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# DETERMINATION OF THE U.S. PLEADING FROM THE CIVIL LAW PERSPECTIVE

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## ABSTRACT

Determining the allegations of a pleading is still one of the most controversial topics in U.S. federal civil procedure law. As the Supreme Court's statements in Twombly and Iqbal have spawned extensive literature, the purpose of this article is to address the matter from a different and to some extent, unusual, perspective, namely the provisions of the civil law pleading, analyzed in terms of their historical development and conceptual cornerstones. In seeking to go beyond a mere comparative analysis, this methodological approach aims to better understand the Supreme Court's interpretation.

In particular, this approach allows us to conduct what in the U.S. is often overlooked: a combined evaluation of both the policy considerations and the conceptual framework. While both informed the creation of the introductory phase within civil law systems, it should be noted that policy values were also prominent in shaping the 1938 Federal Rules of Civil Procedure, according to Clark's general vision of civil justice at the time. This approach raises the question as to whether the Supreme Court has been the change-maker or whether the Supreme Court has unavoidably had to turn toward a stricter determination of pleadings, to accommodate the changing nature and needs of litigation.

The answer to this daunting question is two-fold, and the historical and international comparison conducted strengthens the conclusion. First, the non-conclusory factual allegations, to be considered as true, perfectly align with the requirements of pleading within civil law systems. The essential role played by the claim within the different legal traditions converges not

only at the definitory level; indeed, in both traditions, we might consider the requirements of the pleading as being the most critical step in defining the lawsuit's subject matter and its res judicata binding effects. Second, managerial judging, as it notably finds fertile humus in the civil law, might serve to moderate hasty motions to dismiss and avoid the misunderstood gatekeeping function at the mere pleading stage.

## INTRODUCTION

This article primarily draws opportunity from a recent study by Professor A. Benjamin Spencer on the Supreme Court's interpretation in Iqbal of the second sentence of Rule 9(b) of the Federal Rules of Civil Procedure – which permits conditions of the mind to be alleged generally as being subject to the plausibility pleading standard it devised for Rule 8(a)(2) in Twombly.[1] Namely, the plaintiff must introduce facts and circumstances sufficient to render the allegations plausible. That interpretation is, according to Professor Spencer, textually, "patently unsupportable." [2] I was utterly intrigued by this conclusion, as much as by reading his brilliant considerations on the Iqbal jurisprudence regarding the specific pleading case of Rule 9(b).

I realize that the determination of pleadings post-Twombly and Iqbal (collectively, "Twiqbal"), discussed at length in the U.S. literature, currently has different interpretations. The purpose of this article is to offer a different tool to assist in addressing the ambitious question of whether the Federal Rules have to change, and if so, how to do it. That is, a civil law comparative analysis, which allows us to approach the question from a broader perspective.

There is no doubt that the determination of the pleading reveals how each civil justice system is structured and how the parties and the judge manage the process through the discovery phase. More generally, the discussion on

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1 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Although some authors initially argued that the decision did not have any actual meaning for the pleading doctrine; *See,* e.g., Douglas G. Smith, The *Twombly* Revolution?, 36 PEPP. L. REV. 1063, 1098 (2009), others illuminated how it would have substantial doctrinal and practical consequences in terms of the content and role of the pleading. *See*, e.g., A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. REV. 431, 431–32 (2008); A. Benjamin Spencer, Pleading and Access to Civil Justice: A Response to Twiqbal *Apologists*, 60 UCLA L. REV. 1710 (2013); Scott Dodson, Pleading Standards After *Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. 135, 137–38 (2007); Mising Author Here, Leading Cases, Federal Jurisdiction and Procedure, Civil Procedure, Pleading Standards, 121 HARV. L. REV. 305, 310–11 (2007); Arthur R. Miller, From *Conley* to *Twombly* to *Iqbal:* A Double Play on the Federal Rules of Civil Procedure, 60 DUKE L. J. 1 (2010); Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials *o*n the Merits: Reflections On the Deformation Of Federal Procedure, 88 N.Y.U L. REV. 287 (2013); Adam N. Steinman, The Pleading Problem, 62 STAN. L. REV. 1293 (2010); Michael S. Pardo, Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation, 51 B.C. L. REV. 1451 (2010).

2 *See* A. Benjamin Spencer, Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by Iqbal, 41 CARDOZO L. REV. 1015, 1016 (2020). *See* also Andrew Todres, 9(b) or Not 9(b)? That Is the Question: How to Plead Negligent Misrepresentation in the Post-Twombly Era, 82 FORDHAM L. REV 1447 (2013).

the duties of the pleading conferred on the plaintiff undoubtedly reflects the historical path followed by every country-specific civil procedural law in concretizing the fundamental principles of civil justice. It is the public service of each system to provide a remedy or assign a specific right enforceable by the authority of the decision, according to the due process of law, universally recognized.

Thus, one might observe that the approach to a study on the pleading problem from a different and perhaps unusual point of view--the civil law comparative perspective--must not neglect a threshold evaluation. That is, the classic assumption of the dichotomy between the rights system in the civil law and the remedy system in the common law, as it informs the primary level of the civil action's structure. At first glance, this dichotomy might demonstrate a possibly diverse and apparently irreconcilable approach to the introductory phase of the process. For example, heightened requirements seem appropriate in a system where the pleading must explain the right brought in action, given it would seem to require a more in-depth determination of the facts. One might say this kind of primary assumption seems intuitive and natural, and thus conclude that notice pleading in the U.S. appears to be in line with a remedy system, due to the absence, generally speaking, of a pre-assigned right to be brought in the action.

On the contrary, this preliminary and somewhat provocatory premise soon reveals its inadequacy, for several reasons concerning the essence and the actual significance of this distinction.[3] It does not mean that the dichotomy has no impact on the comparative evaluation I will conduct. Rather, the Twiqbal interpretation of pleading determination, which requires more particularity in pleading fraud, and the suggestions for its renewal that arise from the literature, allow us the opportunity to critically examine this traditional dichotomy and to determine whether it has a practical impact. It further allows us to consider the dichotomy through the specific lens of its historical and global evolution.

In this article, rather than explain the U.S. doctrine of notice/special pleading, I seek to define it by reference to its milestones throughout the evolution of U.S. law, as viewed through the lens of the historical development of civil procedure under the civil law tradition. Comparative analysis provides us with a method to understand each country-specific

3 *See*, e.g., Barry Friedman, When Rights Encounter Reality: Enforcing Federal Remedies, 65 S. CAL. L. REV. 735 (1992); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857, 885-97 (1999); Tracy A. Thomas, Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process, 41 SAN DIEGO L. REV. 1633 (2004); Thomas R. Phillips, The Constitutional Right to a Remedy, 78 N.Y.U. L. REV. 1309 (2003).

pattern of development in civil procedure.[4] The aim is therefore to develop a tool based on this analysis that may be useful to frame the U.S. Supreme Court's trend and, at the same time, to appreciate its criticism.

The article proceeds in three stages. Section I summarizes the origin and the debate on notice pleading regulation and interpretation, with a particular focus on what seems appropriate for the pleading of fraud. This Section examines the origin of the current rules to lay the foundation for an eventual comparative analysis, focused on the role played by the evaluation of policies behind the relevant rulemaking. Section II engages in this comparative analysis by comparing the U.S. law to the most relevant civil law systems, namely the German and the Italian. First, the comparative evaluation of the German law on pleading determination emphasizes how the U.S. system is rightly moving towards a more effective role for the judge within the pre-trial phase because of the growing influence of the managerial judge theory. This changing view might suggest that the enhanced role and use of the motion to dismiss should be addressed differently from how it has been considered in the majority of the literature after Twiqbal. This perspective leads us to the revitalization of Rule 12(e) and the motion to clarify pleadings by the judge's own initiative. Notwithstanding some specific peculiarities between the regulatory regimes regarding pleading determination under U.S. and German law, both systems grapple with the dilemma of balancing different policies when crafting and interpreting rules around the judicial discretionary power in conducting the pre-trial phase and the effectiveness of the discovery phase. Accordingly, regardless of whether the exclusive objective of the original policy behind notice pleading was to lessen the costs of litigation and ensure the broadest access to courts by everyone, nowadays, the purpose of achieving a decision

4 The access to a comparative method to understand each country-specific civil procedure system has grown significantly over the two last decades (at least). *See* generally, CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE (Adrian Zuckerman ed., 1999); Cornelis H. van Rhee & Remme Verkerk, Civil Procedure*,* in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 140 (Jan M. Smits ed., 2d ed. 2012); Oscar G. Chase & Vincenzo Varano, Comparative Civil Justice*,* in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 210 (Mauro Bussani & Ugo Mattei eds., 2012); CIVIL LITIGATION IN A GLOBALIZING WORLD (Xandra E. Kramer & Cornelis H. van Rhee eds., 2012); APPROACHES TO PROCEDURAL LAW: THE PLURALISM OF METHODS (Loïc Cadiet, Burkard Hess & Marta Requejo Isidro eds., 2017); CIVIL LITIGATION IN COMPARATIVE CONTEXT (Oscar G. Chase & Helen Hershkoff eds., 2d ed. 2017) [hereinafter CIVIL LITIGATION]; Joachim Zekoll, Comparative Civil Procedure, in THE OXFORD COMPANION OF COMPARATIVE LAW 1306 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019). *See also* Scott Dodson, The Challenge of Comparative Civil Procedure, 60 ALA. L. REV. 133 (2008); Cesare Cavallini & Marcello Gaboardi, How to Reduce the Gap: A Comparative View on the Policies *B*ehind Intervention Rules, 39 REV. LITIG. 1 (2019); Cesare Cavallini & Marcello Gaboardi, Is Federal Rule of Civil Procedure 19(b)Too Discretionary? Comparative Reflections on the Compulsory Joinder of Indispensable Parties, 54 AKRON L. REV. 39 (2021).

on the merits through an effective and efficient pre-trial phase should be able to prevail over the hasty dismissal of a lawsuit. This Section thus tries to understand if the determination of a U.S. pleading, with particular reference to the determination level of facts required after Twiqbal, also shares a common objective with the civil law system, as it may be the connection between the pleading's content and the object of the res judicata effects. Second, and in the same vein, a comparison to the Italian system – which historically developed symbiotically with the German one because of the common Pandectist origin – is useful. This comparison shows how one should give more regard to the link between the rules governing pleading and the res judicata object (primarily in terms of claim preclusion) and defining its scope through the basic unit of litigation: the cause of action. Finally, this Section analyzes, also from a comparative perspective, the essence of Twombly and Iqbal, centered on the (non-) conclusory allegations as the primary requirement for determination of the pleading. The purpose here is to determine if the Supreme Court's interpretation can be rationalized within a broader global scenario.

Section III proceeds to draw out the conclusions of such a comparative analysis to contribute to the debate on the possible rewriting of the U.S. pleading rules, and potentially, reform of the entire pleading system. Further, it reflects on how a consideration of the German and Italian legal systems, in particular, allows for reframing the requirements set out in Rule 9(b), but not necessarily in contrast to the Twiqbal interpretation.

## I. THE FEDERAL RULES OF CIVIL PROCEDURE 8(A)(2) AND 9(B). THE PERCIEVED MISTAKE IN TWOMBLY AND IQBAL FROM A CIVIL LAW PERSPECTIVE

### *A. The interpretation of the pleading in Twombly and Iqbal: Introductory remarks for a comparative perspective.*

The interpretation of the pleading following Twombly and Iqbal has been extensively discussed in the literature.[5] This paper seeks to contribute to the current discussion on the "adventures" of U.S. notice pleading from a perspective broader than domestic law, that being a comparative perspective. As foreshadowed in the introduction to this article, the objective of this comparative evaluation from a civil law perspective is to

5 *See* Spencer, supra note 2; Todres, *supra* note 2; *see* also Robert. G. Bone, Plausibility Pleading Revisited and Revised: A Comment on *Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 864-865 (2009); Scott Dodson, New Pleadings, New Discovery, 109 MICH. L. REV. 53 (2010).

better understand the term of reference (in this case, rules 8(a)2 and 9(b) of the U.S. Federal Rules of Civil Procedure) by tracing its historical development. In other words, the motivation for pursuing a comparative evaluation is to conduct an inquiry about the reasoning behind the current pleading rules, in the hope that it might allow us to better understand the current context as a whole.

One can recognize that the primary task in analyzing a specific set of rules (mainly for a comparative evaluation) is to clarify its scope and rationale. For this task, it seems crucial to briefly revisit the history of the pleading provisions and to focus first on the actual meaning of Rule 8(a)(2) and subsequent interpretation by the Supreme Court. It is appropriate here to set out a few points, mainly regarding the model of the cause of action,[6] the definition and function of which has been historically controversial and troublesome.

*1. From Code Pleading to the Federal Rules*

It is worth commencing our inquiry with the impressive observation that, "Twombly and Iqbal have destabilized both the pleading and the motion to dismiss practices as they have been recognized for over sixty years."[7] To investigate this claim I must examine the pleading rules established by the previous Code pleading system, and further, what initially motivated the transition to that Code from common law pleading. Tracing this backward path allows us to better appreciate the "destabilization" caused by Twombly and Iqbal and the impact it has had on reforming the U.S. law, by comparison with the development of the pleading in the civil law system.[8] Given the "reversion to fact pleading"[9] implied by the Twiqbal requirement

6 *See*, e.g., JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 249 (5th ed. 2015) [hereinafter FRIEDENTHAL ET AL.]. Hence, even a brief remark on the origin of the pleading's requirements is due to select the key points, which might be interesting and useful for the civil law perspective and the following comparative method.

7 *See* Miller, supra note 1, at 2.

8 Following this investigative path, it will be relevant to consider two themes, apparently not connected, but at the same time essential for a comparative evaluation between the U.S. system and the European one. First, the dichotomy between the right and remedy system informs each system traditionally and accordingly as a primary tool for a strict comparative approach; I would say mostly, regarding the issues on the pleading's content and function. Second, the growing relevance assumed in the U.S. jurisprudence by policies and social values arguments that have unavoidably inspired and, to some extent, conditioned the turning point established by Twombly and Iqbal. Although this second theme *see*ms, at first glance, a prerogative of the U.S. tradition of judicial rulemaking, I will discover how the prevalence of policy arguments is currently assuming a new and relevant role in the civil law jurisprudence context. At the same time, it does not serve as a formal source of law.

9 *See* FRIEDENTHAL ET AL., *supra* note 6, at 263.

of plausibility, it is worth re-examining the historical reasons underlying both the Code pleading provisions and the Federal Rules. This path will reveal more commonalities with, than differences from, the civil law scenario, and help identify some different interpretations of the current rules of the U.S. pleading system and its prospective reform.

At this preliminary stage, one should note that U.S. procedural reform in the nineteenth century which "gave pleadings a clear-cut function"[10] played a central role in determining the content of the pleading. The elimination of the writ system, previously the predominant form of common law action, allowed for reshaping the pleading's function to provide more freedom for the plaintiff in pleading the facts, in pursuit of "a just determination."[11] In so doing, the so-called code approach was to structure pleadings to allow parties and the judge to address the controversy through an exhaustive set of facts, albeit "plain and concise." The privileging of adjudication on the merits rather than the tactical behaviors of the parties' lawyers was the policy behind Code pleading, thus making the purpose "substantial." The reference to the facts constituting the cause of action implied – whatever this term cause of action should have signified[12] – that a well-defined complaint would have shaped the trial as a whole, thereby avoiding a motion to dismiss at the early stage and regulating the discovery phase as the decision's object able to assume the res judicata effects.

Even at this preliminary stage of analysis, a first comparative insight emerges and deserves to be emphasized. The different function assumed by the Code (and its fact pleading) compared with the writ system aligns with the reform of civil procedure acts in Europe at that time, characterized by growing changes regarding the introduction of a cause of action. In particular, during the same historical period, I might foresee a comparison among the nascent civil procedural science in Italy, emerging from jurist Giuseppe Chiovenda's authoritative works in the second and third decade of the twentieth century.[13] For the purposes of this article, it seems useful to recall that the 1865 Italian Code of Civil Procedure, like the current one established in 1942, was certainly inspired by the Roman principle *narra mihi factum dabo tibi ius* ("give me the facts and I shall give you the law"). That means that the pleading must encompass the facts on which the judge must decide, thus identifying facts relevant to the right brought in the claim

10 *Id*. at 244.

11 *Id.*; *See* Charles E. Clark, CODE PLEADING 54 (2nd Ed. 1947).

12 *See infra* Section II.

13 *See* GIUSEPPE CHIOVENDA, PRINCIPI DI DIRITTO PROCESSUALE CIVILE, 627 (1923) hereafter Principi]. *See infra* Section II.

and ultimately the relief asked of the judge. At the same time the U.S. was undergoing procedure reform, the Italian (and European) pleading model was developing around a renewed civil procedure science that proposed a dogmatic view of all process players (plaintiff, defendant, and judge) joined around the concept of action, which meant, and means, the right to access the court whenever a legal dispute arises.

The Italian reference is quite useful as it was the outcome of the consolidation of different procedural systems experienced until that moment, previously in France (the original source coming directly from the Napoleonic Code), and later in Germany.[14] The influence of the German doctrine and civil procedural system on the nascent procedural science in Italy, promulgated a few decades prior, was decisive. It signaled a very different way of thinking of the civil procedure law than the formalist and overly technical rules inherited from the French Napoleonic Code. The determination of the pleading was indeed the fertile ground on which the relationship between the pleading and the cause of action grew into one of the cornerstones of Italy's civil procedural science.

One might say that this occurred because the civil justice system in France, Germany, and Italy was (and to some extent still is) structured around the so-called "right" system.[15] However, that is not entirely true. The particular focus on the determination of the pleading in the early days of the civil procedural science in Europe (or at least in Germany and Italy) was principally a reaction to the excessively formalist view of access to justice inherited from the French tradition, as mentioned above. It emerged first within the German codification, then in Klein's Austrian codification of the German reforms, and finally in the Italian codification shaped by the authoritative doctrinal influence of Giuseppe Chiovenda and Francesco Carnelutti.[16] This historical path shaped the fundamental principles

14 *Id*. at 10-15. It is interesting to note that the evolution of the system of civil procedural law in Italy at that time sought to reconcile two sources. On the one hand, the consolidation of the principles of separation of powers and independence of the judicial authority arising from the French Revolution and the consequent Code Napoléon. On the other hand, the more in-depth and complete German studies on civil process, the relevance of which remarkably has been to build a new civil procedural law in Europe, grounded in the common tradition, due to the secularization of the Roman Law. *See* OSKAR VON BÜLOW, DIE LEHRE VON DEN PROZESSEINREDEN 1 (1868); ADOLF WACH VORTÄGE ÜBER DIE REICH-ZIVILPROZESSORDNUG 1 (1895). Klein was the drafter of the Austrian Code of Civil Procedure that inspired the reforms of the original version of the Code in Germany and shortly after in Italy. *See also*, Carlos Petit, *Due Process and Civil Procedure, or How to Do Codes with Theories*, 66 AM. J. COMP. L. 791, 793-95 (2018) (underlining the relevant role played by the Italian procedural code in Europe since the second decade of the twentieth century and until now in civil justice regulation in South America).

15 *See* infra Section II.

16 *See* Petit, supra note 9 at 792-794. *See* also, GIOVANNI TARELLO, DOTTRINE DEL PROCESSO

underlying the civil process framework, clarifying the plaintiff's duties in bringing the process's introductory act. In so doing, it aimed to achieve a perfect balance between, on the one hand, the principles enshrined in the French Code (and French Revolution) and, on the other, the counter-framing of the judge's more active role in directing a matter for trial. This was based upon a vision of civil justice as a public good with the freedom of citizens to define the subject matter. *Da mihi factum, dabo tibi ius*, renewed in its building task for modern civil justice.

While this was the foundation of modern civil procedural science within the civil law context, a reasonable comparison between the U.S. pleading code and the emerging civil law one century ago can already be made. The U.S. code pleading represented a reaction towards the given pleading system, which for a long time was anchored to formalist procedures (i.e. the common law writ system).[17] Moreover, at the dawn of the twentieth century, both systems sought to align the content of the renewed pleading with the objective that the outcome of the suit would hopefully turn on the "substantive merits" of the case, rather than the "lawyers' . . . technical skills."[18] Ultimately, whether or not one might consider code pleading as a system, the natural connection between the pleading's content and its purpose—to set forth the parties' litigation on the facts—constitutes a common heritage in both legal traditions. In Europe, it was born from an amalgamation of the French tradition and the German doctrine, while in the U.S., it was the consequence of the abolished distinction between law and equity.[19]

Given the historical and comparative pattern, it is worth noting that within the civil law context, the early twentieth century birth of civil procedural science in the midst of the various code reforms was inspired in the background by clear policy arguments. The first of these was the "social" value of civil procedure and justice on private matters in general that shifted the conception of the civil process function from a matter of public good to a tool to resolve private issues. This renewed function was not a betrayal of the French Code (nor Revolution). It was, quite simply, the

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CIVILE, STUDI STORICI SULLA FORMAZIONE DEL DIRITTO PROCESSUALE CIVILE, 127 (1989). Particularly focusing on the Klein's influence on Chiovenda's opinions, one of the most important Italian scholars in history and philosophy of law.

17 *See* FREDRICK W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1948); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON LAW 11 (3d ed. 1923).

18 *See* FRIEDENTHAL ET AL., supra note 6, at 244-45 ("*By the late 1930s a majority of states had followed New York's lead by adopting what has come to be known as the code approach*").

19 *See* JAMES POMEROY, REMEDIES AND REMEDIAL RIGHTS 21 (4th ed. 1910); James Clark, The Code Cause of Action, 33 YALE. L. J. 817, 825 (1924).

result of the due balance between the parties' and judge's role in the proceedings. Furthermore, the determination of the pleading stems from the outset of that balance.

As that general comparison seems sufficient to outline the common developments that shaped the approach to pleading on both sides of the Atlantic, I return to our primary focus on the U.S. law at issue. This requires analyzing what led to the turning point represented by the Federal Rules:[20] the road taken to arrive at the adoption of the guiding principle of "just determination" of the civil proceeding.

*2. Towards the Federal Rules*

Even though the code pleading approach was largely adopted by state court reforms, the same did not occur at the federal court level. On the contrary, until the 1938 Federal Rules of Civil Procedure were adopted, there was no uniform pleading system applied in the federal courts.[21]

In order to provide an overview of the current issues regarding pleadings and amendments, I must first recognize that the objective of the Federal Rules – simplicity and liberality in the determination of pleadings – has been changed, initially through the interpretation of several federal district and circuit courts, and then by the Supreme Court in Twiqbal.[22] This shift has been acknowledged extensively in the literature and need not be revisited in detail here. Our purpose is thus to understand whether these changes were reasonable, ultimately unavoidable, or, by contrast, overlapped gradually with arguments raised by the comparative method.

To evaluate these changes, first implemented by the 1938 Federal Rules and then rewritten, as it were, by Twombly and Iqbal, I again return to the Code pleading system. In abolishing the writ system generally applied at common law, the Code set forth modern pleading requirements. But at the same time, Code pleading itself was misguided. At the very least, it was considered misguided by the drafters of the Federal Rules, consistent with the mainstream doctrine of the time.

While Code pleading undoubtedly denoted the new season of the so-

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20 *See* Miller, supra note 1, at 3 ("*History matters. When adopted in 1938, the Federal Rules of Civil Procedure represented a major break from the common law and code systems.*"").

21 *See* FRIEDENTHAL ET AL., supra note 6, at 245; *See generally* Edson R. Sunderland, The New Federal Rules, 45 W. VA. L. REV. 5 (1938). It is worth remembering that until 1938, Federal courts applied the Conformity Act (Act of June 1, 1872, c. 255, 17 Stat. 197), according to which the Federal court was required to apply the rules (of practice) that were generally applied in that State.

22 *E.g.*, STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 251 (6th ed. 2020).

called modern pleading, it required a particular formulation in defining the pleading's requirements: the pleading had to be "a plain and concise statement of the facts constituting each cause of action."[23] However, since the pleading code overturned the writ system, the main problem was how the right to relief (initially intertwined with the writ) could be set out in the pleading, in trying to connect a mere procedural system with substantive issues. This question needed to be confronted in both the civil law and common law systems, and the solutions found in each system would be instrumental in shaping the modern framework for their respective introductory phases of the civil process.

Nonetheless, U.S. judges, lawyers, and scholars were probably less equipped to address this change than their continental counterparts, for several reasons. First, the bridge to the pleading code from the writ system was a distinctive feature of the Anglo-Saxon civil justice tradition, such that the reform represented a very new approach to determining what is needed for the plaintiff to obtain a remedy from the court, and was not required to be determined previously under the writ system.

Second, if one considers the terminology usually adopted by codes in civil law countries, this task of communicating the right to relief in the pleading was laden with the potential difficulties of language. Not surprisingly, the terms "cause of action" and "fact" caused several interpretation issues and were long debated within the U.S. doctrine [24]. [I would say not surprisingly because the term "cause of action" was already a proper term employed within the continental (civil law) system, where it meant the right in issue a claimant was required to identify in notifying the court of a justiciable controversy. Conversely, the term was foreign to the common law, as its courts concerned themselves with identifying the remedy sought by the claimant, rather than the right in issue (that is, the cause in action).]

The transposition of these terms, well-known to the civil law, into the different context, as it was, of U.S. civil procedure, gave rise to significant doubts. Namely, that the term cause of action "is too ambiguous to provide a meaningful guide"[25] when I seek to determine how it arises from the

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23 *See* FRIEDENTHAL ET AL., supra note 6, at 249 (quoting N.Y. Laws 1851, cl. 479, §1).

24 *E.g.*, JAMES POMEROY, Code Remedies § 347 (4th ed. 1904); Walter W. Cook, Statement of *F*acts in Pleading under the Codes, 21 Colum. L. Rev. 416 (1921); Edwin F. Albertsworth, The Theory of Pleadings in Code States, 10 CALIF. L. Rev. 202 (1922); Comment, Code Pleading: Nature of a "Cause of Action", 12 CALIF. L. REV. 303 (1924); William W. Blume, The Scope of a Civil Action, 42 Mich. L. Rev. 257 (1943).

25 *See* FRIEDENTHAL ET AL., supra note 6, at 248. To exemplify what I seek to explain in the text, it is worth recalling the clear considerations given to those terms related to the current meaning of the

corresponding pleading's set of facts. Moreover, the meaning of the term "fact," when referring to a fact capable of particularizing a cause of action, was debated, resulting in more inconsistency than clarity.[26]

Although this is not the place to revisit the debate on the meaning of "fact" during the Code pleading era, one ought to point out a few of the main arguments, which were undoubtedly taken into account by the reform to the pleading's requirements accomplished through the Federal Rules. A contextual comparative landscape might also be useful for evaluating this historical path from a different but relevant perspective, considering that some of these issues are (indirectly) recalled by the changes occasioned by the Supreme Court due to Twombly and Iqbal.

First of all, the most controversial issue that emerged from the Code pleading application was determining the facts constituting the cause of action. In particular, I must reference the so-called "aggregate operative facts" theory, also discussed by Charles Clark.[27] This theory, diverging from Pomeroy's then-concurrent "primary right" doctrine,[28] centered exclusively on the facts of the injury capable of demanding relief irrespective of the scope of the (old) single chosen writ at common law. Since the pleader did not allege the substantive law to apply, the type of harm suffered, and the consequent remedy to seek, he was in the position to allege all the facts that seemed operative to obtain "every type of relief the law provides."[29] It is worth noting that this theory intended to overcome the most significant criticism of the writ system at common law: that "operative facts," generally speaking, were the antithesis of the continuous repeating of writs or equitable actions, and the plaintiff, who alleged operative facts, was treated as if "he had been allowed to join every applicable writ."[30]

The aggregate operative facts theory also received much criticism, mainly regarding how to avoid the risk of rambling allegations and lengthy

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"shorthand term" cause of action. SUBRIN ET AL., *supra* note 22, at 247. Specifically, cause of action is now replaced in the Federal Rules locutions by the more extended expression "claim showing that the pleader is entitled to relief." Therefore, it means that now as in the past, the controversial question regarding the determination of the pleading's facts might have been caused, probably initially, by the inaccurate use of the terminology, while the correct meaning behind the term should have been addressing a broader systematic approach. *See* infra Section II.

26 *E*.g., CLARK, supra note 11, at 226 § 38; Cook, supra note 24, at 416-420; Clarence Morris, Law and Fact, 55 Harv. L. Rev. 1303 (1942).

27 *See* CHARLES E. Clark, HANDBOOK OF THE LAW OF CODE PLEADING, 137 (2nd ed. 1947). *See also* Silas A. Harris, What Is the Cause of Action*?* 16 CALIF. L. REV. 459 (1928).

28 *See* JAMES POMEROY, CODE REMEDIES § 347 (4th ed.); *see also* Comment, Code Pleading: Nature of a "Cause of Action", 12 CALIF. L. REV. 303 (1924).

29 *See* FRIEDENTHAL ET AL. supra note 6, at 250.

30 Id.

pleadings as compared to the writ system.[31] More specifically, it was recognized as a potential failing of the theory that it did not ask the claimant to apply the law to the case, giving rise to doubts regarding the perceived accuracy of the reply by the defendant and decision by the judge. To avoid that risk, the doctrine and several courts required a sort of tailor-made pleading, by which the plaintiff informed the opposing party and the judge of the legal theory chosen to support the relief.[32] In that sense, it is consequential that the Code pleading system was not too far from the writ system at common law.[33] One can also note that the reference to cause of action failed to determine the pleading's content in the U.S.

From the civil law perspective, it is not surprising to note the failure of the term cause of action to provide a reference for the determination of the pleading in the U.S. system. The notion of cause of action, literally translated, was based on a (partially) different framework. [34]Wondering what the "cause" of a civil action might be indicates that its elements cannot be evaluated on a case-by-case basis by the judge; by contrast, they must be predetermined. The notion of a "cause" of action is challenging to fit into a civil process grounded on the entitlement to relief, but fits better within a system based upon a preassigned right.

Accordingly, from a civil law perspective, the notion of a "right" implies that the plaintiff must allege, respectively, a two-fold set of facts, as established by the procedural law and inferred from the very notion of the right to be litigated itself. First, the fact constitutive of the right brought in the action; second, the specific fact that recognizes and proves that the defendant has violated that right. There is no alternative nor a discretionary way to plead within the civil law pleading context. By contrast, in that context, the "elements of the claim," an expression which appears to have supplanted the ambiguous "cause of action" in the U.S.,[35] are pre-defined and universally recognized in terms of *causa petendi* (including the constitutive facts of the right and its injuring events) and *petitum* (the right brought in the action as above determined by facts and the kind of "relief"

31 *See* FRIEDENTHAL ET AL., supra, note 6, at 251-253.

32 *See generally* CLARK supra note 11, § 43; *See also* Clarke B. Whittier, The Theory of a Pleading, 8 COLUM. L. REV. 523 (1908); E. F. Albertsworth, The Theory of Pleading in Code States, 10 CALIF. L. REV. 202 (1922).

33 *See* FRIEDENTHAL ET AL., supra, note 6, at 253.

34 *See* CHIOVENDA supra note 13, at 621-24. The term cause of action involves either the so-called causa petendi, and the so-called petitum, as well as the plaintiff must allege the facts which are the source of the predetermined right brought in the lawsuit against the defendant. Accordingly, the term cause of action originally refers to as a "right" system, as the continental ones grew across the nineteen and twenty centuries, both in German and Italian Law.

35 Id. at 247.

consequently asked of the judge).[36]

Thus, it is appropriate that the continental system of right, as a legacy of an ancient tradition, focused on the pleading's content as the crucial point of the civil action. Accordingly, there is no doubt that this point has been well-established primarily by the rules, as they were and currently are, respectively, Section 253 of the German Code of Civil Procedure,[37] and Article 163 of the Italian Code of Civil Procedure.[38] At this stage, however, it is worth noting the different structures of the two civil justice systems. The dichotomy between right and remedy has unavoidably created a very daunting task for U.S. law in trying to give sense to notions that are too general ("fact") or extraneous to the common language ("cause of action") of the U.S. system, as both are traditionally familiar with the right system. The notion of cause of action, whether related or not to specific relief granted by the court, cannot go beyond a general definition, which refers to elements that determine its content. At the same time, defining what facts will support each element cannot be set out in a rule, because determining whether the elements of the stated cause of action have been met is subject to the discretion of the court on a case-by-case basis.[39]

On the contrary, the same notions, included within the right system, can perfectly shape the pleading content and its underlying principles. Therefore, the emergence of mere notice pleading was a natural consequence in the U.S. The promulgation of the Federal Rules served as the occasion to clarify this pleading's determination criteria, making it coherent with the remedy system and the U.S. civil process system as a whole.

Nevertheless, while keeping in mind the dichotomy between a "right" and "remedy" system, a different approach seems to be emerging from the Twiqbal jurisprudence, and its recognized "reversion to fact pleading." One must then address that topic differently. The next section begins by briefly revisiting Rule 8(a)(2) of the Federal Rules, first to introduce the specific

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36 Suppose one wants to search for a general principle applied within continental civil process regulation, all-embracing of the Roman Law legacy through the centuries. In that case, one can turn one's eye to the civil action's determination criteria, irrespective of the conventional translation in the U.S. definition as the cause of action or claim. This topic involved the most prominent scholars of the late nineteenth and the early twentieth century both in Germany and Italy. *E.g.*, Richard K. Schmidt, DIE KLAGANDERUNG 1 (1888); Konrad Hellwig, ANSPRUCH UND KLAGERECHT § 15, 37 (1900); ADOLF WACH, VORTRAGE UBER DIE REICHSCIVILPROCESSORDNUNG 262 (1879); CHIOVENDA, supra note 13, at 204; GIUSEPPE CHIOVENDA, INSTITUZIONI DI DIRITTO 306 (1933).

37 *See* infra note 101, Section 2.A.

38 *See* infra note 101, Section 2.B.

39 *E.g.*, SUBRIN ET AL., supra note 20, at 247 ("In civil litigation, a judge often asks the plaintiff lawyer what her prima facie case is.").

provision of Rule 9(b) and second, to highlight the most relevant issues for a proposed comparison and final evaluation of the current U.S. law from a civil law perspective.

*3. From Conley to Twombly and Iqbal.*

The incisive formula established by Rule 8(a)(2) of the Federal Rules, providing that the pleader must set forth "a short and plain statement of the claim showing that [the pleader] is entitled to relief," represents the opposite way of defining the content of the pleading compared to the civil law system over the last two centuries. One of the most relevant considerations precipitating the so-called notice pleading reform was the failure of the rigorous pleading requirements set forth by the Codes to facilitate the potential and desired disposal of sham matters. Courts very often turned to other procedural devices to dispose of those matters.[40] Charles Clark, in elaborating the new provision for summary judgment in the Federal Rules,[41] also recognized the Codes' failure in this respect and introduced less rigorous pleading requirements, as stated by Rule 8(a)(2).[42]

Here the aim is to point out, on the one hand, the reasons by which Federal Rules adopted notice pleading, and on the other hand, the differences with the civil law provisions in terms of proceeding impact, pleading motions, and action dismissal. First of all, it is striking that one of the most relevant patterns retained from the 1938 Federal Rules was the connection between the so-called notice-pleading (or new pleading) and the motion to dismiss set forth by Rule 12(b)(6). In other words, the outcome was how Rules 8 and 12 seemed to interpret, share, and enhance the policy values emphasized in Clark's approach to the "new" civil litigation. As glowingly summarized by Arthur Miller, "the openness and simplicity of the Rules facilitated citizen enforcement of congressional and constitutional policies through civil litigation."[43] Stated precisely, the main reason behind the modification of the pleading's content, from fact pleading to notice (or standard) pleading, is still founded in policy objectives. The renewed framework of the pretrial process in generalized pleadings represented the main form of access to justice to grant "equality of treatment of all parties

40 *See* Richard L. Markus, The Puzzling Persistence of Pleading Practice, 76 TEX. L. REV. 1749, 1755-57 (1998).

41 *See* CLARK, supra note 24, at 11 § 86; FRIEDENTHAL ET AL. supra, note 6, at 258 (focusing on the "broad rules of discovery" as a new procedural tool to allow a less stringent and more simplified pleading).

42 *See* CLARK, supra note 24, at 566 §1188.

43 *See* Miller, supra note 1, at 5.

and claims in civil adjudication process."[44] Accordingly, to give all litigants their day in court, Clark's approach was to break from "hypertechnical artifices"[45] and distinctions that had emerged from code pleading. Since Clark's purpose was to facilitate a determination on the merits, all Federal Rules, but first, the pleading, had to be reduced to a more straightforward complaint form and content, showing that the pleader is entitled to relief.

In that context, the motion to dismiss set forth by Rule 12(b)(6) was not considered, in theory, as a general tool for regulating meritless claims.[46] On the contrary, such decisions by Federal Courts showed that the motion was only applied in the most limited cases.[47] Rule 12(b)(6) was originally a sort of compromise between Clark's view and the drafting committee of the Federal Rules.[48] The result was to create a strong presumption against dismissing a pleading, and consequently to enhance the summary judgment or the trial (through the discovery phase) as primary tools for decision-making on the merits.

I can proceed to a preliminary evaluation, and here consider from a two-fold perspective the reasons behind the rules and the policies that guided notice pleading as the cornerstone of the Federal Rules. First, one needs to highlight the endorsement of Clark's approach by the Supreme Court (and the following overruling set forth by Twombly and Iqbal) through those policies. Second, it is worth comparing this path of determination of the pleading to the civil law rules, still in force until now. It might uncover fascinating and useful insights to inform future considerations for reforming U.S. law.

The path traveled by determination of the pleading is aptly described by the formula "from Conley to Twombly and Iqbal," now part of the heritage

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44 *Id.* (notice that pleading should commence with "broad discovery, and limited summary judgment," the "interdependent elements of the pretrial process"). *See also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (focusing on the role of the summary judgment in regulating "the burden of showing the absence of a genuine issue as to any material fact"); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (same).

45 *See* David M. Roberts, Fact Pleading, Notice Pleading, and Standing, 65 CORNELL L. REV. 390, 396 (1980); *see* also Christopher M. Fairman, The Myth of Notice Pleading, 45 ARIZ. L. REV. 990 (2003).

46 *See* Michael E. Smith, Judge Charles E. Clark and the Federal Rules of Civil Procedure, 85 YALE L.J. 914 (1976); Charles E. Clark, The Handmaid of Justice, 23 WASH. U. L. Q. 297 (1938).

47 *See*, e.g., Robbins v. Wilkie, 300 F.3d 1208, 1210 (10th Cir. 2002); Brever v. Rockwel Int'l Corp., 40 F.3d 1119, 1125 (10th Cir. 1994); Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002); Bender v. Suburban Hosp., Inc., 159 F.3d 186, 192 (4th Cir. 1998); Bennett v. Schmidt, 153 F.3d 516, 519 (7th Cir. 1998). *See also* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (2d ed. 1990) [hereinafter WRIGHT & MILLER]; *Id*. § 1357.

48 *See* Fairman, *The Myth of Notice Pleading, supra* note 45, at 992 *quoting* Smith, supra note 46, at 927, *supra,* note 39, at 992.

of U.S. civil procedure. Even though extensive literature has been written on this topic, it seems significant for the purposes of this study to stop and revisit a few points along this path, viewing them from the particular civil law perspective.

It is remarkable that the trilogy of Supreme Court decisions on notice pleading (before Twombly)[49] outlined opposing considerations. On the one hand, the Supreme Court recognized that many circuits, despite Rule 8, often required heightened pleadings, mostly in civil rights cases.[50] However, on the other hand, those Supreme Court decisions stated that Rule 8(a) exclusively determined the role played by notice pleading (with exception of pleading for fraud and mistake pursuant to Rule 9(b)) and repeatedly observed that a fact-heightened pleading "must be obtained by the process of amending the Federal rules, and not by judicial interpretation."[51]

To this end, on the legislative front, in 1995 Congress enacted the Private Securities Litigation Reform Act (PSLRA).[52] No doubt this particular subject matter needed a very heightened pleading standard. Equally undoubtedly, this kind of fact pleading represented a departure from the interpretation of notice pleading until that moment set forth by the Supreme Court jurisprudence, and, even before that, the approach of the drafters of Rule 8.[53] Just prior to Twombly, therefore, the determination of the pleading was sort of a puzzle, since it resulted from combining the strict application of the notice pleading required by Federal Rule 8, with some deviation from that Rule either by circuits or by acts of the legislature.

What were the reasons for that heterogeneous approach to the introductory phase of the civil process? Why, possibly, would the statement set forth in Conley[54] go on to be only partially followed, even before Twombly? Many important opinions in this regard point to the change in policies adopted by Congress as being "overly politicized by economic and ideological forces"[55] while others considered that the "puzzling

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49 *See* Conley v. Gibson, 355 U.S. 41 (1957); Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163 (1993); *Swierkiewicz*, supra note 44, at 512.

50 *See* Miller, From *Conley*, supra note 1, at 12; Fairman, supra note 45, at 996.

51 *See Swierkiewicz*, *supra* note 44, at 515 *quoting* Leatherman, supra note 49, at 168.

52 *See Private Securities Litigation Reform Act of 1995* (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995).

53 *See* also Marcus, supra note 40, at 1761.

54 That notably is "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of this claim[.]" *See* Conley, *supra* note 49, at 46.

55 *See* Miller, From *Conley*, supra note 1, at 13.

persistence"[56] of fact pleading was primarily due to the increasing case management by judges that occurred in several instances in the lower courts. Moreover, there was no doubt that the proliferation of cases being litigated were also becoming more complex and technical. This provided the fertile soil from which sprouted the need for a different interpretation of the Federal Rules' keystone: Rule 8. In other words, it is not surprising that, given this transformation of the civil litigation landscape, "the goal of simplicity and liberality in pleading has been the subject of recent, dramatic and controversial reform."[57]

"From Conley to Twombly and Iqbal" epitomizes the avenue and the endorsement at the highest level of this changing view. A "new model of civil procedure," to adopt Professor Miller's words,[58] has been progressively overlapping, until now, with the original intention of Rule 8, ultimately in the name of efficiency.[59] Furthermore, in that name, the original relationship between the pleading and the motion to dismiss changed dramatically. The standard of pleading advanced by Twiqbal, requiring the facts to render allegations plausible, or "plausibility pleading," thus now represents, at first glance, the pleading's betrayal of simplicity, and reinforces the rare use of Rule 12(b)(6) via the "unbridled discretion"[60] of the district courts.

That kind of discretionary power by courts is better stated, even by a majority opinion, by Iqbal. In this regard, several points are worth noting from a comparative perspective.

First, in correctly determining the factual basis of the claim for relief, Iqbal's rule has strengthened the dichotomy between the allegation of facts and legal conclusions. This distinction set forth by Twombly and highlighted by Iqbal provides that the judge must separate factual

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56 *See* Marcus, supra note 40, at 1776; Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433, 466-471 (1986). *See* also Robert F. Peckham, The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770, 780 (1981).

57 *See* SUBRIN ET AL., supra note 22, at 252.

58 *See* Miller, supra note 1, at 34.

59 *See*, e.g., A. Benjamin Spencer, Understanding Pleading Doctrine, 108 MICH. L. REV. 1, 6-9 (2009).

60 *See* Miller, supra note 1, at 22. *See* also Marcus, supra note 56, at 482. It has thus highlighted that the increasing discretionary role by judges in applying fact pleading and the connected motion to dismiss demonstrates, on the one hand, a betrayal of the foundational principle of the Federal Rules of Civil Procedure. On the other hand, the reemergence of fact pleading, shortly after to some extent consecrated by Twombly and Iqbal, would have allowed too much personal preference in judging by courts, mainly regarding the motion to dismiss, in face of the classical way due to the summary judgment. *See* also Stephen B. Burbank, Pleading and the Dilemmas of Modern American Procedure, 93 JUDICATURE 109, 110 (2009); Robert. G. Bone, *Twombly* Pleading Rules and the Regulation of Court Access, 94 IOWA L. REV. 873, 882-90 (2009).

allegations from conclusory ones.[61] That is, the judge must decide based upon "judicial experience and common sense"[62] as to whether the claim for relief is plausible. If nothing else, the dichotomy was the reason for the code pleading's failure, in theory as in practice. Rule 8 was properly conceived to relinquish those problematic terms and categories that were a source of trouble and did not permit evaluation of the pleading as a whole in the plaintiff's favor. Accordingly, the enhancement of this dichotomy transforms the original conceptual and operative framing of the pre-trial architecture as it was intended at the time the Federal Rules were introduced. The fact-conclusion distinction assigns the judge a role similar to a factfinder, but to be played during the pre-trial, rather than trial, phase, and based on the complaint. A strict consequence of this distinction is the (arguably too great) discretionary power of the judge to consider factual allegations on their view,[63] and to proceed mainly to the motion to dismiss, based on an exclusive view of the facts alleged in the complaint.

Professor Miller underlines the risk of the pre-trial phase's transfiguration and doubts the actual achievement of process efficiency as a whole. He observed that the plausibility standard risks overturning the entire civil process setting.[64] This concern centers around two aspects in particular which make the attribution of this discretionary power somewhat unconstrained. First, the exercise of this power being premised on "judicial experience" or "common sense" results in an unavoidably subjective and arbitrary assessment of the facts.[65] Second, this type of uncertain road taken by the courts transforms the motion to dismiss procedure into a premature stage of the trial, which would usually occur after discovery but, in this case,

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61 *See* Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) by which "Rule 8… does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusion"; "A pleading that offers 'label and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.'" *Id*. *quoting* Twombly. *See also* Howard M. Erichson, What is the Difference Between a Conclusion and a Fact*?*, 41 CARDOZO L. REV. 899 (2020) who expresses it as an "elusive distinction"; Bone, supra note 5, at 859 (stating that "the majority in Iqbal is extremely unclear as to why these allegations were legal conclusions"); Edward A. Hartnett, Taming *Twombly,* Even After *Iqbal*, 158 U. PA. L. REV. 477, 491 (2010). The fascinating opinion by Steinman in terms of the "irony of plausibility" Steinman, *supra* note 1, at 1318-19. "Conclusoriness is destructive; it justifies disregarding an allegation. Plausibility is generative; it justifies creating an allegation that is not validly made in the complaint itself (perhaps because it was alleged only in a conclusory manner)."[CITE]. This sentence eloquently shows that the pleading determination - as now established by Twiqbal - needs a more in-depth consideration. *See also* Adam N. Steinman, The Rise and Fall of Plausibility Pleading*?*, 69 VAND. L. REV. 333 (2016).

62 *See* Iqbal, *supra* note 61, at 679.

63 *See* Miller, supra note 1, at 25.

64 *See i*d. at 28-30.

65 *See*, e.g., Guthrie et. al., Inside the Judicial Mind, 86 CORNELL L. REV. 777 (2001).

is reached in the absence of it.[66]

The debate on plausibility pleading and the new model of "trial-type determinations on a motion to dismiss,"[67] primarily involves discussion of the (still) current values and principles that inspired the Federal Rules of Civil Procedure. There are, however, some unexpected but perhaps useful reflections to be gained from viewing the problem with different eyes, that is, through the lens of the civil law context.

*4. Insights from a Civil Law Perspective: A premise.*

Accordingly, our task is now to determine whether one might identify some different arguments to better understand the process that has signaled the U.S. pleading's new era, considering also, but not exclusively, the achievement of economics in influencing the law to take into account the variable myth of efficiency. It has thus correctly been emphasized that Charles E. Clark believed that civil procedural rules "should serve the fair and efficient elaboration and vindication of substantive rights."[68] There, the transformation of requirements of the pleading was pursued primarily (but not exclusively) to achieve efficiency, with the primary tool for delivering justice being to grant more extensive access to it.[69]

Notwithstanding that Clark's approach to the function of the civil procedural rules was to assign to them the role of "handmaiden of justice," it is worth noting that this way of addressing procedural reform in that era was exactly the same as what was growing within the continental debate and reforming acts on civil justice.[70] To clarify: the "handmaiden of justice" role was not intended to imply a secondary function. On the contrary, as

66Miller, *supra* note 1, at 29. In terms of efficiency, Professor Miller observes that "this expansion of pleading Rule 8(a)(2) and Rule 12(b)(6) may well dissipate the supposed time and resource economies early termination is thought to achieve." For a partially different view, *see* Steinman, supra, note 2, at 1310-12, which suggests a more positive interpretation (mostly) of Iqbal, relatedly on the discovery phase and its costs. *See* infra, text and accompanying notes.

67 *See* Miller, supra note 1, at 34.

68 *See* Simona Grossi, The Claim, 55 HOUSTON L. REV. 1, 4 (2017) (emphasis added).

69 That is, currently, the mainstream of civil procedural rules, as a whole. *See*, e.g., A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. Rev. 1710 (2013) *quoting* Stephen C. Yeazell, Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law, 39 Loy. L.A. L. Rev. 691, 691 (2006) .

70 *See*, e.g., the essential milestones by EMILIO BETTI, DIRITTO PROCESSUALE CIVILE ITALIANO 3 (1936) and the worldwide known textbook by ENRICO T. LIEBMAN, MANUALE DI DIRITTO PROCESSUALE CIVILE 30-31 (5th ed. 1984). In summary, the essence of the civil process' function, which permitted it to evolve in a civil justice system, was (and still is) within the civil law context the consideration of the procedural rules as an autonomous set of rules. Nevertheless, it is to be regarded as an "instrument" to grant essence and real life to the substantive law.

civil law systems recognize, this is a primary function, which reveals how rules of civil procedure are essential to driving the individual right to enforcement, concerning the right to be heard and all that this universal constitutional principle implies in governing the trial process. It does not matter whether substantial rules come before procedural ones. Rather, the point is that without procedural rules, the so-called substantive law cannot be accessed, and therefore practically, does not exist. Although this kind of view undoubtedly reflects law based on the history of the civil law system (which can be traced to Roman law), I however think it might be a useful way to understand the motivation for Clark's approach to reform. That was and is the essence of the "handmaiden of justice."

The transformation of the pleading was also for the purpose of seeking less formalism and more pragmatism, given the excessive formalism that characterized Code pleading, in particular due to the nebulous term (and notion of) "cause of action." In other words, reform of the pleading was designed to overcome the difficulties otherwise posed by seeking to determine the essence of a cause of action, which in its formalism impeded broader and neo-liberal access to justice.

Yet, despite the cause of action being the main culprit for the formalism of Code pleading, it nonetheless re-entered the Federal Rules, its name changed but its controversial meaning unchanged. Indeed, even though the term "cause of action" has been formally overlapped by the term "claim,"[71] the claim nonetheless resembles the cause of action -- unavoidable given that the framing of the initial process has otherwise remained unchanged. Therefore, our first insight generating a different perspective stems once again from the reasons for the failure of Code (fact-) pleading. As I have recognized, Clark's purpose was primarily to facilitate access to justice for citizens, irrespective of lawyers' technical skills and related costs, such that notice pleading should have simply served to "particularize the matter [so as to distinguish it] from any other case."[72] Nevertheless, the first outcome achieved by these reforms culminated in Rule 8(b) of the Federal Rules, and the notion of "cause of action," an entirely nonspecific term, was not, in reality, put aside in the litigation system, nor the court's daily activity. The reason, in our opinion, is that it was, to some extent, unavoidable.

Hence, the first insight for a civil law perspective regards social policies as the purpose of reforms to eliminate the failing cause of action

71 *See* Clark, supra note 11, at 137, who noticed that "the cause of action must, therefore, be such an aggregate of operative facts as will give rise to at least one right of action," precisely as Rule 8 states the definition of the claim. *See also* SUBRIN ET AL., supra note 22, at 247; Grossi, supra note 68, at 7-10.

72 *See* Charles E. Clark, Pleading Under the Federal Rules, 12 WYO. L.J. 177, 183 (1958).

requirement, as the Code pleading stated for a long time. Of course, one realizes that social and economic reasons and policies undoubtedly inspire legislatures and courts in reforming the law in every corner of the world. Yet, this is unusual for civil procedural rules, which have an implicit further scope: to serve the substantial law, to design how a statutory law can realize citizens' rights when they become controversial and litigious. In our case, I thus try to seek a more likely explanation for why the notion of cause of action was not discarded, looking at the past through a different lens.

Having acknowledged the reason for the failure,[73] one might pose another question. Given the difficulty of determining the cause of action and inherent facts, has notice pleading (as outlined in Rule 8(b)), despite having been inspired by the highest values of the civil justice system, ultimately been a suitable provision? Posing that question is not meant to suggest a by-default agreement with the new paradigm proposed by Twombly and Iqbal. However, by looking beyond pleading requirements and examining the question through the comparatist's spectacles, one might obtain a different outlook regarding the reasons that precipitated the approach promulgated in Twiqbal.

First, a historically accurate understanding of the right brought in a civil law complaint requires asking: what is a right? On some views, a "right" is nothing more than a series of material facts protected by the law, pursuant to which the civil law "pleader" accesses justice.[74] Therefore, a "substantial" right comes to assume its essence within the civil law context when it requires justiciability. For example, a seminal work in the civil law context expressly refers to the "legal system in the prism of judicial assessment,"[75] thereby recognizing the primary role of the civil action in determining how much force a rule actually ascribes to a certain right. Accordingly, the right becomes controversial as it is determined in the pleading by inherent facts. Here the comparison becomes fascinating, since the trial type of the civil law system allows and, to some extent, compels the pleader to file all the

73 *See* also *infra* Section I.

74 It is not appropriate, at this stage, also focusing on the distinctive framework due to the civil law "right" systems, usually thought of as opposed to the "remedy" law, and therefore so distinguishing between the entitlement to relief, on the one hand, and the declaration of a preexistent right, on the other hand. This dichotomy is very relevant, but as I will try to explain further, it will be a final perspective from which I will summarize the arguments set out the article and to offer some conclusive remarks on the U.S. law in issue. *See infra* Section II. *See also infra* Section III. The purpose of this stage of the article is, therefore, to recognize that, even within the so-called "right" system, the determination of the complaint (pleading) contemplates the inclusion of facts, in the same way that it structures access to justice through the pleading in the U.S law.

75 *See* ENRICO ALLORIO, PROBLEMI DI DIRITTO. L'ORDINAMENTO GIURCO NEL PRISMA DELL'ACCERTAMENTO GIUDIZIALE ED ALTRI STUDI 1 (1957).

facts which are provided by the law to 1) individuate the right, and 2) demonstrate standing to the court.[76]

Here it should be mentioned that referring to "the facts," variously defined, as they serve to set the scope of the litigation and the adjudication's subject matter, is an unavoidable common ground for (civil) justice. Furthermore, the pleading's U.S. history, as outlined above, opens the door to the second consideration, from the comparative approach here pursued.

That is, in our opinion, the strength of the role played by technical issues and policy values in the U.S. reforms over time.[77] This unique role is undoubtedly a prerogative of the American approach and worldwide represents one of the most exciting and advanced models of how the law historically must address society's values. However, it played a crucial role in the reformation of the pleading. As I recall, history makes matters, and thus history recognizes Twombly and Iqbal's interpretation of Article 8(b), by which the plausibility standard moves towards a different efficiency value: "there is, of course, justification for protecting innocent defendants from excessive costs of discovery and interference with their affairs."[78]

I would make a preliminary remark at this stage. Tracing U.S. civil procedure history reveals a sort of unstable construction in the requirements for pleading facts. A first step of the comparative evaluation shows that notwithstanding notice pleading and its above-mentioned policies for providing a less technical way to access one's day in court, the role assumed by the cause of action and the alleged inherent facts is duplicated in the definition of the claim. Given that the determination of the facts is essential for civil litigation and this determination ought to be pursued by the law whenever the pleader has to prove the right to relief, a civil law comparison might help to better understand the pattern regarding pleading requirements as a whole. That is, even if the phase at which that determination is made may vary (depending on the type of trial framework), the result does not change: it seems the "ultimate" facts ("group of circumstances for which a court grants relief")[79] must be alleged.[80]

This way of addressing the U.S. determination of pleadings might also

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76 *See infra* Section II. *See also infra* Section III.

77 *See infra* Section I.

78 *See* FRIEDENTHAL ET AL., supra note 7, at 264.

79 *See* SUBRIN ET AL., supra note 23, at 248.

80 "Cause of action and their elements constitute the substantive law that it is the responsibility of procedure to "process." Id. *See* Spencer, supra note 2, at 1029, who clearly explains that "[t]he plausibility pleading standard of Rule 8(a)(2) applies to an assessment of . . . whether the allegation adds up to a claim," distinguishing of the "assessment of whether an allegation has been properly stated," as required Rule 9(b). *See* infra Section I.B. text and accompanying notes.

account for one of the most controversial and criticized issues raised by Iqbal. This is the perceived "elusive distinction" between conclusion and fact, as it has troubled scholars more than, actually, the district courts in applying it.[81] Moreover, remarkably, it has been reasoned in the literature that the distinction serves district judges to "disregard plaintiffs' allegations in a variety of situations where a particular element of a civil claim is easy to allege in general terms even if it may not be supportable."[82] In some ways, therefore, the reference to an element of a claim – in other words, an element of a cause of action – is what is really necessary. The most relevant but questionable lesson from Iqbal, the fact-conclusion dichotomy, risks clouding this point, without really assuming a substantive meaning. This dichotomy traditionally structures the civil law justice system and has several implications for the pleading's form and function. Therefore, there is room to debate, likely from a different perspective, as to whether (and why) Rule 8(b) has really been overlapped by Twiqbal, in which terms, in regard to which longstanding values, and finally whether there is an opportunity for reform.

At this point, I turn to the latest dilemma regarding the determination of the content of the pleading, concerning Rule 9(b), which appears extremely fascinating.

*B. The Iqbal Interpretation of a Special Case. The Perceived Mistake regarding Rule 9(b).*

Some suggestions emerge from considering the perceived application of the plausibility standard to the second sentence of Rule 9(b),[83] as Iqbal specifically interpreted it.[84] The matter can be summarized as such: according to the so-called "textual evidence," if "with particularity" in the first sentence of Rule 9(b) refers to the heightened pleading standard, then the word "generally" must refer to the ordinary pleading standard, which, since Twombly, requires plausibility pleading.[85]

Much criticism has followed this interpretation, and consequently, it has been proposed to rewrite the second sentence of Rule 9(b) to exclude the

81 *See* Erichson, supra note 61, at 904-14 (emphasis added).

82 Id. at 919 (emphasis added).

83 FED. R. CIV. P. 9(b). It reads as follows: (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

84 *See Iqbal*, 550 U.S. at 686-87 (2007).

85 *See* Spencer, supra note 2 at 1028.

plausibility standard.[86] Thus it is worth including this particular issue (referring to a specific pleading) in our overview of the U.S. pleading's determination from the civil law perspective.

A couple of arguments, the background of which seem in line with this article's purpose, are worth emphasizing. One argument is, once again, the policy that animates Rule 9(b), which has to some extent, been misrepresented by Iqbal's interpretation. Professor Spencer correctly (in our view) sets this out as follows:[87] first, according to the Petition Clause of the First Amendment, which operates as the constitutional ground for the right to access to justice,[88] the second sentence of Rule 9(b) was designed to grant the easiest access by the pleader in alleging facts relevant to condition of the mind. The reasons, of course, were to permit access to the court, particularly for discrimination claims, through general allegations of facts, applying the plausibility standard which would now require "reasonable opportunity for further investigation or discovery."[89]

Second, Professor Spencer has emphasized, mostly regarding condition of the mind allegations, the uncertain impact on the motion to dismiss based on "judicial experience and common sense."[90] In judging the plausibility of the pleading's condition of mind requirements, the court could resort to personal "schemas dominant within the judicial class." Hence, the pleading would have to defeat these schemas to survive a motion to dismiss.[91] The pleader should have the opportunity for discovery, which should be regarded as a necessary tool to vindicate claims such as discrimination or others grounded on a specific condition of the mind.

Leaving to the concluding remarks our evaluation on whether there is an opportunity to reform this sentence and how, it is now worth highlighting a few general comparative insights, as they might emerge from Rule 9(b) regarding special pleading. As a general consideration, the civil law tradition does not count within its rules a form of special pleading.[92] That may be a simple point, but it is extremely significant for a

86 Id., at 1048-1053.

87 Id., at 1042-44.

88 *See* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

89 *See* Spencer, supra note 2 at 1043; A Benjamin Spencer, Pleading Civil *R*ights Claims in the Post-Conley Era, 52 HOW. L. J. 99, 160 (2008).

90 Spencer, supra note 2 at 1044-1046 *quoting* Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. REV. 1124, 1160 62 (2019).

91 Id., at 1045.

92 *See*, respectively, the general but severe provisions established by ZIVILPROZESSORDNUNG [ZPOEG] [CODE OF CIV. PROC.] § 253, translation at https://www.gesetze-im-internet.de/engischzpo/englisch-zpo.html (Ger.)https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html [hereinafter German Code] and Italian Code of Civil

reasonable comparative evaluation. To be accurate, a primary evaluation that stems from the recognized U.S. pleading system is that the introduction of notice pleading in the Federal Rules had to legitimate and, to some extent, favor the specific provision set forth by Rule 9(b). The reason was, and currently is (following the Iqbal interpretation, the facts of which were about discriminatory intent), that in moving away from fact pleading, free and easy access to justice could not create a license for the pleader to bring a complaint in which he is unable to demonstrate a right to relief.

In other words, once again, the criticism of the Iqbal interpretation of Rule 9(b) is correct, in our opinion, since it is grounded in historical and policy arguments. Nevertheless, the first evaluation that arises from a survey of civil law systems – which recognizes a uniform form of pleading providing strict content for the complaint – shows that one should address the pleading problem entirely. The aforementioned criticism of Rule 9(b) indicates that the real issue is not only the complaint's determination of more or less specific facts or circumstances from which the judge may deduce the condition of the mind, but the pleading system as a whole.[93] As Rule 9(b) signifies, at a minimum, notice pleading cannot be adaptable as an all-inclusive model for the introduction of civil actions. Therefore, it presents an opportunity for a renewed examination of the pleading problem as a whole, which should follow a two-fold guideline. First, a focus on the unavoidably strict relationship between individualization of the pleading's facts and the plausible claim to relief. Second, a possible prospect of the general model of pleading. That model may be able to overcome much of the specificity of current type pleadings, which are ultimately a possible source of confusion and vacillating interpretations.

At this point, a more in-depth analysis of the civil law scenario may be instructive.

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Procedure of 1942, Pub. L. No. 1443, § 163, translated and reprinted in SIMONA GROSSI & MARIA CRISTINA PAGNI, IMONAROSSIARIARISTINAAGNICOMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE app. B (2010) [hereinafter ITALIAN CODE]. *See* infra Section II, at par. 1, 2.

93 *See* Fairman, supra note 42 at 1006-07. "Rule 9(b) heightened pleading exists as a distinct part of the pleading spectrum. However, its space in the model is not restricted to fraud cases alone. Jurisdictions continue to require pleading comparable to the particularity of Rule 9(b) in other substantive areas. Sometimes, the pleading requirements even exceed those ever contemplated by the drafters for any type of claim." [is this quote from Fairman, if so, can we put the quote in a parenthetical?]

## II. THE U.S. PLEADING'S DETERMINATION WITHIN THE CIVIL LAW CONTEXT.

### *A. A Presentation.*

Before embarking on a comparative evaluation between the U.S. pleading systems and the homologous pattern within the civil law scenario, there are several points I need to make at the outset. Hence, we must declare that a comparative evaluation, aimed at contributing to a further interpretation of the U.S. law, necessarily starts to convince the reader that I am talking about two entities that, appropriately, are not so far from each other, even though they come from different civil justice frameworks. In this regard, I recognize how a primary role might be played by the structural prerogative of the so-called "right" system in the civil law tradition, as juxtaposed with the "remedy" one, which characterizes the Anglo-Saxon civil justice tradition.[94] This point is undoubtedly relevant, to the extent I noted above; however, as I said, it seems to serve better as a conclusory evaluation, not a preliminary pattern.

The first point I must make is to share the assertion by which "pleading standards are essential to the character of a civil justice system."[95] This essentiality qualification means that irrespective of country-specific regulations and civil justice frameworks, the determination of the pleading implies achieving its function to fulfill both public and private duties and services, as they combine to make a just decision on the merits of the action brought in the lawsuit. In the end, thus, one can better determine whether and how the dichotomy between right and remedy signals an unbridgeable difference.

At this stage, policy considerations, as they notably characterize the evolution of U.S. law, remain in the background. This does not mean, however, that they are not relevant at all. It means that a comparative evaluation (with a civil law system) is more focused on the rules and their systematic interpretation, even as policy considerations are playing a

94 *See* infra, Section I for some general advice .

95 *See* Steinman, supra note 2 at 1294-95. It is worth underlining what Professor Steinmann described in approaching his study: "Initial pleading is the key to the courthouse door. If pleading standards are too strict, the door becomes impenetrable. But if pleading standards are too lenient, concerns arise that opportunistic plaintiffs without meritorious claims will force innocent parties to endure the burdens of litigation and, perhaps, extract a nuisance settlement from a cost-conscious defendant who would rather pay to make the case go away": .This cutting-edge sentence perfectly reveals how technical issues (how a pleading may be structured) are essential to achieve some policies in the background.

growing role also in those systems, particularly in the Italian one.[96] Those policy considerations will be revisited at the conclusion of this article.

The second point concerns methodology. The choice of examining German and Italian law stems from the historical mutual reasoning between both systems, through the origin of their rules, as the common ground of the doctrine on this crucial topic grew over time. Although a few differences can be identified in each civil law system, they together represent a standard reference compared to U.S. law. As I treat the German and Italian systems separately, the task is to arrive at a significant standard pleading model of comparison, justified adequately by their historical convergence, which I believe to be the Roman tradition revisited through the modern architecture of a civil procedure system as an autonomous science pursuing civil justice.

Moreover, the reason is due to the peculiar framework that characterizes the genealogy of the civil law system in the early days of the past century, in Germany and shortly after in Italy, traced back to the so-called neo-Pandectistic way of shaping new rules for civil procedure upon a systematic ground.[97] Nevertheless, while now policy considerations are progressively entering the dynamics of reform within the European context, quite the opposite road – the equivalence of technical issues to policy considerations and the recognition of their intertwined nature – might now be taken by U.S. law. The determination of the pleading provides an exemplar reference.

Our third and final point concerns terminology. For the purposes of this article, it is relevant to engage with the possible correspondence between terms and their actual meaning as recognized in each system. Accordingly, while the general term "pleading" may correspond to the general civil law conceptual (but not expressly ruled) construction of the introductory act of the civil law process, the term "claim" may fit well with the form of that introductory act, such that it may absorb the U.S. specific term "complaint."

### *B. The German Law.*

#### *1. Enhancing the Managerial Judge*

Starting from the determination of the pleading within the German law allows us to historically examine one of the most crucial civil procedure topics that has emerged and which still involves doctrinal debates and

96 *See*, e.g., Cesare Cavallini & Emanuele Ariano, Issue Preclusion Out of the U.S.? The Evolution of Italian Doctrine of Res Judicata in Comparative Context, 31 IND INT'L COMP L. REV. , 1 (2021).

97 *See* Alessandro Somma, Global Legal History, Legal Systemology, and the Genealogy of Law, 66 AM. J. COMP. L. 751, 768 (2018).

remarkable jurisprudential statements, either in Germany or Italy. Namely, that is the discussion raised by the process subject matter, as the prominent field grounding the debate on the problem of the pleading in Europe. Thus, the discussion may be contextualized within a global approach by "identifying the issues."98 It means that determination of the pleading, the statement of claim, and the form of the complaint all combine to define the res judicata subject principally, among other functions, providing to the defendant the essence of the claim, in terms of facts and legal theories supporting it. Given that, as an introductory act to access court, the determination of the pleading inevitably reflects its purposes, as they developed around a systematic pattern more so than a background policy suggestion.

Within German (and then, with some theoretical differences, Italian) law, the determination of the pleading reveals itself to be the result of a broader approach at play. Viewing the determination of the pleading in the context of its legal history serves to better explain the current situation. The original framework of the pleading's function in Germany was grounded on a "remedy" conception of the process subject matter, as this qualification might affect a "right" system.[99] This preliminary notation is quite important and must be explained, so as to provide the starting point for the comparative evaluation to U.S. law.

While the pleading determination concurs in describing the process subject matter, German doctrine conceptually defined the pleading's function as a mere procedural claim initially,[100] not considering the substantial right as the immediate subject of the ongoing trial and its final res judicata. The conceptual framework's evolution has essentially regarded how this semi-remedial civil action's function must be reflected in the pleading's object and requirements. Truthfully, in German law and, of course, in other statutory law that grew from this theoretical basis, the pleading's requirements were not the most important issue to define the framing of the civil action. On the contrary, they were the logical corollary

98 *See* CIVIL LITIGATION supra note 4, at 251, in which it is emphasized that every civil justice system provides a mechanism to identify the issue prior to adjudication, although they may differ "greatly" regarding requirements for pleading, and the court's role in facilitating this identification.

99 This assumption keeps troublesome the classical dichotomy between "right" v. "remedy," as it has been for ages delivered in an opposite and often incompatible sense.

100 That could be the translation of the term "Prozessualer Anspruch" as it notably defined and makes sense of the "remedy" framework of German law, in term of connection between pleading and process subject matter. *See* BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS, 3 (1882); ARTHUR NIKISCH, DER STREITGEGENSTAND IM ZIVILPROZESS 3, (1935);WALTER HABSCHEID, DER STREITGEGENSTAND IM ZIVILPROZESS UND IM STREITVERFAHREN DER FREIWILLIGEN GERICHTSBARKEIT, 131,191 (1956).

of the well-established acknowledgment of the civil action subject matter.

The delimitation of the subject matter of the trial in Germany has undergone a slight transformation over the last century, evolving towards a model more in line with substantive law. Although the civil law right system has facilitated this development, the real reason for this development lies in the resolution of pure procedural issues. As it was, principally, claim preclusion has been universally recognized as the most relevant civil justice function, both from the party perspective and the public service of the State.[101] Accordingly, the doctrine's work in progress on the res judicata object partially assigned a more crucial role to the "right" individuation, as it emerges from the facts alleged in the pleading, as those which are relevant for determining the plaintiff's relief.[102]

Therefore, the evolution of the German law on the process subject matter shows how the nature of the pleading did not need to change because it was thought of as a necessary mechanism to introduce the process regardless of whether it was framed by a more "remedy"-like function or by a more "right"-like one. In other words, once the determination of the pleading was established, it did not change according to the different frameworks progressively adopted in terms of the process subject matter. Hence, Section 253 of the German Code of Civil Procedure has set forth, since its origin, that:

> *(1)* The complaint shall be brought by serving a written pleading (statement of claim).
> *(2)* The statement of claim must include:
> *1.* The designation of the parties and of the court.
> *2.* Exact information on the subject matter and the grounds for filing the claim, as well as a precisely specified petition.[103]

The words of the statute speak clearly. To describe the essence of the German civil process in a nutshell, there are two important considerations. The first is that, as one can see, there is a complete fact pleading standard, the determination of which has been well-established since the rule's first

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101 *See*, *e.g.*, CIVIL LITIGATION supra note 5 at 563-66.

102 *See*, *e.g.*, Hans-Joachim Musielak, Der Rechtskräftig Entschiedene Lebenssachverahlt, NJW 3593 (2000);KARL REISCHL, DIE OBJECKTIVE GRENZEN DER RECHTSKRAFT IM ZIVILPROZESS 217 (2002); Jurgen Stamm, Zur Verzicht aus die Streitgegenstandslehre im Sinne einer Rückbesinnung auf die Materiellrechtlichen und prozessualen Ausgangsfragen, 129 (1) ZZP 25 (2016).

103 *See* ZIVILPROZESSORDNUNG [ZPOEG] [CODE OF CIV. PROC.] § 253, translation at https://www.gesetze-im-internet.de/engischzpo/englisch-zpo.html (Ger.) [hereinafter GERMAN CODE].

pronouncement, in so permitting the evolution of the res judicata object towards a more precise definition--to facilitate the achievement of the core objective of avoiding re-litigation. Furthermore, the detailed provision on fact pleading, consistent with the triple determination of material facts constitutive of the subject matter, the legal theory grounding them, and the consequent relief asked of the judge, is further capable of adaption to an evolving res judicata subject because it is strictly connected to the judge's active role in the so-called Materielle Prozessleitung (direction in substance of the course of proceedings). To that end, Section 139 (1) of the German Code of Civil Procedure sets forth that:

> (1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.[104]

In these terms, the German law recognizes a sort of Kooperativen Prozessstil (cooperative process style). It means that the drama's actors (the parties and the judge) are continuously engaged within a frank collaborative exchange to ensure due process on relevant issues of fact and law as determined and specified since the introductory acts of the process.105 Moreover, this collaboration model allows the judge to ask the parties to clarify issues emerging from the introductory acts, namely those which are too general but may be essential for the later decision-making process.

The second consideration is that German fact pleading and its very detailed determination of facts relevant to subject matter individualization seems apparently congrous with the suggested advantage of German civil procedure, managerial judging, as it has been emphasized within the U.S. literature.[106] Even though this is not the place to elaborate on the theory of

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104 *See* GERMAN CODE supra note 103, at § 139(1).

105 *See*, *e.g.*, PETER L. MURRAY & ROLF STURNER, GERMAN CIVIL JUSTICE 227 (2004).

106 The topic has been addressed fully. *See* Hein Kotz, Civil Justice System in Europe and the United States, 13 DUKE J. COMP. & INTL L. 61 (2003); Arthur Von Meheren, Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and the Federal Rules, 63 NOTRE DAME L. REV. 609 (1988); John F. Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823 (1985); John F. Langbein, The Influence of Comparative Procedure in the United States, 43 AM. J. COMP. L. 545 (1995); Michael Bohlander, The German Advantage

the opined advantage, it seems useful to note that the premise of the convergence between the German civil procedural law and the U.S. one – that is, the common managerial judging[107] – was grounded principally on the determination of the pleading and its role. It has been proposed that both systems were structured by a too-general and ill-defined fact pleading,[108] while in reality, at the time, the U.S. notice pleading was supported by Rule 8(a)(2) Federal Rules and its Conley interpretation.

On the contrary, the U.S. courts' so-called case management has been promoted in parallel with the resilience of some forms of fact pleading in various circuit decisions,[109] fine-tuned through the Twiqbal "overruling" of notice pleading and introduction of the plausibility standard. Hence, it is worth noting that a connection between pleading, pretrial, and discovery tools characterizes, more or less, the evolving framework of each phase,[110] although historically the opposite has been said to be the main difference between common law systems (where no connection was the rule) and civil law systems (where pretrial and discovery flow directly from prosecution of the introductory acts).[111] As history matters, however, the rigid partition in the U.S. between pleading and trial, as it informed the original proceeding's structure, has progressively undergone transfiguration -- for example, the narrowing of the scope of the discovery phase to prevent abusive discovery. In so doing, it has abandoned the original sense and function of notice pleading, at least as Clark envisioned it.

It is thus not surprising that this transfiguration has problematized the sentence in Conley claiming "such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedure,"[112] and accordingly, the discovery-centered framework of the

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Revisited: An Inside View of German Civil Procedure in the Nineties, 13 TUL. EUR CIV. L. F. 25 (1998); Ronald J. Allen et al., Legal Institutions—The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship, 82 NW. U. L. REV. 705 (1988).

107 *See*, Judith Resnik, Managerial Judges, 96 HARV. L. REV.. 376 (1982).

108 *See* Langbein, *supra* note 102, at 827, who expressly affirmed that "The plaintiff's lawyer commences a lawsuit in Germany with a complaint. Like its American counterpart, the German complaint narrates the key facts, sets forth a legal theory, and asks for a remedy in damages or specific relief". (emphasis added).

109 *See infra* Section I.

110 *See* Mirjan Damaska, The Common Law/Civil Law Divide: Residual Truth *Of A* Misleading Distinction, *in* COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 3 (Janet Walker & Oscar Chase eds., 2010); Richard Marcus, Exceptionalism *and* Convergences: Form *Versus* Content *and* Categorical Views *of* Procedure, *in* COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 521.

111 That surely happened at the beginning of procedural reforms in both systems in the early decades of the past century. *See* Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 932 (1987).

112 *See* Conley v. Gibson, 355 U.S.4147 (1957).

civil process as a whole.[113] In other words, a gradual clarification of the process subject matter, originally framed only by the discovery tools available through a purely adversarial system, has given way to a more balanced framework between the function of the pleading and the court's early involvement in the case.[114]

A comparison with German law thus reveals what is at stake. The so-called "pleading war,"[115] as it has developed in the U.S. literature following Twiqbal, has primarily concerned some criticisms regarding the plausibility standard. This includes, as I have recognized, the subjective notion of judicial experience and common sense as an exclusive and tautological parameter to implement the same notion of plausibility.[116] Conversely, what the German law brings to the forefront is the unavoidably strict relationship between pleading and the machinery of discovery. That was an issue unresolved by Twiqbal, although the notion of the managerial judge doctrine was already established in the scholarship a couple of decades before.

What German law suggests is a stricter relationship between pleading and discovery machinery, which confounds the proclamation in Twombly that ". . . we cannot detect what we cannot define, we cannot define abusive discovery except in theory because in fact we lack essential information."[117] This sentence eloquently shows how in conducting the discovery phase in the U.S., the judge must seek to enhance the clarity of the factual basis of the lawsuit, while at the same time, avoiding abuse of this phase (over-discovery), originating with the sanctioning approach ad hoc created by Rule 37 of the 1983 Federal Rules of Civil Procedure reform.[118] This stands

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113 *See*, *e.g.*, Jack B. Weinstein, The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and *Erie*, 54 BROOKLYN L. REV. 1 (1988); Stephen N. Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. REV. 691 (1998); James. R. Maxeiner, Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, A Day in Court and a Decision According to Law, 114 PENN STATE L. REV., (2010), 1257.

114 *See*, *e.g.*, Abram Chajes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1284 (1976); Resnik, *supra* note 105, 376; Peter H. Shuck, The Role of Judges in Setting Complex cases: The Agent Orange Example, 53 CHI. L. REV.337, 340 (1986).

115 *See* Scott Dodson, *Pleading and the Litigation* Marketplace 99 JUDICATURE 11, 12 (2015) quoting Richard Markus, The American Pleading Wars (2013) (unpublished manuscript).JUDICATURE

116 *See*, *e.g.*, Stephen Burbank, Pleading and the Dilemmas of Modern American Procedure, 93 JUDICATURE 109, 118 (2009).

117 *See Twombly*, *supra* note 6.

118 *See generally* ARTHUR MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 3 (1984). *See* the 2000 amendment to FED. R. CIV P. 26 (B) (2), which introduced a sort of discovery

in contrast to German law, where the judge does not lack information at this stage of the proceeding due to the absence of notice pleading.

A comparative evaluation on this point allows us to address the point from a different perspective. Irrespective of differences in the structure of the particular framework of the civil proceeding, the current situation produced by the evolving U.S. law, compared with the German law, demonstrates how crucial managerial judging is in guiding parties to fair litigation. The point here is not to translate country-specific rules across civil justice systems, but to achieve shared guidelines informing the best way to grant efficiency in civil justice. Efficiency in the U.S. system has been increasingly sought by improving the effectiveness of the discovery phase –by assuring, through the judge's control, the proportionality of discovery activities "to needs of the case."[119]

As German law suggests, the relationship between the introductory and pre-trial phase (read: discovery) is grounded on a well-determined fact pleading, as a necessary tool to introduce the parties and the judge to a useful clarification of the relevant issues. Notwithstanding, the U.S. civil proceeding framework notably recognizes an autonomous role and function of the discovery phase. The approach of sanctioning against so-called over-discovery and bulk discovery unavoidably keeps attention on the determination of the pleading, and to some extent, ends the notice pleading justification.

Redebating the notion of the managerial judge signifies, from a broader view, taking into primary consideration the acknowledged (starting) point by which determination of the pleading does not experience an unstable construction due to the changing values behind the rule, but unavoidably requires a more technical approach. That is, I must consider all the devices provided to grant relief (or not) during the (U.S.) pre-trial phase. As changing values behind civil litigation (cases growing in complexity, rights emerging from the social and economic changes, such as civil rights, securitization rights, etc.)[120] might justify Twiqbal distinguishing Conley, it would be too restrictive to assume that more accurate pleading in determining relevant facts is needed only due to a (different) policy

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standard referring to the discoverable information related to "any party's claim or defense"; *see* Richard Marcus, The 2000 Amendments to the Discovery Rules, 1 FED. COURTS L. REV. 289 (2006).

119 *See* the 2015 amendment to FED. R. CIV P. 26 (B)(2), related to the Scope of discovery. *See* Bryant G. Garth, Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform, 39 B. C. L. REV. 597 (1998); Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 TEMPLE L. REV. 27, 27 (2001).

120 *See infra* Section I.3.

orientation. As the developments in Twiqbal could be related to the values underpinning litigation that have varied over time, one also finds the litigation structures themselves give rise to an immediate and real need for at least a partial revamping.[121] In doing so, Twiqbal could represent a necessary movement towards realizing new procedural policy purposes, while opening the door to rethinking the civil process entirely and possibly following suggestions emerging from a comparative viewpoint. That is the first step.

*2. Revitalizing Rule 12(e)*

The second step in our comparative analysis hints more directly at the essence of Twiqbal: the plausibility standard. Plausibility, as I noted, results in an uncertain requirement, involving an overly discretionary exercise of the judge's power and indirectly enhancing the motion to dismiss the case, contrary to the intention of the drafters of Rule 12(f)(2) of the 1938 Federal Rules.[122] Furthermore, the comparison to German law, even more so than Italian law in this case, allows us to take into account a different point of view, with regard to the often-overlooked Rule 12(e). Section 273 (2) of the German Code of Civil Procedure[123] sets out that:

> (2) By way of preparing for the hearing, the presiding judge or a member of the court hearing the case delegated by the presiding judge may in particular:
>
> 1. Direct the parties to amend their preparatory written pleadings or to provide further information and may in particular set a deadline for explanations to be submitted regarding certain items in need of clarification.

I note that this kind of provision perfectly aligns with the primary purpose of the civil proceeding under the German framework. In contrast, the judge's active role from the beginning of the lawsuit appropriately

121 This can occur without losing the so-called "American Exceptionalism": that means, of course, that the party control of discovery remains as the main principle governing the adversarial model, and it does not imply any judge's control or interference in the freedom of discovery requests. It should require more accurate fact pleading, as a necessary "filter" to avoid an inefficient trial by ambush. *See* Ellen E. Sward, Values, Ideology, and Evolution of the Adversary System, 64 INDIANA L. J.. 301, 303 (1989); Oscar Chase, American "Exceptionalism" and Comparative Procedure, 50 AM. J. COMP. L. 277 (2002); Richard Marcus, Putting American Procedural Exceptionalism into a Globalized Context, 53 AM. J. COMP. L. 709 (2005).

122 *See infra* Section I.

123 *See* German Code, supra note 101, at § 273(2).

manages the content of the pleading as it has been determined by the plaintiff (and obviously by the defendant's reply).

Not surprisingly, a quite similar provision (functionally oriented to supplement and clarify pleadings) also exists in the U.S. Federal Rules, in Rule 12(e), despite the different structure of the adversarial proceeding.[124] I say not surprisingly, because this rule was originally intended as a sort of counter-rule to notice pleading, and it was interpreted by commentators and courts as a tool to undercut notice pleading by driving the parties to set out facts more detailed than those they originally pleaded, for better planning of the trial phase.[125]

However, this rule, in its prior form, "was responsible for substantial uncertainty and was soundly and frequently criticized."[126] In a nutshell, the purpose once the bill of particulars was amended, has been to anticipate through this motion facts that could have been detailed appropriately within the discovery. This was so the original pure function of notice pleading and the separate and autonomous discovery phase were centered, following the original intention pursued by the Federal Rules drafters. Hence, the question of whether the (new) plausible pleading requirements can now affect the use of Rule 12(e)[127] seems extremely relevant as compared to the different role assumed after Twiqbal by the motion to dismiss. Since the new pleading must contain more specific facts to be tested against the plausibility standard, less discretionary use of this power by courts might be achieved not by pursuing a motion to dismiss the case but by making a specific motion sua sponte to clarify the pleading.[128]

More specifically, the possible advantage emerging from Twiqbal might be a renewed design of the introductory phase. The managerial judge takes the floor more so than in the past, beginning with the plausible pleading evaluation as a threshold matter. That being so, to avoid the judge's power becoming too discretionary, a motion to dismiss can be denied whenever the judge, sua sponte, directs a party to provide a more definite statement,

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124 It means, obviously, that in the U.S. system, to clarify pleadings driving the following discovery phase is a party's task, as its specific motion is reserved only to the defendant.

125 *See*, *e.g.*, *Graham v. New York & Cuba Mail S.S. Co*., 25 F. Supp. 224 (E.D.N.Y. 1938), and the emphasized the original provision (then amended) on the role played by the so-called "bill of particulars"; *see* Stephan F. Tucker, Comment, Federal Civil Procedure- Federal Rule 12 (E): Motion for More Definite Statement- History, Operation and Efficacy, 61 MICH. L. REV. 1126 (1963).

126 *See* FRIEDENTHAL ET. AL.,supra note 6, at 269.

127 *Id*. at 270.

128 *See generally* Cooper v. Cmty. Haven for Adults & Child. with Disabilities, No. 8:12–cv–1041–T–33EAJ, 2012 WL 2402829, at *2-3 (M.D. Fla.); Kyeame v. Buchheit, No. 1:07–cv–1239, 2011 WL 3651369 at *1-2 (M.D. Pa.); *See also* Friedenthal ET AL., *supra* note 7, at 270.

conferring on Rule 12(e) a new "current utility."[129] Indeed, if a Rule 12(e) motion is granted whenever so moved by the defendant, the risk of it being used as a dilatory tool seems inescapable given the availability of discovery in the subsequent step (such that some, whether courts or scholars, opine for abolishing said rule).[130] While the revised Rule 12(e) was targeted to the limited purpose of eliminating a pleading's vagueness in order to allow the defendant the opportunity to issue a proper response, a revitalized Rule 12(e) used in the context of managerial judging might avoid the implicit risk of delaying tactics by the defendant, and it preserves an efficient discovery phase, which does not assume a substitutional function. In so doing, the motion sua sponte might be a way of interpreting the plausibility test, mostly in the case of special pleadings requirements, as Rule 9(b) requires.[131] While I recognized that an assessment of plausibility involves the application of the judge's "experience and common sense," the motion sua sponte for a more definite pleading can reduce – mainly in complex cases – the implicit biases that might impact this assessment.

In other words, if plausible pleading remains uncertain, as a context-specific task, and even tests "factual convincingness"132 more than factual detail, it seems clear that how convincing the pleading is to the judge at his discretion is based on which facts are alleged by the plaintiff and how the defendant replies to them.

Balancing a motion to dismiss with a functionally revisited motion for a more definite pleading (also sua sponte) might serve dual purposes. On the one hand, it deals with a more reasonable tracing of the plausibility test, considering that the increasing pressure for heightened pleading requirements allows for the revival of Rule 12(e) – a sort of renewed bill of particulars,[133] to avoid a motion to dismiss as the result of a negative adjudication as to the plausibility of the pleading at stake. There is no doubt, following Twiqbal, that the plausibility test is grounded in the judge's

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129 *See* JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE CASES AND MATERIALS, 625 (12th ed. 2008) [hereinafter CIVIL PROCEDURE, CASES AND MATERIALS] (questioning the new relationship between Twiqbal and Rule 12(e) to avoid dismissing a pleading as "believed to be without merit" (*quoting* Garcia v. Hilton Hotels *Int'l*, Inc., 97 F. Supp. 5, 8 (D.P.R. 1951)).

130 *See*, *e.g.*, Button v. Snelson, No. 3:12–CV–01941, 2013 WL 4714398 at *2 (M.D. Pa); Hsu v. OZ Optics Ltd., 211 F.R.D. 615, 619 (N.D. Cal. 2002); Tucker, *supra* note 125, at 1136-37; Fleming James, Jr., The Revival of Bill of Particulars, 71 HARV. L. REV. 1473, 1476 (1958).

131 *See* Friedenthal et al., *supra* note 7, 269.

132 *See* Kevin M. Clermont & Stephen C. Yeazell, Inventing Tests, Destabilizing Systems, 95 IOWA L. REV. 821, 832-33 (2010).

133 *See* RICHARD F. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE, 1204-05 (10th ed. 2000) [hereinafter Field et al.].

common sense. However, that power in decision-making could appear less discretionary if the judge moves sua sponte to a pleading- clarifying motion; judging on a set of facts entitled to the assumption of truth might suggest that factual allegations are complete.

On the other hand, that kind of comparison shows how managerial judging is not only a technical tool, nor simply just a historical choice arising from a divergent approach to the civil proceeding structure, as German law seems to demonstrate. As with Italian law, German law is not to be considered the enemy of the so-called adversarial system. On the contrary, both the German and Italian civil justice systems adopt a semi-adversarial model in reality, because they provide for the judge's active role in collaborating with parties in clarifying the relevant facts.

Moreover, it is not surprising that managerial judging is increasing in the U.S. system, irrespective of the proceeding's dissimilar structure regarding the discovery phase and other pre-trial devices, compared with the civil law tradition. Those differences do not inhibit a useful comparison within the U.S. law. Furthermore, that comparison allows us to rationalize the standard of plausibility pleading with reference to a shared objective of civil justice globally. That objective is, if possible, to permit the proceeding to go ahead, and to reach a decision on the merits.

The comparison to German law has shown how the determination of the pleading following Twiqbal might provide one (though not the exclusive) tool to achieve a "pre-trial interchange among the parties"[134] relying upon a more active role by the judge. The comparative approach to the Italian system, discussed below, may open the door to further insight.

### *C. Italian Law.*

#### *1. Determination of the Pleading and Res Judicata.*

The comparison between the determination of the pleading in the U.S. and the Italian system allows us to take into account another point at issue, which can be summarized by this question: how relevant might heightened pleading requirements be in facilitating a more effective and efficient application of the res judicata doctrine (also referred to as the claim preclusion effect)?

In answering this question, the parallel evaluation with the Italian system is interesting. The ground surrounding the technical provision of

134 *See* Field et al., *supra* note 133, at 1258.

determination of the pleading has developed similarly to the German one, although it has been focused on the connection with the subject matter definition and the correlate res judicata effects. Art. 163 of the Italian Code of Civil Procedure sets out the object of the determination of the pleading as follows:

> The complaint shall contain the following items:
>
> (3) The indication of the object of the claim;
>
> (4) The description of the factual and legal grounds of the claim and the relative conclusions*[.]*[135]

Despite these curt provisions, the determination of the Italian pleading is similar to the German one, sharing the common revised Roman tradition and the purpose to individuate the right entitled to relief through a set of facts filed by the plaintiff in just the introductory phase. As in the German system, the underlined policy to grant a decision on the merits, rather than a preliminary dismissal of the case due to a pleading deemed not plausible (ahead of discovery and the trial phase), is realized in the Italian procedural law. In particular, Italian law focuses on the case of incomplete pleading, allowing the judge to require additional allegations of facts. Hence, Art. 164 of the Italian Code of Civil Procedure sets forth that:

> The complaint is null also where the *[requirement]* under number 3 of Article 163 lacks or is completely uncertain, or if the description of the facts under number 4 of the same article lacks.
>
> The judge, *[having]* ... assessed the nullity of the complaint pursuant to the previous paragraph, assigns to the plaintiff a final time limit for renewing the complaint or, if the defendant has appeared before the judge, a time limit for *[supplementing]* the claim. The waivers *[that]* occurred, and the *[*rights*]* vested before the renewal or the *[supplementation]* remain valid*]*.[136]

The purpose of these provisions is twofold: either to enable the defendant to know the essence of the claim and accordingly to reply accurately, or to grant a decision on the merits, whatever it may be. In that sense, one can appreciate the similarity to the German law, even though they are quite different rules, given the policy that inspires them: a more active role by the judge from the introductory phase, in order to plan the allegation of

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135 *See Italian Code*, *supra* note 92, at 188-89.
136 *Id*., at 191.

complete facts to facilitate the delivery of a decision on the merits. However, some further reflections can be drawn from the Italian literature on the due connection between the determination of the pleading and res judicata effects, in order to provide a comparison to possible implications for the U.S. debate. Briefly on that point, one of the civil law procedural cornerstones is the res judicata object determination as a consequence of the process subject matter primarily raised by the pleading's content. Within the civil law system, the set of facts that identify the right that the plaintiff is going to bring to the court, in order to obtain a just declaration,[137] is minimal. This connection has been emphasized from the outset of the modern civil justice system in Italy and Germany. Still, in Italy, it has grown more significantly because of the stricter reference in the pleading's determination to the substantive right assumed as entitled to relief.

Having said that, I would like to draw attention to the primary effect of the res judicata doctrine, which is to be considered a global achievement: the so-called *ne bis in idem* principle, which is used for the efficient purpose of avoiding retrying the same litigation. In this regard, the question that arose from the traditional doctrine and jurisprudence has unquestionably been the precise determination of the notion of the same action, referring to a second (identical) action brought to the court between the same parties.[138] Within the context of the Italian system, the question has been answered by relying on the decisive role played by the determination of the pleading. The sufficiency of the facts set forth in the pleading to determine the right presented to the Court becomes the first parameter to evaluate, by the second Court, the identity or not of the succeeding process, compelling the second Court to dismiss the case, also sua sponte.

Moreover, this essential res judicata effect has also been accomplished differently, irrespective of the final first decision. It indirectly informed the notion, and the identical scope, of the *lis alibi pendes* rule. Article 39 of the Italian Code of Civil Procedure sets out that:

> (1) If actions involving the same parties and having the same object are pending before different judges, the judge before whom the action was filed later, at any time and instance of the proceeding, also sua sponte, issues an order stating the *lis alibi pendens* and orders the

137 *See* PRINCIPI, *supra* note 13, at 629; Augusto Cerino Canova, LA DOMANDA GIUDIZIALE E IL SUO CONTENUTO, COMMENTARIO CODICE I DI PROCEDURA CIVILE, 44 (Enrico Allorio Ed. 1980).

138 According to the criterion of the dispute's prevention set forth by the priority of the notified pleading to the defendant, the second action is that it has subsequently established.

striking of the case in the Register of Proceedings.[139]

In this case, the *lis alibi pendes* rule avoids parallel proceedings between two same actions, in so anticipating the same effect of res judicata. That is the inconsistency of having two decisions on the same action, where either action is pending, or one has been already decided. In any case, however, the criteria by which the judge (or the defendant) can move toward this way of dismissal is, of course, the same substantial definition for determining a cause of action. In particular, to realize the most efficient and fair dispute resolution, the *lis alibi pendens* rule requires that this kind of evaluation is made at the early stage of the second proceeding, based on the content of the pleading.

This kind of comparative reference does not necessarily mean that Twiqbal aimed to return to a fact pleading system. It is true that the Supreme Court noted therein that "much can be said in defense of fact pleading,"140 and that "the detail required under fact pleading facilitates the application of the doctrine of res judicata."141 However, the purpose of better facts in determining a pleading might also serve to define more accurately the res judicata object,142 and consequently to achieve a primary goal of civil justice.

*2. Implications for the U.S. Law.*

The Italian system might thus be instructive for some further reflections on the determination of the pleading in the U.S., perhaps yielding a different evaluation of the impact of the plausibility test. Given it could rely on different terms for the post-Twiqbal debate, to some extent, it might induce us to see plausibility as less crucial.

For these purposes, it is worth noting that the relationship between the pleading and res judicata involves some relevant policy values, which seems understandable for several reasons.

First, although the res judicata exception qualification in terms of the affirmative defense (Rule 8(c)) generally assigns to the res judicata a sense of private matter,143 it has increasingly taken into account a partially

139 *See Italian Code*, *supra* note 90, at 107.

140 Kevin M. Clermont, Three Myths about Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1349 (2010).

141 *Id*.

142 *See* Clarke B. Whittier, Notice Pleading, 31 HARV. L. REV. 501, 519 (1918).

143 *See*, *e.g.*, Joan Mahoney, A Sword as Well as a Shield: The Offensive Use of Collateral Estoppel in Civil Rights Litigation, 69 IOWA L. REV. 469, 486-487 (1983-1984).

different role, one which places the judge in a more central role. Here I refer to the court's sua sponte power to dismiss the case by applying claim preclusion despite the defendant not arguing it.144 This jurisprudential trend is grounded in a revised scope of the res judicata effect (the so-called *ne bis in idem*), as the Supreme Court established in Arizona v. California, explaining that the res judicata doctrine "is not based solely on the defendant's interest in avoiding burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste."145 Accordingly, in addition, the other (same) action pending exception (in repetitive actions)146 should be revisited, as it surely involves the claim and issue preclusion doctrine to avoid simultaneous prosecution as "inefficient and wasteful."147 Moreover, it seems at least contradictory that the defendant "may not lie in wait silently until one of two actions is brought to judgment and then use that judgment to ambush the plaintiff and defeat the other actions."148 Otherwise, in times of economy of justice, it must not be surprising that parallel litigation between the same actions cannot go on undisturbed according to the Federal Rules system so that at least the stay remedy should be applied by the court even on its own motion.149 This power (discretionary, perhaps) might prevent the draining of resources from the judicial system and certainly avoids potentially contradictory decisions. Changing policy values regarding the res judicata doctrine (and the related parallel litigation matters) allows us to reconsider the determination of the pleading from a different perspective, in so observing an unexpected correlation between both doctrines, even after Twiqbal.

To begin with, one might observe – correctly, in our opinion - a natural relationship between the role of the pleading and the res judicata determination, as the latter has been reshaped remarkably by the Restatement (Second) of Judgment.150 Before that, the res judicata object was a result of the ongoing determination of the subject matter throughout the pre-trial phase, under which notice-pleading, amendment discovery, and pre-trial conference were so intertwined that by the end the claim was

144 *See*, *e.g.*, Cabrera v. Comas, 62 Misc. 3d 1207, 2019 N.Y. Slip Op. 50014, 112 N.Y.S.3d 875 (N.Y. Civ. Ct. 2019); Farrakhan-Muhammad v. Oliver*, Civil Action No*. 15-cv-02266- GPG (D. Colo. Nov. 20, 2015); Trzeciak v. Petrich, No. 15-3355 670 Fed.Appx. 390, 391-92 (7th Cir. Nov. 1, 2016).

145 *See* 530 U.S. 392 (2000).

146 *See* Alan Vestal, Repetitive Litigation, 45 IOWA L. REV. 525 (1960).

147 *See* James P. George, Parallel Litigation, 51 BAYLOR L. REV. 769, 774 (1999) (*quoting* RICHARD MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION, 104 (3d ed. 1998).

148 *See* Friedenthal et al., *supra* note 6, 619.

149 *See* George, *supra* note 145, at 778.

150 *See* RESTATEMENT (SECOND) OF JUDGMENT, § 24 (1), (1982). (hereinafter RESTATEMENT).

processed so as to open the door for summary judgment or trial.151 In other words, the notice pleading "was not a stand-alone rule"152 but "part of a system of rules"153 as it has just been described. Therefore, while this system inspired Professor Allan Vestal in enhancing a broader view of the res judicata object,154 to emphasize the (unavoidable) connection between parties' factual allegations and res judicata doctrine, the Restatement (Second) of Judgment truly addressed that point, first at the terminological level. Defining the claim as the unit to succeed the traditional but overly confused notion of cause of action, and thus defining the res judicata primarily by claim preclusion, the Restatement's drafters adopted the so-called transactional approach. This meant, though, that the reference in determining the res judicata object became that "natural grouping or common nucleus of operative facts"155 which was modeled on the transaction notion.

Therefore, while the transactional approach allowed us to abandon the schematical approach followed in the times of Code pleading (as it was the Remedial Right or the Same Evidence theory),156 it however represented the occasion to adopt a more "pragmatic standard."157 It meant that the res judicata efficiency policy (to avoid relitigating after the final decision) is relevant to fairness for the parties (primarily for the plaintiff) due to the self-responsibility of alleging the facts, and all of those that constitute the basis for unequivocally determining the preclusive effect on the adjudicated claim.

A couple of considerations stem from this way of thinking and considering the content of the Twiqbal pleading. First, the comparative method adapted to the U.S. pleading problem *vexata quaestio* elegantly serves not only to identify convergences between different systems but above all, to possibly find new interpretations of the Supreme Court's established orientation, despite the structural differences of those systems. At least, the comparison makes other considerations worthwhile, as they

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151 *See*, *e.g.*, W. Thompson Comerford Jr., *Civil Procedure--Rule 15(b)--Amendment of Pleadings to Conform to the Evidence*, 9 WAKE FOREST L. REV. 247 (1973).

152 *See* Grossi, *supra* note 68, at 17.

153 *Id*.

154 *See* Allan Vestal, Res Judicata/Claim Preclusion by Judgment: The Law applied in Federal Courts, 66 MICH. L. REV. 1723 (1968); Allen Vestal, Res Judicata/Preclusion: Expansion, 47 S. CAL. L. REV. 357 (1973-1974).

155 *See* RESTATEMENT § 24, comment b, 199. (emphasis added)

156 *See*, *e.g.*, ROBERT C. CASAD & KEVEIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY 62 (2001).

157 *See* RESTATEMENT § 24, comment b, 199; *See also* CHARLES A. WRIGHT & MARY K. KANE, LAW OF FEDERAL COURTS 727 (4th ed. 2002).

seem to be the inferences raised by the pleading's minimum requirements of parties' allegations and the application of the res judicata doctrine.

Second, within the distinctive U.S. pre-trial framework (but which is also not so different to the civil law model for the introductory phase), the pleading need not allege some "evidentiary support."158 As it has been eloquently noted, that interpretation has however represented a "common misreading"159 of Twiqbal. On the contrary, what is properly significant for Twiqbal is that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence."160 This often-undervalued statement in Twombly is a crucial point for understanding the implications of Twiqbal, and what finally might justify moving away from notice pleading as set out in Conley. Moreover, as the comparison has shown, there is no question whether the pleading is more factually heightened than a mere notice pleading, and above all, there is no question as to the accompanying evidence as a requirement to demonstrate, at the pleading stage, the plaintiff's probability of being entitled to relief.161

Otherwise, while "[r]eading Rule 8's general pleading standard as mandating an evidentiary approach would confound the text and structure of the Federal Rules in other ways as well,"[162] it would align it perfectly with the civil law system. Thus, within the German and Italian systems respectively, evidentiary allegations at the pleading stage are permitted, but not necessary. There is no requirement to discharge a plausibility standard. However, this structural difference of the proceeding does not impede us from gathering some useful insights on the possible standard policies pursued through more complete factual allegations, as ultimately a more precise application of the res judicata doctrine. That is, finally, a neither secondary nor irrelevant purpose of the recent development in U.S. civil justice values.

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158 *See* Steinman, *supra* note 1, at 1317-1318, 1328 ("Allegations do not require evidentiary support at the pleading phase").

159 *Id*. at 1328.

160 *See* Twombly, 550 U.S. at 556; *See also* Steinman, *supra* note 1, at 1328-1330, who rightly emphasizes this argument.

161 *See* Part D for further comparative arguments about the non-conclusory standard of allegations regarding standard plausibility achievement.

162 *See* Steinman, *supra* note 1, at 1330.

*D. Rationalizing Twombly-Iqbal? The comparative significance of non-conclusory allegations.*

Our comparative evaluation now proceeds to the main question: might Twiqbal also be rationalized in a global context? If so, on which terms? Answering this question could be a possible alternative way of thinking about reforming the current rules of pleading, to which the final section of this article will be devoted.

Answering this question requires, however, approaching the essence of Twiqbal at the comparative level, that is, the conditions on which the pleading is sufficient to state a claim for relief, having disregarded the so-called conclusory allegations. As it has been efficiently framed by Professor Adam Steinman, the "two-step framework for evaluating the sufficiency of a complaint"[163] is first to "identify allegations that are conclusory, and disregard them,"[164] then secondly to determine if "the remaining allegations, accepted as true, plausibly suggest an entitlement to relief."[165]

To begin with, it is first worth considering whether it makes sense to compare the non-conclusory allegation with the civil law system. The answer is more accessible than one might have thought, even if the same notion of the U.S. (non-) conclusory allegation seems until now controversial, or at least elusive, either in the practice or in the literature.[166] Nevertheless, it needs to proceed step-by-step. First, needless to say, the non-conclusory determination pertains to the policy values pursued by Twiqbal, the traditional contraposition between the value of court access and the value of "weeding out non-meritorious claims."167 I might analyze this in more depth. Is that, in fact, an appropriate contraposition? Answering means approaching a broader evaluation of the significance of the (non-) conclusory allegation.

There are few doubts, in my opinion, that the meaning of (non-) conclusory allegation is grounded in the reaction of the Supreme Court in Twiqbal to the notice pleading function and often too nonspecific content in terms of the factual allegation. According to this consideration, redefining

163 *Id.* at 1314.

164 *Id*.

165 *Id.*

166 *See* Erichson, *supra* note 61, at 900, 907-908; Donald J. Kochan, While Effusive, "Conclusory" is Still Quite Elusive: The Story of a Word, Iqbal, and a Perplexing Lexical Inquiry of Supreme Importance, 73 U. PITT. L. REV. 215, 240 (2011); Edward A. Hartnett, Taming Twombly, even after Iqbal, 158 U. PA. L. REV. 473, 477-79 (2010); Steinman, *supra* note 2 1298, 1333; *Id.; see also* Steinman, The Rise and Fall of Plausibility Pleading*?,* 69 VAND. L. REV. 333 (2016).

167 *See* Erichson, *supra* note 61, at 920.

the pleading's content is meant to avoid the risk that factual allegations are merely resolved in a "formulaic recitation of the elements of a cause of action."168 In other words, one might say that Twiqbal reaffirmed an obvious concept: stating a claim does not mean describing the claim itself. That probably resulted from a practical misunderstanding of notice pleading as ruled (until now) by its neighboring rule.

Thus, a second step is to identify what would assume the pleading's factual allegations to be a spitting image of conclusory pleading. Following this path, it seems simpler to individuate first a conclusory allegation as "the final and ultimate conclusion which the court is to make in deciding the case," exactly as Charles Clark stated more than a half-century ago.169 It means, however, that one has to secondly determine which allegation cannot be a mere conclusion.

Generally speaking, the suggestions raised by the dichotomy between generality and specificity of the factual allegations seem convincing,[170] above all because this dichotomy avoids treating the legal conclusion as necessarily conclusory, or unnecessary in stating a claim. The point is, however, not only to consider the legal framing of the claim as conclusory because it is too general (or a formulaic recitation of the cause of action), but, regardless of the legal framework, to consider the facts alleged in the complaint as sufficiently specific to understand a) what happened, and b) that what happened requires due process, such as a plausible pleading.

The civil law's heightened pleading systems, as investigated above, either in German law or in Italian law, approach that dichotomy textually. Within these systems, despite differences in the proceeding structure and judiciary organization, only specific factual allegations on those terms serve to particularize the claim (read: the pre-assigned right stated in the claim). Further, despite the content of the complaint needing to identify the set of rules upon which the plaintiff aims to establish the violation of their right by the defendant, this identification at the pleading stage is not binding for the judge to assign (or not) a remedy to the claim. Moreover, that initial identification furthers the objective of showing a particular soundness of the pleading (represented in the U.S. by the standard of plausibility).

The final asset of the legal classification of the claim is thus a judicial prerogative, also recognized at the constitutional level, and surely represents

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168 *See* Iqbal, 556 U.S. at 67 (*quoting* Twombly).

169 *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 234 (2d ed. 1947) (emphasis added); *accord.*, Hartnett, *supra* note 164 at 491.

170 *See* Robert G. Bone, Plausibility Pleading Revisited and Revised: A Comment on Aschroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 860 (2010).

a key moment in decision making.[171] Nevertheless, the only elements that structure the claim are the ultimate allegations of facts, with particular reference to the specific events contextualizing the need for justice — in other and equivalent terms, the entitlement to relief. At the pleading stage, the legal conclusion as to these factual allegations does not matter; while legal conclusions are allowed, they are irrelevant to individuate the claim and the presiding judge's duty to answer it.

In these terms, whether or not the conclusory allegation turns into a legal conclusion, there is no difference between legal families. Furthermore, there is no substantial difference in the conclusory allegation as an elusive recitation of the typical elements of a cause of action. This statement from Iqbal reveals the closest argument in support of drawing on the civil law system to better understand the problem of the pleading. Yet, the role of the pleading in facilitating the easier application of the res judicata doctrine (ultimately favored by the civil law perspective) might be supportable also by a stricter definition of the pleading's non-conclusory factual allegations. As it could properly be, in our opinion, the so-called transactional approach suggested in the literature.172 The "identification of the real-word acts or events underlying the plaintiff's claim"173 naturally recalls the correlation between claim and process subject matter determination to be res judicata, as I have previously examined within the German and Italian law. Accordingly, it aligns with the transactional approach determined through the res judicata conceptual development raised by the Restatement (Second) of Judgments.

Considering the issue from this broader, global perspective can give rise to some advantages. Undoubtedly, determining the requirements of the pleading in the acts or events underlying the claim might realize a few goals (at minimum), the achievement of which reveals a perhaps unexpected common reference and shared values with the civil law provisions in issue.

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171 *See* NICOLÒ TROCKER, PROCESSO CIVILE E COSTITUZIONE, 637 (1974); *see* EBERARHD SCHILKEN, ZIVILPROZESSRECHT, 165, (2014) by which «Das Gericht hat das Recht von Amts wegen zu kennen und anzuwenden. Iura novit curia. Es ist auch eine übereinstimmende rechts Ansicht der Parteien nicht gebunden» (The Court of First Instance shall know and apply the right of its motion. Iura novit curia. There is also a concurring right view of the parties not bound.); OSCAR JAUERNIG-BURCHARDT HESS, ZIVILPROZESSRECHT, 25, (2011); LEO ROSENBERG ET AL., ZIVILPROZESSRECHT, 77 (2010).

172 *See* Steinman, *supra* note 2, at 1134; Allan 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, 243 F.R.D., 604, 607-609 (2006), who opines in terms of "actual, identifiable event" as necessary pleading's content requirement.

173 *Id*., at 1334-1339.

To begin with, a more fact-specific pleading, in the mentioned terms, undoubtedly assures a notice function,174 perfectly aligned with the same policy-driving force underlying the civil law, and in both systems is grounded in the due process clause and the effectiveness of the right to be heard. Indeed, the notice function has substantially been considered as the main, if not the exclusive, function of the pleading within the original design of the Federal Rules. However, in so reflecting the value for the broadest access to justice,175 the post-Twiqbal pleading era and the transactional pleading's content as a global model for access to justice might satisfy a common policy standpoint that realizes standard constitutional principles irrespective of different country- (and system)-specific proceeding frameworks.176 Secondly, the comparison eloquently shows that the heightened pleading's "process-facilitation function"177 is the best way to make workable relevant procedural issues, such as joining of multiple parties, and/or compulsory counterclaims, among others. The civil law systems all provide in that sense, upon the rationale by which a preliminary clear pleading's set of facts and events (transactional approach) permits the court to wholly and correctly address these issues and gives the court the right parameters in admitting them.

The latest notable goal that could follow the post-Twiqbal pleading era, as viewed from a comparative perspective, is probably more ambitious since it concerns the way of making civil justice more affordable through efficiency in the discovery process. This goal, hugely ambitious as it is, must go through different evaluations, valorizing the reshaped judge's role

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174 *See* Steinman, *supra* note 2, at 1341, 1377-1349.

175 *See*, *e.g*., Christopher M. Fairman, Heightened Pleading, 81 TEX. L. REV. 551, 554- 57 (2002).

176 It is worth highlighting the suggestion expressed by Professor Steinman, *supra* note 2, at 1348 n. 311, who writes that,

> One could even imagine a system that has no meaningful scrutiny at all at the pleadings phase. It could allow a plaintiff to begin a lawsuit merely by notifying a defendant "I'm suing you," and then rely on other pretrial processes to perform the notice-giving, process-facilitating, and merits-screening functions. Such a system would not be fundamentally irrational, but its desirability would depend on how that post-pleading process is structured and implemented.

In this regard, the civil law pleading's determination has shown that a not mere notice- function may be achieved through a full-structured trial system (from beginning to the end), or the U.S. typical pre-trial system. Moreover, this article aims to demonstrate how comparison better rationalizes how the pleading notice function may work better in the pre-trial model - as the U.S one, provided that the factual pleading determination consists of notice of real facts and events. While these facts or events could entitle the plaintiff to relief from the defendant, they assure that the same defendant can move against, determining more efficiency for the subsequent discovery process or taking more seriously a possible motion to dismiss. Despite the structural differences between the U.S. system and civil law ones, the pleading's determination as above, rationalized realizes an ordinary policy matter within a shared systematic ground.

177 *See* Steinman *supra* note 2, at 1348-49.

in conducting the pre-trial phase as an unavoidable feature to balance the party's self- responsibility with the pleading purpose to "set the parameters for the ensuing litigation case,"178 in so preparing for the final aim to have a decision on the merits. Thus, it is now time to make some concluding remarks and assess how the future of the pleading may need reform.

## II. CONCLUDING REMARKS. IS THERE AN OPPORTUNITY FOR REFORM?

### *A. Policy Values v. Systematic Concepts: A Reconciliation beyond the Right and Remedy System.*

A possible after-effect of comparing the common law and civil law systems is the requestioning of the plausibility rationale within the broader context by which determination of the pleading cannot be a stand-alone issue at stake. To be honest, this way of thinking is not, at first glance, entirely new.[179] However, the comparative approach adopted here might become the norm and help a different and broader context break itself free from a more myopic view, as with concerns about the dilemma regarding the return of fact pleading.[180]

At this point, it is worth emphasizing a methodological issue, which emerges from the comparative perspective, whenever it has tried to be useful in the determination of the pleading in the U.S. context. In particular, even though the civil law country-specific rules on determination of the pleading cannot and must not be merely translated into the U.S. pleading schemes, for several reasons, the historical path of the pleading's determination in both legal families however shows that a comparative method, at least in civil procedure matters, cannot merely be a problem of more or fewer convergences. Rather, it allows for the identification of some trendlines that could have historical reasons (and comparative values) and on this basis allows us to wonder whether they might be useful to implement in each domestic rule's interpretation.

By this kind of comparative evaluation, the policy values behind

178 *See* Marcus, *supra* note 47, at 1775-56.

179 *See*, *e.g.*, Scott Dodson, Comparative Convergences in Pleading Standards, 158 U. PA. L. REV. 441, 455 (2010) ("This nearly universal standard is . . . essentially similar to the old code pleading requirement rejected by the Federal Rules of Civil Procedure…Recent trends in American pleading suggest that America may be moving toward the global norm by experimenting with more rigorous fact pleading and dispensing with mere notice pleading."). *See* Clermont, *supra* note 138, 1343. *See* furthers arguments in the following text.

180 Criticizing this path, *see* Clermont, *supra* note 138, 1340.

rules play their own role, even if not exclusively. I do not totally agree with the perspective that "foreign systems may not be an apt comparison" because they merely "use pleading more as a way to start the case effectively, rather than as a way to weed out weak cases." [181] Truthfully, it seems to be a question of understanding the reason for such a distinction between the two systems, which appears more perceived than real.

Within civil law systems, whether pleadings indeed have the scope to provide notice to the court and the defendant of the contention's terms, it is also true that pleadings must be integrated because that is the best way to achieve a decision on the merits, whatever it will be, with the prejudice of *the ne bis in idem* effect. So that, specifically in the Italian Code, an incomplete fact pleading does not achieve the scope of providing notice to the court and the defendant of the matters in controversy, but it compels the judge to ask the plaintiff for a renewed pleading, failing which the case is dismissed (without prejudice on the merits, of course). Paradoxically, it is the civil law system that is truly adversarial, as it leaves to the parties the early stage of the pleading, without necessarily involving the judge, and in any case, limits the judge to order the plaintiff to revise the pleading. Yet the primary purpose (namely, the policy) is to decide on the merits. That is considered the best way to realize the effectiveness of the litigation scheme through the final effect of res judicata.[182] This means, however, that the policy to weed out weak cases is pursued only indirectly, and the reason of course is due to the pre-existing rule on heightened pleading (or a "plain-pleading paradigm"[183]), provided primarily to lay the ground for the preclusive effect of the final adjudication.

Within modern U.S. pleading history, although there is no doubt that the primary function of the pleading has been "the elimination from consideration of contentions that have no legal significance,"[184] it is also recognized that this function must align with the notice function.[185] This is equally fundamental, as it realizes the due process clause in terms of the defendant's effectiveness and the court's relief adjudication (or not).

That means today, however, that Twiqbal, in requiring through the plausibility test a more heightened pleading, ascertains that the notice-

181 *Id*. at 1343.

182 It is partially misleading the common opinion by which in civil law systems pleading's rule and functions are less relevant than in the U.S. system. *See* Charles E. Clark, Simplified Pleading, 27 IOWA L. REV. 272, 273 (1942). We need to distinguish what the pleading's rules establish and what role has been played through doctrine and jurisprudence interpretation.

183 *See* Steinman, *supra* note 2, at 1349.

184 *See* Friedenthal et al., *supra* note 7, at 245.

185 *Id*. at 246.

function is not equivalent to the original understanding of notice pleading, as it was primarily inspired (almost only) by the institutional purpose of providing the most extensive access to justice.

In other words, the so-called pleading's gatekeeping purpose reveals a partial view of the pleading's function, and it does not seem a prerogative only adopted by the U.S. law, but at most an enhanced Federal Rules technical framework to avoid the risk of a most expensive, unfair, and delayed discovery phase. That view is partial, in my opinion, because the role assigned to the court to "undertake preliminary merit-screening"[186] should align with the function of pretrial devices, such as pretrial orders and mostly the discovery process. Moreover, assigning to the pleading this semi-exclusive gatekeeping role, one would end up taking a risk that the Supreme Court, by introducing the plausibility test and thereby abandoning the original system of notice-pleading, might be shown to be less adversarial than a civil law system, in that it enhances a discretionary evaluation by the court to eventually dismiss the case.

That is why the comparative view could be instructive for correctly framing the determination of the pleading post-Twiqbal. In my opinion, it can enhance a balanced evaluation of policies and conceptual frameworks regarding the pleading's role and content. This kind of reconciliation between policies and conceptual cornerstones could be the added value that emerges from a broader vision of the pleading's functions.

As a transactional approach to a pleading can contextually serve several policies, it also pursues the objective to not betray the essential (and exceptional, from a civil law perspective) structure of the U.S. procedural civil justice, namely the pretrial devices. Indeed, the assertion by which factual, non-conclusory allegations do not need evidentiary support at the pleading stage ends up negating the need for the plausibility test.[187] Ultimately, what would the effect be where the non-conclusory facts alleged are to be assumed as true?

Thus, it is time to consider the argument, only briefly explored above, regarding whether the so-called right/remedy dichotomy is a potential impediment to approaching a strict comparison between the U.S. and civil law civil proceeding.

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186 *See* Steinman, *supra* note 2, at 1349-50. *See also* Lawrence B. Solum, Procedural Justice, 78 S. CAL. L. REV. 181, 228 (2004), who argues that "the system of pleading should not unduly interfere with decisions on the merits".

187 *See* Steinman, *supra* note 2, at 1316 (also referring to Iqbal, 129 S. Ct. at 1950), who emphasized that "when a complaint contains nonconclusory allegations on every element of a claim for relief, the plausibility issue vanishes completely".

The response is negative, of course.188 On the one hand, even though there is no doubt that civil law procedural systems are grounded in a strict rights system, Twiqbal and the stricter pleading standard it requires reveals how stating a claim entitled to relief requires the right brought to the court to be scrutinized at the pleading stage. In the German and Italian civil proceeding frameworks, while those systems are grounded in the pre-assigned right to be filed in the complaint, they rule in terms of non-conclusory factual allegations. These are the conditions needed for the explanation of the right and mostly for asking the court to deliver the restorative remedy. On the other hand, therefore, no more confusion would emerge from the so-called exceptional U.S. pretrial devices than from the more fluent civil law proceeding, which runs seamlessly in court from the pleading stage to the final adjudication. These structural divergences do not play against a comparative evaluation between the requirements of each pleading.

On the contrary, that kind of alternative (and historically framed) evaluation shows how mutual convergences between different legal traditions are more effective and, above all, serve each other, to implement a broader vision and justify jurisprudential trends and overruling eventually. Therefore, the conclusion, appropriately, is not to deny the (original) pleading's gatekeeping function.189 Instead, the purpose is to rationalize, which allows the judge to test the pleading as plausible (to continue to the pre-trial phase), which solely means to strengthen the pleading's factual allegations, taken as true. While this reasoning might align with several other pleading functions, it aligns even more with the historical and comparative view from civil law systems, the policies of which have only indirectly assigned to the pleading a gatekeeping right (preferring, as I saw, to reach a decision on the merits, as quickly as possible even in the case of an unmeritorious claim).

This way of thinking finally allows for a reconsideration of the matters regarding Rule 9(b)(2) upon which this article commenced. Accordingly, generally alleging condition of mind facts may be an inadequate reading, as it stems from the opposite phrase with particularity, exclusively referring to the pleading standard for fraud claims. Nevertheless, if one tries to consider this kind of pleading within the civil law litigation scheme and begins with the common core of the non-

188 *See* Cesare Cavallini & Marcello Gaboardi, Rights v. Remedies. Towards a Global Model UC Davis J. Int.'l. Law & Policy, (2022) forthcoming.

189 *See* Clermont, *supra* note 138, at 1348.

conclusory allegations as a shared claim's model, one might come to a workable conclusion. That is, once again, the distinction implied in the good sense of the non-conclusory term, between the (mere) real fact-event narrative and the evidentiary support, which needs to be proved in the subsequent discovery process. Either for the claim of fraud, or a claim relevant to condition of mind, the pleading must contain facts and events "sufficiently tethered to an adequately identified transaction in order to be accepted as true at the pleading phase."190 In that sense, the contraposition between allegations which are made with particularity versus generally only reflects the substantially different cases involved in a claim of fraud (which implies particular actions done by the defendant) compared to condition of mind claims (that by definition refer to a mere state of mind). In any case, the (international) transactional approach, as it realizes several meritorious values, requires that the pleading's factual allegations stipulate what will be res judicata and drives the discovery process as a crucial and efficiently well-ordered phase by which the court can deduce evidentiary support in deciding the case.

Definitively, Twombly and Iqbal, even unknowingly, shed light on a renewed methodological approach for procedural issues. Indeed, that is the right balance between policy values and systematic concepts, as favored by and enhanced through the international context.

### *B. Conclusion*

The determination of the pleading in the U.S. after Twombly and Iqbal, viewed through the lens of civil law systems, shows there is no need to reform Rule 8(b)(2), at least insofar as the textual definition of the pleading's content as a short and plain statement of the claim is concerned.

As the word plain precisely reflects the transactional approach and its relevant policies, the word short can surely assure due conciseness (even) within a stricter standard for pleading allegations.

Conversely, the dichotomy between the phrase with particularity and the term generally established by Rule 9(b) might require more precise terminology, to reflect the intentions of the drafters of the Federal Rules, and to capture what ought to be needed in a claim of fraud rather than mere notice pleading. While fine-tuning these words might be sufficient, our historical and comparative evaluation of pleading requirements suggests a broader evaluation of all pretrial devices is required, if one is to achieve one

190 *See* Steinman, *supra* note 2, at 1342.

of the key objectives of litigation: an affordable civil justice system.[191]

191 Due to the COVID-19 pandemic, and related library closures, a minimal amount of sourcing could not be accessed in English during the editing process.