before the taking of evidence, that is to say in a phase where it might still have scarce knowledge of what may be missing in the evidential means the parties have filed (similar remark in Taruffo 2012, p. 134) which may result in a problem every time procedural law restricts the parties' powers of initiative within the preparatory phase of the proceedings. On the other side, if the evidence suggested by the court is expensive, the interested party may deliberately not comply merely out of economic considerations. Hardly necessary to add that, also in Spain, important areas of civil justice are ruled differently, if not by the opposite principle, insofar as the rights involved are featured as either non disposable or affected by significant disbalance between the parties: just by way of example, in family, child, incapacitation matters, the court may order of its own motion the evidence it deems appropriate: in this sense Art. 752.1, comma 2, LEC reads: “Sin perjuicio de las pruebas que se practiquen a instancia del Ministerio Fiscal y de las demás partes, el tribunal podrá decretar de oficio cuantas estime pertinentes.” For a general picture of the enhanced court's powers of inquiry, see Ríos López (2006), pp. 148 ss.

Significantly the same approach encountered in the Spanish LEC shows up in the ELI/UNIDROIT Model European Rules of Civil Procedure 2020¹⁶, where both Rule 25 and 92¹⁷ provide the court general authority to advise the parties on possible additional offers of evidence, whereas is labeled as “exceptional” the court’s power to take evidence of its own motion. This model too results therefore in a compromise¹⁸ that goes clearly in favor of a basically active role of the court in this matter.

Art. 115 of the Italian C.p.c.—Code of civil procedure—makes the taking of evidence dependant on the request of the parties; yet, legislation and case law set forth a diffuse series of exceptions tending to overturn such a general provision. This system will be discussed further on in more detail.

Finally, derogations to the dispositive principle are also to be found in countries traditionally modelled on the adversary system.

In England the adversary system still holds, despite the almost complete disappearance of the jury in civil litigation¹⁹, the abolition of the hearsay rule²⁰, and the fact that the 1998 Civil Procedure Rules conferred the court significant means to effectively exert its case-management powers²¹. Nevertheless, the court is granted general authority to advise the parties on evidence it is for them convenient to offer (Rule 32.1.), to which the previous remarks on art. 429 LEC may apply. Also, the court may take of its own motion

¹⁶ Available online in <https://www.europeanlawinstitute.eu>, on which see also Stadler et al. (2023), pp. 35 ff. and 252 ff.

¹⁷ Pursuant to Rule 25(3) “In so far as appropriate the court may invite the parties to supplement their offers of evidence. Exceptionally, it may take evidence of its own motion.” Accordingly, Rule 92(2) allows the court “while affording the parties an opportunity to respond, may suggest evidence not previously proposed by a party, which it considers may be relevant to an issue in dispute. If a party accepts such a suggestion, the court will order the taking of that evidence so that it may be offered in support of that party’s contentions of fact and law.” Then goes on in sentence 3 by stating that: “Exceptionally the court may, while affording the parties an opportunity to respond, order the taking of evidence not previously proposed by a party”.

The official commentary tends however not to take firm position in favor of the party disposition principle: it highlights on the other hand the fact that (so comm. to Rule 25, para. 7) “In practice, however, both forms of judicial intervention are likely to be of little effect as courts are not, generally, provided with sufficient resources to conduct their own investigations of factual and evidential matters. In reality, notwithstanding such powers, courts are likely to continue to be limited to such materials as are introduced by parties’ pleadings, with the court doing no more than making suggestions to the parties, under its substantive case management powers, of what supplementary evidence may be necessary (see the first sentence of Rule 25(3) and Rule 92 especially with comment 4).” Which isn’t, though, a good reason to prevent the Court from having granted general powers of initiative in this matter.

¹⁸ So explicitly the official commentary on Rule 92, par. 4.

¹⁹ It is interesting that even in the few cases a trial by jury is provided for—outside actions for defamation it is hardly ever used—the court is granted power not to set it up if “the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury” (so the Supreme Court Act 1981, prov. n. 69), which indicates a system clearly oriented towards a rational and skilled assessment of facts.

²⁰ The definitive abolition of the hearsay rule by the Civil Evidence Act 1995, prov. 1(1) may also be understood as a contribution to a rational and skilled assessment of facts: the rule against hearsay evidence actually represented the major hindrance to the use of either the oral testimony and the document as evidential source of the statements therein contained.

²¹ See on this topic Jolowicz (2009), pp. 373 ff.; Zuckerman (2013), pp., 5 ff.

specific measures of inquiry, like that of ordering a party to clarify any matter in dispute or give information thereto (Rule 18.1.(1)), of appointing technical advisors («assessors»: see Rule 35.15), in addition to that of giving binding directions to the party-appointed experts²² and to the parties themselves²³.

Even the North American civil justice, famous for being a diehard model of the adversary system, undergoes since decades the tendency to give the judge effective powers in case management, encompassing *ex officio* powers to take measures of inquiry. See notably, of the 1975 *Federal Rules of Evidence*, Rule 614 (a), whereby “The court may call a witness on its own or at a party’s request.”; and Rule 706 (a), stating that “[...] The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.”²⁴ It is interesting to note that one of the reasons for granting the Court power to call witnesses has been expressed this way: “the judge is not imprisoned within the case as made by the parties.”; which openly conflicts with the intimate logic of the adversary system.

4. HOW THINGS STAND IN ITALY

The second part of this essay is focused on Italy and its way of managing the balance between parties’ and court’s powers of initiative in the taking of

²² See., e.g., Rules 35.12 providing the court a general power of direction covering the merits of the expert’s task. Of particular significance is also Rule 35.9., stating that “Where a party has access to information which is not reasonably available to the other party, the court may direct the party who has access to the information to — (a) prepare and file a document recording the information; and (b) serve a copy of that document on the other party.” As to assessors and experts in general, see Andrews (2013), 349 ff., and in a comparative perspective, Ferraris (2012), pp. 81 ff., spec. 90 f.

²³ See in general, as regards the judicial control of evidence, Andrews (2013), pp. 391 ff. It should be however borne in mind that “English law ... Unlike some of the continental systems, it has not developed a distinction between procedural truth and real truth. ... English law, by contrast, is reluctant to accommodate judicial findings of fact that are known to be factually incorrect or that have been reached without consideration of relevant evidence that is known to exist and which could have been produced”: so Zuckerman (2013), p. 161 f. Which, evidently, does not prevent English law to be reluctant to provide the court general power of initiative in taking evidence.

²⁴ As for Rule 614 (a), according to the *Advisory Committee on Proposed Rules*, “While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. One reason for the practice, the old rule against impeaching one’s own witness, no longer exists by virtue of Rule 607, *supra*. Other reasons remain, however, to justify the continuation of the practice of calling court’s witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.” As for Rule 706 “The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. The trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the sheer availability of the procedure decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.” Further references are available on <https://www.rulesofevidence.org/>.

evidence. It will provide the opportunity for general remarks on how court's power should be administered to be effective and not to jeopardise fundamental guarantees.

Art. 115 of the Italian civil procedure code (hereinafter «c.p.c.») states that, unless otherwise provided for by law, the court shall base its decision on the evidence offered by the parties and the public prosecutor. It makes then, as a rule —and according to the current opinion— the taking of evidence dependent on the parties' request²⁵. Still, a diffuse and important series of exceptions emerges in such a way as to significantly weaken the general rule.

It is worth pointing out that some influential scholars have been challenging the reported mainstream interpretation of art. 115 c.p.c. Michele Taruffo²⁶, especially, maintains that said article doesn't even set out a rule of the like: it must be interpreted as simply imposing the judge not to disregard the evidence provided by the parties – ultimately what has been called the «right to evidence» – without saying anything about his own powers of investigation²⁷. This author is one of the most prominent representatives of the idea that, to carry out its task of being fair and just, a modern civil judicial system should grant the court general power of initiative in the taking of evidence, such being a fundamental factor for the proceedings to attain an outcome as much as possible consistent with the factual truth and therefore effective protection for the rights involved. In this respect, a restrictive approach to court's powers should be regarded as a relic from the past and rejected accordingly.

Contrary to this reading of art. 115 c.p.c., one might say that not only art. 115 but the complex of the statutory provisions dealing with the matter say what this doctrine has been challenging, namely that the court shall not order the taking of evidence of its own motion, unless the law provides otherwise²⁸. This is in fact not only the intention the original lawmaker expressed alongside the articles of the 1940 code of civil procedure: the procedural legislation developed thereafter seems in fact to be going in the same direction, since it is *only in specific matters or situations* that it expressly grants the court *ex officio* powers in the taking of evidence. Which is to say that explicit provisions are deemed necessary for those powers to be conferred to the court²⁹.

²⁵ See for references, Comoglio (2012); Zuffi (2013); Patti (2021), pp. 51 ff.; Gioia (2020), pp. 399 ff.

²⁶ M. Taruffo (2011), spec. pp. 470 ff. and 477 ff.

²⁷ See also in this sense Comoglio (2012), pp. 371 ff.; in the sense that art. 115 enshrines a right to evidence see already Ricci (1974).

²⁸ This is what seems to me quite clear, and what Taruffo himself tends ultimately to concede (Taruffo, 2011, p. 471). Comoglio (2012), pp. 357 ff., instead, is much more doubtful that the common understanding of art. 115 c.p.c. was shared by the 1940 lawmaker.

²⁹ A wide array of specific derogatory provisions affecting the older as well as the most recent legislative regulations suggests that, while parties' evidential initiative is generally assumed, judicial initiative is not. Just by way of some examples, the c.p.c. confers the judge power to order judicial inspection (art. 118 c.p.c.); to request public authorities to provide relevant information (art. 213 c.p.c.); as for witnesses, to examine them beyond the questions submitted by the parties (art. 253 c.p.c.) and even to summon *de relato* witnesses (artt. 257 and 281-ter c.p.c.), to appoint a technical expert and to

The above-mentioned, alternative interpretation of art. 115 c.p.c. requires therefore a deliberate denial of the assumption underlying the complex of the legislation today in force. Which is in principle even possible, since on a pure syntactic basis the provision in question is compatible with this interpretation³⁰ and the general theory admits the evolutive interpretation of laws.

Aside from reasons centered on constitutional values and present needs, a significant role in this respect should indeed be played by the mass itself of derogatory provisions to the general rule. As already pointed out, provisions of the like are supposedly consistent with an opposite rule excluding general *ex officio* powers of initiative in this respect. Nonetheless, they have been gradually extending *ex officio* evidential powers; and the more these provisions proliferate, the more the general clause loses its sense along with its attitude to reflect values and needs of the present society.

In parallel with statutory trends, the case law has been on its part progressively improving *ex officio* powers of investigation. Recent examples of deviations from the general rule can be observed in the activity of the court's technical expert, whose considerable improvement relates to the same phenomenon here in question, resulting in a significant interference by the court (via its expert consultant) in the parties' evidential initiative³¹; then in the area of consumer protection, where a series of decisions by the ECJ have conferred the court significant *ex officio* powers to control the absence of unfair clauses in the contract at the base of the claim (see further on this topic, para. 10.). It is always possible to give distinct explanation for each of the

outline the related questions (artt. 61 ff. and 191 c.p.c.): although conceived for the understanding of technical facts otherwise acquired in the case file, it is in fact an important source of proof, specifically for those requiring specific skills to be identified or taken: see in this sense the leading case Cass., Sez. un., 1.2.2022, n. 3086, ECLI:IT:CASS:2022:3086CIV, also publ. in *Foro italiano*, 2022, I, 1773, comm. by A. Alfieri; critical towards this approach Cavallone (2022). An *ex officio* measure of inquiry is also the court's power to question the parties about the relevant facts any time the judge considers appropriate (art. 117 c.p.c.), insofar as, according to the case law, the court may also use the responses as evidence (see e.g. Cass., 1.3.2019, n. 6168). In specific areas, the court has even a general power of taking of evidence —such being the case, e.g., of labor and social security matters (art. 421 c.p.c., as introduced in 1973), of familiar, juvenile and adult-protection matters (art. 473-bis.2 c.p.c., as introduced in 2022); the in-chamber proceedings encompassing a wide array of different subject matters, stretching from non-contentious to the contentious areas (art. 739, comma 3, c.p.c.). Then a wide range of special statutes confirms the same approach: e.g. art. 121-bis of the industrial property code (introduced in 2006) confers the court, during the examination of the persons involved, power of addressing *ex officio* all the question deemed relevant.

³⁰ It must be said, though, that such an interpretation in question renders quite difficult to give a convincing sense to the introductory derogation clause "Unless otherwise provided for by law" whereby art. 115 c.p.c. admits derogations to the general rule. According to Taruffo (Taruffo, 2011, p. 478 f.), said clause must be referred to the situations where specific provisions exempt the court from taking evidence which it deems superfluous. It is a possible reading, though actually a stretched one: if one accedes to Taruffo's interpretation of the main clause "the court shall not disregard the evidence provided by the parties" the derogative clause should be more consistently read in the sense that, in specific situations, the court in its judgment may overlook the evidence, not its taking, and whatever the way it's been taken. For a similar objection see also Comoglio (2012), pp. 374 ff., whose alternative reading seems, though, even harder to support.

³¹ Reference is particularly to Cass., Sez. un., 3086/2022, cited above, fn. 29.

case law-based derogation from the alleged general rule; yet, what is here to point out is the fact that none of them has been prevented by the traditional and still now commonly accepted interpretation of art. 115 c.p.c.

In such a context it becomes increasingly less important wondering whether a disposition principle in evidential matters survives, and more urgent, instead, determining how judicial powers can be rightfully governed so to prevent a wanton use and a prejudice—more than to a disposition principle—to the parties' fundamental rights, namely the right to be heard, to contradict, to set the subject-matter of the proceedings.

5. *EX OFFICIO* POWERS AND COURT'S IMPARTIALITY: A FEW REMARKS

As anticipated in the foreword, the debate on whether to grant the courts general power to take evidence is not the subject of this essay. Just on one of the most disputed aspects of this topic I will spend some remarks for a better clarification of the next passages.

Within the arguments for supporting a general judicial power of initiative in evidential matter, one is that it does not undermine the third-party position of the court. Leaving aside the amount of legislation explicitly providing this power, and the reasons why the courts' general approach to the taking of evidence was kept generally passive along the centuries³², I find this argument, up to a certain point, convincing.

From a formal-functional perspective, what a court generally does by ordering evidence of its own motion is, in fact, ordering evidence to be taken, which is a vehicle (a means of proof) and not a proof. Strictly speaking, the former is neutral since the court does not know in advance whether and which party the evidence turns out to be favorable to³³.

³² According to Nieva Fenoll (2019), p. 1233 f., these reasons have far more to do with a prejudicial mistrust towards the court's ability and impartiality than with the fear that, during the proceedings, an allegedly impartial court could lose its third-party position by taking evidence *ex officio*. This is also why the famous medieval sentence *iudex secundum allegata et probata iudicare debet* implied most probably the predicate *partium*, irrespective of the fact that this word was not included in the Durante's text to which we owe the major dissemination of this maxime: see also, for a convergent conclusion, Panzarola (2019), spec. pp. 26 ff. As to the common law system, the trial by jury—i.e. the proceedings structured in function of a judgment rendered by a jury—has been a long-lasting factor of passivity by the judge, capable of significantly influencing the court's attitude even today, where the judge mostly sits without jury: "After centuries of familiarity with the restraints imposed by use of the jury, English legal thinking has come to see them as virtues. The conviction that the adversary system is the best adapted for the good administration of justice in England is still with us": so Jolowicz (2009), p. 377 and pp. 373 ff. extensively on this topic.

³³ So, *inter alios*, Gioia (2020), p. 401 f.; Nieva Fenoll (2014), p. 961 f. Along with M. Taruffo, these authors maintain, on the contrary, that the one which loses indeed impartiality is the court which does not use the *ex officio* powers it is entitled to, in the sense that it privileges its own interests to that of the proceedings to the search for truth. Apart from this peculiar understanding of court's impartiality,

On a more substantial basis, the attitude to address dubious points of fact towards a solution as close as possible to reality —without detracting from the inescapable margins of complexity and relativity in this assertion as well as in its single components— is indeed what a rule of law-shaped society expects from a court, this being vital for the rights proclaimed by law to be effective. As regards the factual issues, a court is therefore expected to be neither indifferent nor partial but aimed at rationally assessing the relevant facts. Once this premise is accepted, there's no reason why this attitude should affect the court's impartiality when it materializes in taking evidence, and not, let's say, when the court raises *ex officio* an objection of contractual invalidity; or even when, based on the evidence provided by the party, it positively establishes a party's assertion to be true.

In the meantime it is true that judicial powers of initiative in the taking of evidence may, on a statistical basis, result in an advantage for the weaker party, namely for that who either finds it harder to accede to a qualified (and generally more expensive) legal assistance or has less chance to have access to evidence; and that the court may also foresee the possible outcome of evidence. However true, this backdrop is not capable to undermine the court's third-party position in the single case, once it is accepted that these are possible consequences, not the causes of the judicial initiative.

Still, it would be erroneous acceding to the geometric and absolute conclusion that the use of these judicial powers cannot affect in any case the court's third-party position, since there are limits the court should not trespass, lest this position is compromised. This is the case of a court that, despite the presence of evidence already acquired on a certain allegation, orders of its own motion the taking of evidence to double-check the same allegation. A behavior like that may be interpreted as an attempt by the court to refute an already proven fact by finding evidence pointing to the contrary: this is indeed an index of partiality a court should not afford, which requires, when put in place, appropriate remedies. On this specific issue I shall return below (*infra* 9.1.).

6. JUDICIAL SELF-RESTRAINT

The conferral to the court of *ex officio* powers in the taking of evidence entails issues of different nature.

Even when the court is provided with such powers, its attitude, left aside notable exceptions in specific areas or activities³⁴, remains generally passive.

the question whether the court is subject to a positive obligation to exert its evidential powers will be discussed, *infra*, 8.

³⁴ As to the subject matters, it is, for example, the case of the civil proceedings for protection of vulnerable persons and particularly of children. As to the activities, reference is mainly to that of the court's technical expert, whose activity often result in, or actually ends up collecting new evidence.

This is partly due to the court's cultural tendency to self-restraint, partly to the lack of resources for systematically assuming an active role³⁵, which often results in a veritable disproportion between the number of magistrates and the average case-flow. In short, the normal vehicle of evidential initiatives was, and keeps being, the parties, whereas the court maintains in this respect a subsidiary function.

In this scenario, the major risk is that of a non-uniform use of those powers, which may be a factor of distortion and unfairness when, in comparable situations, the court behaves differently, respectively by abstaining from and by using the powers in question.

7. SOME DIRECTIONS. HOW ITALIAN COURTS DISPENSE THEIR POWER OF INITIATIVE IN THE TAKING OF EVIDENCE

Italy lacks specific provisions on the consequences of failure by using *ex officio* powers. On its part, the Italian case-law tends in the last decades to consider this power as a veritable though discretionary duty (“potere-dovere”), and the failure to exert it as a defect capable to invalidate the procedural and insofar the subsequent judgment.

Some clear directions as to how the court shall make use of its powers of investigation have been given in labor litigation³⁶, where the judge, pursuant to art. 421 c.p.c., is expressly granted general power of initiative in the taking of evidence. Yet the reasons expressed in this case-law should extend in general to the situations where the court is given similar powers of initiative.

From the referred case-law it is possible to draw some directions that are worth considering for a general approach to the problem concerned.

A) *a)* A party, although time-barred from the right to offer evidence, may nonetheless request the Court to take evidence of its own motion: in this case the court may not dismiss the request solely on the ground that the party's request is belated, and in the lack of other impediments (see further on, *sub C*) and para. IX) it shall use its evidential powers accordingly. *b)* In any case, the court shall rule on the request and state grounds for its decision. *c)* Failure

³⁵ In this respect the ELI/UNIDROIT commentary to Rule 25 (see above, note n. 18) hits the mark, along with the Scholars who stress this point: see e.g. Jolowicz (2009), p. 220 f.; Nieva Fenoll (2014), p. 965. The lack of resources results not seldom in a severe disproportion between the number of magistrates and the average volume of the case-flow, encouraging the tendency by the judges not to exert their own powers initiative.

³⁶ See above all the Joined Chambers of the Italian Corte di Cassazione: Cass., Sez. un., 17.6.2004, n. 11353, spec. par. 6., in *Foro Italiano*, 2005, I, 1135 ff., comm. by E. Fabiani, establishing that the judicial power to take evidence *ex officio* underlies specific rules, the violation of which results in a breach of procedural law exposing the consequent judgment to annulment; and Cass., Sez. un., 23.1.2002, n. 761, *ivi*, 2002, I, 2017 ff., comm. by C.M. Cea, establishing, among other important directions, that a party, although time-barred from the right to offer evidence, may nonetheless request the Court to take evidence of its own motion.

to comply with either these directions *sub a)* or *b)* results in an infringement affecting the proceeding and the consequent judgment.

B) In the absence of a party's request, the failure to exert *ex officio* powers of investigation does not seem to constitute a procedural infringement.

C) Whether or not there's a party's request, the court may validly take evidence of its own motion under the following conditions: *a)* at the basis of the measure lies an evidential trail, i.e. there are already some circumstances supporting the allegation; *b)* the court may not take evidence *ex officio* on facts the parties haven't previously alleged; *c)* by derogation from *b)*, a measure of inquiry may be taken *ex officio* over a fact that, though not alleged by the party, results from the documents in the case-file, either if *c1)* it is a fact whose legal effects may be raised by the court of its own motion (e.g. the nullity of the contract underlying the claim) or *c2)* it is a secondary fact³⁷, such being a fact allowing an indirect representation of the principal facts—*i.e.* the facts representing the ground (the justification) of the legal effect—and serving basically as an evidential function.

D) Whenever the court resolves to take evidence of its own motion, the parties shall be given the opportunity to comment on it and bring additional evidence consequent to that ordered by the court.

8. EX OFFICIO POWER AND PARTY'S REQUEST TO USE IT

I would firstly spend some remarks on the approach considered on *A)* and *B)*, as regards a positive duty for the court to exercise its *ex officio* powers under penalty of procedural infringement.

This approach, which is far from being universally accepted³⁸, leads indirectly to a restitution of the party's evidential powers. It adds to the general situations where the law explicitly grants the party such a benefit, and it is basically a special type of restoration.

The outcome conflicts somehow with the aim pursued with the time-bar: since it meets the need to give the proceedings a certain speed, it is

³⁷ For references see also above, 2., fn. n. 3

³⁸ Almost needless to say that this solution is far from reflecting a global trend. In Germany, just to offer an example, there seems to be still valid the opposite solution, that the court's power of initiative in the taking of evidence is a purely discretionary and unquestionable power, so that the court has neither the duty to oblige the party's request nor to state the ground of its denial, this being allegedly an implication of the *Verhandlungsmaxime*: see for references Kern (2016), n. 184. See, though, in the specific case of *ex officio* questioning of parties pursuant § 448 ZPO, BGH 23.2.1994, in *NJW-RR*, 1994, 636, which had the appealed decision quashed on the ground that the court of the merits hadn't used its *ex officio* power to question a party under said § 448, despite of its saying that the allegations of this party were entirely plausible (*durchaus möglich*) yet unable to convince it: see further on this topic M. Huber, § 448, cit., para. 5. In a much more resolute manner, art. 194, comma 3, of the Peruan Código Procesal Civil points out that "*En ninguna instancia o grado se declarará la nulidad de la sentencia por no haberse ordenado la actuación de las pruebas de oficio.*"

then indifferent whether the proceedings is slowed down by a party's or by a court's initiative. In addition, it renders an *ex officio* power something contrary to its *ratio*, namely an instrument for the party to obtain what he has been already foreclosed on. A conflict like this is nonetheless acceptable³⁹, being consistent with the need for the court to rationally assess the facts "without being imprisoned within the case as made by the parties" (so the comment to the U.S. Federal Rules of Evidence 614 cited *supra*, 3.).

On the other hand, this solution leads to a procedural breach only in the presence of a request by the party (so direction A)), being in fact clear that, according to this direction, in the absence of a formal request the court's abstention from using its powers of investigation doesn't constitute a proper procedural violation (cfr. direction B)). It is a quite empirical solution since it leaves to the party's initiative the legal consequences of a failure by the court to comply with a duty of its own, which restores to the party a disposition power that in theory was taken away. It is, though, a realistic compromise between the conferral of *ex officio* powers and the fact that the possibilities for the court to extensively exert these powers are very limited, on account of both its resources and its functional structure, more tailored for controlling the parties' initiative than for assuming the initiative itself.

9. EX OFFICIO TAKING OF EVIDENCE. LIMITS

The limits to the court's own evidential initiative, as reported *sub C*), provide material for extended analysis, which I'll try here to outline in few remarks.

9.1. Already Proven Facts

The condition mentioned *sub C)a*), whereby at the basis of the requested evidence there has to be an evidential trail, is in part convincing. If there's already clear evidence of a factual allegation to be true, or false, a court's resolution to take evidence *ex officio* is not only questionable as superfluous, but gives (as anticipated *supra*, 5.) actual ground to suspect that the judge is prejudiced in favor of a party or against the other. Despite the court isn't aware of the outcome, it is obvious that an additional measure in this situation, if not irrationally superfluous, may serve the sole purpose of refuting the previous finding.

Different is the situation where a point of fact remains uncertain because none of the parties have succeeded in demonstrating their respective assertions. Despite that, I don't think that, in this case, an *ex officio* initiative to shed light on the fact may call into question the court's impartiality, more

³⁹ See also in this sense Cass., Sez. un., 3086/2022, cit. above, fn. n. 29, spec. p. 30 f.

than it does where an evidentiary trail exists. In both cases, an objection that the point of fact should be directly adjudicated in accordance with the burden of proof would also miss the mark, being in contradiction with the legislative choice to endow the court with evidential powers of initiative, provided this choice always interferes with the burden of proof. Which doesn't mean that the burden of proof never applies; it means, instead, that its application must be considered as a last resource, to be applied after the parties, and eventually the court of its own motion, have tried to positively establish the relevant facts⁴⁰.

9.2. Allegations and Content of the Case File

Condition *sub C)b)* stems from the general rule whereby it is for the parties only to bring the action, to set the relative statements as well as the underlying factual assertions. The court may therefore not take evidence on facts the parties haven't previously alleged, provided these facts are constituent elements of the case. This condition prevents the overstepping of the *thema decidendum* which is for the parties to set out; in addition, it serves the principle that the court shall not base the judgment on facts of which it has special knowledge – meaning for «special» what it may draw from a personal knowledge, not reflected in the case file. Also, it applies to the facts regardless of whether they constitute the base of the claim or of an objection.

A series of problems on this direction arise, since neither all the facts nor all the objections are at the same level. And here come the directions *sub C) c)* as correctives to the former.

Provided that the court may not draw the assessment of facts from its special knowledge, problem is whether and when the base for the finding

⁴⁰ A different, though connected issue, stems from the diffuse tendency to assign legal significance to the failure of one party to challenge the opponent's allegations. Depending on the consequences each legal system draws from the party's failure to challenge a fact asserted by the opponent, a non-challenge clause is capable to influence or even bind the judge not to question the allegation concerned and —accordingly— not to use his *ex officio* investigative powers. As for Italy, art. 115 c.p.c. seems to be rigorous in this respect, stating that the court shall base its decision on the facts that are not challenged by the party who had entered an appearance. The case law is then unanimous in granting a limited time frame for the party to challenge the facts asserted by the counterpart (the time-window is confined within the preliminary stage of an ordinary proceedings, though the precise deadline is disputed), which makes quite high the risk that, instead of renouncing intentionally, the party simply runs unintentionally into a time-barrage. There are however many reasons to disagree with such a reading, and to assume that art. 115 c.p.c. must be interpreted in that it does not prevent the court from refuting the non-challenged facts if the contrary already results from the case file, irrespective of whether the facts involved are to be qualified as principal or secondary, and, where the contrary appears to be likely, from taking evidence on party's request or *ex officio*: see in this sense Taruffo (2011), pp. 483 ff.; Carratta (1995), pp. 282 ff.; see also for references Mandrioli & Carratta (2022), p. 94, spec. fn. n. 67. As for Germany, § 138 ZPO expressly equates the lack of challenging to a voluntary admission of a fact: the former is here featured as an intentional behavior, which § 138 expressly points out by stating that the will not to challenge should result also from the total of the party's allegations (lit. aus den übrigen Erklärungen der Partei): see on this provision Anders (2024), spec. nn. 45–51.

may consist solely in the parties' allegations or also in any element emerged during the proceedings and acquired in the case file. According to the common opinion, what distinguishes the party's allegation from other sources of factual representation is that the former consists in, and have the function of, conveying a party's self-aware statement of facts; a function that other sources available in the case file in principle don't have, even when the content results itself in a deliberate declaration of the party.

In a system where it is for the parties to bring proceedings and to outline its subject-matter (i.e. the *thema decidendum*), it is then consistent that this subject matter and its perimeter be set out through the sole parties' allegations —understood in the sense above-mentioned— and not also by other sources present in the case file, lest this perimeter be exceeded. Within this perimeter, though, an investigation on facts emerging from other sources is possible and even advisable: provided that those facts are secondary —i.e. not capable to shift the *thema decidendum* and mainly functional to provide evidence (see also above, 2., note 3)— a judicial inquiry extended to any source collected in the case file gives more chances for a better finding⁴¹.

Also, it cannot be neglected that, frequently, relevant facts and related evidence show up out of an *ex officio* inquiry, without being previously included in any act or document collected in the case file. Such a situation is indeed quite common during the operations of the court's technical expert since his technical skills help targeting facts and evidence otherwise scarcely detectable – and assuming that, within the present scope, his activity is equivalent to that of the court, which should be certainly the case of experts appointed as court's auxiliaries. Here the question arises as to whether it is possible to extend the *ex officio* powers to secondary facts the case file doesn't even mention (but the issue also affects evidence that the court may not take of its own motion). I think that a complete denial of access to external sources would be excessive and most of all unrealistic⁴²; and that, when it comes to secondary facts, the answer should be in principle in the affirmative⁴³.

There's just to add that, in practical terms, the distinction between principal and secondary facts remains problematic, and I doubt it is possible to set firm boundaries between the two, being the related criteria subject to many variables⁴⁴. I'd venture to say that, in questionable situations, the better ap-

⁴¹ See also in this sense Taruffo (2012), pp. 127 ff., spec. 129.

⁴² Even the adversary-modelled English civil procedure singles out, among the functions of the expert, that of providing "evidence on fact only observable, comprehensible, or open to description by experts": see Andrews (2013), p. 354. Left aside the court's technical expert, it would be hard to rigorously discern, for example, in the witnesses' statements or in those of the parties questioned by the court, the circumstantial facts already mentioned in the case file from those that are not.

⁴³ In a similar direction is also the recent approach by the Italian Corte di cassazione, as set out in Cass., Sez. un., 3086/2022, cit. above, fn. n. 29.

⁴⁴ Caution on the use of this distinction is, with good reason, suggested by Jolowicz (2000), p. 224 f. Just to point out a critical area, we may consider the situations where the fact referred to by law never or rarely occurs as material fact, and it is hence normal for the plaintiff to allege a different fact capable to justify a decision that the former exist. This is the case, e.g., of claims consequent to a breach of the

proach is that of assuming the fact as secondary and shifting then the focus to the direction *sub D*), namely to the implementation of the right to be heard (on which see below par. 11.).

Similar remarks also apply when the inquiry involves those facts whose legal effects is for the court to raise of its own motion, regardless of their qualification as principal facts. Since the court is in this case entitled to influence the *thema decidendum*, there's the same reason illustrated above not to tie its powers of investigation to the parties' allegations.

10. JUDICIAL POWERS OF INITIATIVE IN FAVOR OF CONSUMERS

Consumer protection in civil justice has been the subject of extensive activity by both the lawmakers and the case-law. The recent developments in the EU area show an intensive use of *ex officio* powers as a fundamental resource for achieving the goals of the EEC Directive 93/13 on unfair terms in consumer contracts and, more specifically, for implementing artt. 6 and 7 thereof⁴⁵. Next to court's power to raise *ex officio* the unfairness of relevant contractual clauses⁴⁶, judicial protection of consumers results also in conferring the court related powers of initiative in the taking of evidence.

According to the ECJ case-law⁴⁷, the national court shall notably order of its own motion all the investigative measures deemed necessary to ascertain the absence of unfair clauses at the base of the relevant contract, and this introduces a specific, EU-featured derogation to the disposition principle whenever the Member States don't already include a rule of the like within their internal legal sources⁴⁸.

common duty of care, where the plaintiff has often no choice but to allege the material fact that have purportedly caused the accident. Although this may be labeled as a typical secondary fact, it plays such an essential function in the factual grounding of the claim that it would be hard to maintain that it might not be specifically alleged by the party.

⁴⁵ See, in particular, Article 6.1., whereby "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms", and Art. 7.1. stating that "Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers." It is also relevant what follows in Art. 8, whereby "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer."

⁴⁶ See in this regard, and in support of the ECJ direction towards an enhanced protection of the consumers, Nieva Fenoll (2019). See also, for critic remarks on the Swedish approach towards the EU legislation affecting civil procedure, Wallerman (2017), pp. 147 ff., spec. 155 ff.

⁴⁷ Reference is particularly to ECJ, joined C- 419/18 and C-483/18, 7.11.2019, *Profi Credit Polska v. Włostowska et al.* ECLI:EU:C:2019:930; see also ECJ C-511/17, 11.3.2020, *Lintner v. UniCredit Bank Hungary*, spec. nn. 26 - 27, ECLI:EU:C:2020:188.

⁴⁸ As for Italy, the relevant provisions implementing the Directive 93/13 concern solely the court's power to raise *ex officio* the unfairness of the clause and the related nullity (see spec. art. 36, comma 3,

These investigative powers, as defined by the ECJ case-law, don't seem however to go beyond the limits envisaged in the abovementioned directions *sub C)c*). It should first be recalled that the court is called upon to examine *ex officio*, on the basis of the elements available in the case file, the relevant contractual terms so to assess the possible unfairness of the clauses involved. In this respect, and according to the ECJ, the court's duty to further investigate by ordering measures of inquiry of its own motion, in accordance to direction *sub C)c1*), requires the national court to have serious doubts as to the fairness of the contractual clause involved. In line with the direction above referred to on *C)c2*), such a doubt may also emerge from any document collected in the case file, without being necessary for it to result from the consumer's allegations.

A peculiar discipline the ECJ case law has set out when the claim brought by the professional is channeled by means of a request for an injunction *in-audita altera parte* – meaning here with «injunction» an order for payment of a money debt, or for the fulfillment of any other obligation, the creditor is entitled to obtain without the need for the defendant to be previously heard. In this case, a now well established ECJ jurisprudence entitles the judge, in carrying out his duty to assess the absence of unfair clauses falling within the scope of Directive 93/13, to request *ex officio* from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue⁴⁹. Here it seems that, for *ex officio* investigative powers to be exerted, serious doubts as to the fairness of the relevant clause are not required by the ECJ; which implies that judicial powers of initiative go beyond the limits referred to above on *C)c1*) and even beyond the more elastic criterion proposed in para. 8.1. This solution is, though, consistent with the fact that before the injunction there's no possibility for the defendant to respond or somehow to be heard, which may leave the judge totally unaware of possible infringements and even of the contract in question in its full text.

11. RIGHT TO BE HEARD

Whenever the court orders to take evidence of its own motion, the parties shall be given the opportunity to comment on it and bring additional evidence consequent to that ordered by the court. In this sense is the di-

d.lgs. 6.9.2005, n. 206, stating that “La nullità opera soltanto a vantaggio del consumatore e può essere rilevata d'ufficio dal giudice.”); they don't deal, instead, with the court's related investigative powers.

⁴⁹ See in this sense ECJ, C453/18 and C494/18, *Bondora AS*, spec. para. nn. 45 ff., ECLI:EU:C:2019:1118, which specifically concerns the European Order for Payment as set out by EU Regulation 1896/2006, but the same *ratio* should apply to any national procedure for injunction. On this topic, also for the specific implication in Italy of the said ECJ jurisprudence, see S. Marta, *Tutela del consumatore e superamento del giudicato tramite opposizione tardiva ex art. 650 c.p.c. in caso di decreto ingiuntivo non opposto*, in www.aldricus.giustizia.it.

rection *sub D*, which – and it’s almost needless to say⁵⁰ – is imposed by the fundamental right of defense and to be heard, in the sense, accepted by the ECHR, of being granted the opportunity to take a position on any relevant element of the proceedings, concerning factual and legal issues; as well as that of responding with appropriate means to the initiatives coming from the other party or from the judge.

I would also add that the more accurately this guarantee is implemented, the minor should be the concern to improve judicial powers (in the taking of evidence in particular). This could be seen as a modern version of the idea of an “isonomic procedural order”. Not in the sense that the judge remains passive, but in a sense of equality between parties and judge in the «evidential dialectic», *scil.* of a full possibility for the parties to take position and request evidence in response to the court’s initiative.

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⁵⁰ See however in this sense M. Taruffo, *La prova*, cit., 135 f.; and from Peru, with reference to art. 194 of the national Código Procesal Civil, the landmark decision of Corte Suprema de Justicia, X Pleno Casatorio (tenth judgment of the Plenary Session), 24.9.2020, Case 1242-2017, spec. 87- 90.

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