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CROSS BORDER RECOGNITION AND ENFORCEMENT OF JUDICIAL DECISIONS IN COMMERCIAL MATTERS UNDER EUROPEAN UNION AND ITALIAN LAW

By

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I. Introduction

The traditional approach regarding the enforcement of a foreign decision was that of denying, in principle, the enforcement of the foreign decision and to require a review of the foreign decision in order to ascertain the possibility of allowing enforcement.

This approach, however, can work only between countries which do not have extensive trade relations, as the possibility of enforcing legal obligations (and the resulting judicial decisions)

across the border is a prerequisite for the implementation of an effective and functioning trade system. If the system does not allow an expedited enforcement of a judicial decision across the board, the parties will tend to resort to alternative systems (arbitration, for example) which may be more broadly enforced.[1]

The EU (at that time still being called EEC) soon recognized the key role played by the reciprocal recognition of decisions and although the judicial matters were outside the scope of the Treaty of Rome, which had instituted the EEC, it promoted the drafting and execution, by all member states, of the Brussels Convention on the enforcement of foreign judicial decisions, which was initially executed on 27th September 1968, and was then amended from time to time, to include new member countries.

The territorial scope of the Brussels Convention was extended with the Lugano Convention, executed on 16th September 1988, which is an extension of the Brussels Convention to the countries which are members of the European Economic Interest Area. Most of those countries have subsequently joined the EU, except for Switzerland. In practice, the two conventions included all EU countries plus Switzerland

The basic concept of the Brussels Convention was that the courts of all member states were to recognize and enforce the decisions issued in another member state and that only a limited formal review could be conducted. In practice, the procedure was not always very fast and in some countries the debtor could actually delay full performance by fully litigating, without merit, the "review process".

Later on, with the new EU treaty, the judicial matters were included in the scope of the EU, and the speedy recognition and enforcement of decisions issued in EU member states became a key issue of European policy.

The matter is now regulated by two mandatory EU regulations:

a) Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of civil and commercial judgments, which is an improvement of the Brussels convention and

b) EC Regulation 805/2005 of 21 April 2004, entered into force on October 2005, creating an European Enforcement Order for uncontested claims

c) EC Regulation 1346/2000 of 29 May 2000 regarding insolvency proceedings

[1] International arbitration is widely recognized and enforced pursuant to a number of multilateral conventions, such as the New York Convention of 10 June 1958 and the Geneva Convention of 21 April 1961, among the others.

A further step is represented by the newly approved:

d) regulation 1896/2006 of 12 December 2006, which will enter into force in November 2008, which dictates the rules for a standard Europe-wide collection procedure.

Decisions issued outside the EU, for example in the USA, or decisions which are outside the scope of the EU regulations are still subject to nationwide, not standardized enforcement procedures (unless a bi-lateral treaty exists).

With reference to Italy, those rules were significantly amended in 1995, to facilitate the recognition of foreign decision (which was previously almost impossible) along the lines dictated by the Brussels Convention.

This article will deal primarily with EU rules for commercial law litigation, and will then provide information regarding enforcement of non EU decisions in Italy. Special rules may exist for non commercial matters (mainly family law related), which will not be examined here.

II. Recognition and Enforcement of EU member states court decisions

The matter is regulated by Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of civil and commercial judgments, called "Brussels 1" and entered into force on 1 March 2002, which applies between all member states of the European Union, with exception of Denmark to which still applies the Brussels Convention dated 1968[2].

Similar to the 1968 Brussels Convention, this regulation covers both the issue of common rules for jurisdiction and the issue of recognition of foreign judgments and applies only to civil and commercial matters.

Article 32 clarifies that for the purpose of the Regulation 44/2001, the term "judgment" should be interpreted broadly, to include any order, decree, decision, writ or execution, as well as the determination of costs and expenses by an officer of the court. This means that the recognition is not limited to decisions which finally adjudicate the case and the enforcement procedure may be used also for interlocutory orders and interim remedies.

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[2] Negotiations are in place to include Denmark

It is not required that the foreign decision be final and not subject to appeal, however article 37 provides that the courts of the country were the enforcement of the decision is sought may stay the proceedings if an appeal is filed against the decision.

According to Article 33 a judgment issued in a member state shall be recognized in the other member states without any special procedure being required. This actual reach of this provision is much more limited than it seems as a recognition procedure will be required in order to be able to proceed with foreclosure, however it is not worthless.

In fact, the second paragraph of Article 33 indicates that any interested party may commence the procedure to obtain a decision that the foreign decision shall be recognized and the recognition procedure is required any time the party needs to resort to judicial enforcement of the foreign decision.

The principle of immediate and automatic recognition has, however, some autonomous effects.

For example, the foreign decision could be considered by an Italian court as evidence of a factual situation. Therefore, a foreign decision issued in a separation proceeding was taken into account by an Italian court to determine the date on which two spouses got separated, for the purpose of determining whether they were entitled to divorce under Italian law.[3]

Similarly, in a case brought to the attention of an Italian court and subject, as to its substance, to foreign law, a decision issued between the same parties by the foreign court was used as evidence of the meaning of the foreign law in that specific case.[4]

Given the principle of automatic recognition, the foreign decision can be used in Italy as evidence of the final adjudication of the matter between the parties in all circumstances. For example, if the defendant starts a new action, the plaintiff may use the foreign decision as evidence of the res judicata on the subject matter, regardless of whether an exequatur procedure was ever commenced. Similarly, if a new case is commenced and such a case is dependent upon a finding adjudicated by the foreign decision, such a finding is res judicata and cannot be revisited again.

[3] Trib. Potenza 28 February 1998, Giur. merito 1998, I,54.

[4] Cass. 24 March 1981, no. 1717, Foro it. Rep. 1984, Delibazione, no. 23

The principle of full recognition of decisions issued in other EU member states has limited exceptions, which are listed in Article 34 of the Regulation according to which recognition is denied:

(a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is required;

(b) where it was given in default of appearance, if the defendant was not duly served in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

(c) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is required;

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

The application to enforce an EU judgment must be filed with the Court of Appeals of the district of residence of the defendant[5]. The initial procedure is *ex parte* and the Court will make a formal review of the documentation attached and issue an order granting or denying enforceability in Italy. No review of the merit of the case is admitted.

The applicant shall produce a copy of the foreign decision which satisfies the conditions necessary to establish its authenticity. This means, usually, that the applicant must provide a certified copy however Article 55 explicitly excludes the need for legalization.

The applicant must also obtain from the court that issued the judgment a standard certification, as provided by the regulation, and file the same together with the application for recognition and the decision. The decision must be translated in the language of the country where enforcement is sought, at the request of the competent court.

[5] It is possible that the foreign decision is relevant for the taking of another judicial decision. In such case, the judge in charge of the matter has jurisdiction to decide on the recognition of the foreign decision

The order is served upon the defendant, together with the foreign decision (if not previously served), and the defendant has one month to file an opposition contesting the enforcement order.

The enforceability order carries with it the power to proceed immediately with protective measures, such as a seizure of assets. This is a very useful tool to "induce" the defendant to pay without slowing down too much the opposition procedure.

The opposition procedure is subject to the procedural rules of the country where the enforcement is sought and the length of the opposition procedure varies from country to country and has a direct impact on the effectiveness of the regulation. In Italy, the entire process may take 2 or 3 years and therefore, it is not surprising that the new regulations are more focused on the actual enforcement of the decisions rather than on their recognition.

The defendant cannot reopen the merit of the case and it may only challenge enforceability for procedural defects in the enforcement procedure or by claiming that the decision was not recognizable under Article 34 of the Regulation, discussed above.

It is important to note that the same rules discussed above for EU court decisions shall apply to court settlements, according to Article 57 of the Regulation. This is in line with the rules of several countries where a court settlement has the same value of a judicial decision. The same Article 57 indicates that an authenticated instrument (for example a notarized deed) is also recognized with the same procedure. This may be quite important as in many countries authenticated instrument evidencing a debt are sufficient to commence a foreclosure proceeding.

Issuance of the decision and appeal against the decision

The decision of the Court of Appeals and the holding is communicated by the court to the parties. The decision, if favourable to the plaintiff, is not sufficient, per se, to proceed with the enforcement. The interested party must pay registration tax, request a formal copy, request the offices of the court to affix the enforcement formula, serve the foreign decision and the Italian decision upon the other party, together with a formal request of payment called *precetto.* If the other party does not pay within 10 days, Plaintiff can commence the same judicial foreclosure procedures which would be available to him based on an Italian procedure.

The decision of the Court of Appeals is subject to recourse to the Supreme Court, such a recourse to be filed within 60 days from the date the decision of the Court of Appeals was served, by the lawyer of the interested party[6], upon the lawyer of the loosing party.[7] It is subject of dispute whether the filing of a recourse with the Supreme Court should stop the judicial enforcement procedure.[8]

Tax issues

Italian decisions awarding the payment of a monetary amount are subject to Registration tax.[9] The amount of this tax varies depending on the nature of the underlying legal relationship. The default rate is 3% of the awarded amount. If the underlying commercial transaction is of a professional nature and was therefore subject to VAT, a nominal registration tax is levied.

Registration tax must be paid before commencing the judicial enforcement procedure. The relevant disbursement can be recovered from the defendant.

Court costs and legal fees.

Costs and fees incurred for obtaining the foreign judgment are recoverable in Italy only to the extent that recovery was specifically awarded by the foreign judgment.

Costs and fees incurred for the enforcement of the foreign action in Italy are theoretically recoverable, as Italian law provides for the loosing party to pay relevant costs.[10] In practice, the situation is quite different.

First of all we have to differentiate between fees and costs for obtaining the decision authorizing the enforcement and costs and fees for the actual enforcement procedure.

The costs and fees of the first action, i.e. the action under Article 67 of Law 218/95, may be awarded by the judge, however there is no obligation to award those costs. If awarded, the amount is indicated by the judge based on a tariff which is quite far from reality. Also, the

[6] The communication sent by the court will not cause the clock to start running

[7] See. Art. 325 of the Code of Civil Procedure. If no service of process is effected, which is unlikely, Article 327 of the Code of Civil Procedure indicates that the deadline is one year from the date of the decision

[8] See Article 373 of the Code of Civil Procedure. If the enforcement may cause serious and irreparable harm to the defendant, the Court of Appeals may, upon the request of the defendant, stay the enforcement, however this power is very seldom exercised.

[9] See Article 40 of DPR 26 April 1986, no. 131, as amended

[10] See Article 91 of the Code of Civil Procedure

court will not award costs which have been incurred to prepare the action (for example, translation costs, search cost to locate defendant and his assets, and the like).

Costs (including registration taxes) and fees relating to the judicial enforcement of the decision are awarded in the foreclosure proceeding. Awarded costs are reasonably close to reality, except that preliminary costs such as private investigators, etc. which are not recognized. Fees are awarded at a level which is close to reality if the procedure is smooth, less close if the procedure gets long and complicated.

III. Direct cross-border enforcement of EU member states judicial decisions and authenticated instruments – A first step

The European Council held in Tampere in 1999 did recognize that the mutual recognition of judicial decisions is the cornerstone for the creation of a duly common legal area within the EU, and that the rules provided by Reg 44/2001 still require, in many cases, an exequatur procedure which may take long. The ultimate goal is that of creating the premises for the immediate recognition and enforcement of all judicial decisions throughout the EU and the first step has been the creation of the European Enforcement Order for Uncontested Claims, through the issuance of Reg, 805/2004.

According to the premises to the new regulation, "*such a procedure should offer significant advantages as compared with the exequatur procedure provided for in Reg. 44/2001 …. In that there is no need for approval by the judiciary in a second member state with the delays and expenses that this entails*"

Regulation 805/2004 applies to judgments, court settlements and authentic instruments on uncontested claims regarding civil and commercial matters (excluding arbitration).

A claim shall be regarded as uncontested if:

a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings, or

b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the member state of origin, in the course of the court proceedings; or

c) the debtor has not appeared or been represented at the court hearing regarding the claim after having initially objected to the claim in the course of the proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the member state of origin; or

d) the debtor has expressly agreed to it in an authentic instrument

The regulation also applies to decisions delivered following challenges to judgments, court settlements or authentic instruments certified as European Enforcement Orders,

According to some estimates, the vast majority of judicial decisions to be enforced cross-borders relates to uncontested claims. It is possible that those claims went uncontested in the past due to the difficulty of cross-border enforcements, however this is clearly a first step towards direct enforcement.

The regulation sets forth certain minimum standards for the judicial decision on uncontested claim to be certified as European Enforcement Order. First of all, the decision must have been issued in compliance with the rules on jurisdiction provided for by Reg. 44/2001 and the procedure must meet some minimum standards (for example, there must be evidence of effective service of process of petition upon defendant and information as to timing and office for filing opposition).

The regulation also applies to court settlements, which were previously treated as mere contracts, and to authenticated instruments. In practice, a recognition of debt made in a notarized document will be immediately enforceable, without court proceedings, throughout the EU.

The Regulation includes a series of standard forms which will be used, in each country, to certify the Order for cross-border enforcement.

The enforcement procedure is dictated by Article 20 of the regulation according to which a judgment certified as European Enforcement Order shall be enforced under the same conditions as a judgment handed down in the member state of enforcement.

In order to proceed with the enforcement, the creditor will only need to provide the competent enforcement authorities with a copy of the judgment (with evidence of its authenticity), and with a copy of the European Enforcement Order certificate (with evidence of its authenticity). The latter should be normally translated into the local language.

IV The next (little) step – The European Money Collection Order

Reg 1896/2006 shall enter into force at the end of 2008. The regulation is aimed at creating a common procedure for obtaining a payment order. To this purpose, it dictates some common standards for service of process and petition formalities. The review of this regulation is outside the scope of this paper. In brief, if the claim is not opposed within the prescribed deadline, the resulting order will have the effect of a European Enforcement Order and shall be

enforceable cross-border within the EU. In the event of an opposition, the regular litigation procedure provided for in the member state shall apply. It does not appear that the regulation will substantially change the problems posed by cross-border enforcement, however it is the first important step for the creation of a "common" judicial procedure, which is the necessary precondition to "convince" the various legal systems to accept the outcome of another jurisdiction.

V. ENFORCEMENT OF DECISIONS OUTSIDE THE SCOPE OF EU RULES AND REGULATIONS

The matter is governed by by Article 64ff of Law 218/95 according to which a foreign decision is recognized in Italy without any proceeding[11] when:

a) The foreign Court had jurisdiction to issue the judgment, according to Italian rules on jurisdiction.

b) The original summons was been validly served upon the other party, pursuant to the rules in force in the foreign jurisdiction and there is no violation of the right of the party to defend its case.

c) The parties have appeared in the proceeding according to the laws of the foreign jurisdiction or the failure to appear in court (contumacia), was validly noted by the court.

d) The judgment is res judicata according to the foreign law.

e) There is no Italian judgment with the effect of res judicata relating to the same matter.

f) No proceeding between the same parties for the same matter was started before an Italian court prior to the commencement of the foreign proceeding.

g) The foreign judgment is not contrary to public order.

A brief analysis of the above requirements follows.

A) Jurisdiction

The foreign court must have jurisdiction over the case which led to the decisions whose enforcement is sought in Italy, however the Italian court will disregard the rules on jurisdiction of the foreign court and will apply the Italian rules. Those rules are now contained in Article 3 and 4 of Law 218/95 according to which jurisdiction exists when:

- The defendant has its residence or domicile in the jurisdiction or has appointed a representative authorized to appear in court in the jurisdiction pursuant to article 77 of the Code of Civil Procedure[12];

[11] In practice, in case of decisions awarding damages, a proceeding is always required, unless the debtor pays spontaneously. In fact, Article 67 of Law 218/95 requires a proceeding when the defendants challenges the right of the creditor to enforce the decision and when the creditor wants to resort to a foreclosure procedure or to any other legal remedy for the effective implementation of the decision.

- there is jurisdiction pursuant to of the criteria established by Title 2, Sections 2, 3 or 4, of the Brussels Convention;
- the defendant has accepted the jurisdiction of the foreign court either in writing or by appearing before the foreign court without challenging its jurisdiction[13]

The first criterion is quite clear and does not need much specifications. To avoid any doubt, it is important to note that the representative referred to is that of Article 77 of the Code of Civil Procedure, i.e. a representative who is empowered with the task of taking care of the business of the principal and is granted the specific powers to appear in court. Either element, by themselves, will not be sufficient. A proxy issued to a lawyer will not be sufficient as well.

The jurisdiction criteria of the Brussels Convention are quite broad and diversified and cannot be examined in detail here. The basic rules are that, for contractual obligations, the jurisdiction will be of the court where the contract must be performed.[14] Note that, under Italian law the payment of a debt, unless otherwise agreed, must be paid at the domicile of the creditor[15] and jurisdiction is therefore normally at the place of residence of the creditor. Regarding awards for claims based in tort, the jurisdiction is of the court where the injury occurred.[16]

B) Service of process

This requirement encompasses various facets. First of all the commencement of the foreign procedure must be notified to the defendant. This circumstance is to be verified by the court requested of the exequatur, which will not take it for granted based on the notation that the

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[12] Article 77 of the Code of Civil Procedure indicates that: "The general representative as well as the representative appointed for a specified transaction cannot representing court the principal when such a power has not been explicitly granted to them, in writing, except for urgent matters and interlocutory orders. Such a power is presumed as granted in favour of the general representative of a party without residence or domicile in Italy…"

[13] Prior to the entering into force of Law 218/95 the jurisdiction rules were incorporated in Article 4 of the code of civil procedure, which dictated slightly different rules and that considered also the place of execution of a contract as a legitimate link to exercise jurisdiction. The rules on jurisdiction, however, have procedural nature and the rules in Article 4 of the Code of Civil Procedure are therefore irrelevant even for foreign cases commenced, or completed, when such old jurisdiction rules were still in force

[14] See Article 5(1) of the Brussels convention .

[15] See Article 1182 of the Italian Civil Code

[16] See Article 5(3) of the Brussels convention. If the place where event that caused the harm eventuated is different from the place where the harm was suffered, the courts of both places will have jurisdiction at the option of the injure party (Court of Justice 30 November 1976, no. 21/76)

foreign court issued the decision and, therefore, implicitly admitted that the petition was duly served.

The possible disputes regarding the notification requirement relate to the formalities of notification and to the evidence of the notification. Unlike other countries, Italy has very formalistic rules regarding notification of judicial acts. Service of process is almost always made through a court bailiff[17] and the judicial act does not need to be served in person. The bailiff can leave the service at the defendant's home or office, or if he cannot get access to those places, he can leave the service with the doorman, etc. [18].

If the plaintiff is from a country which is a party to the Hague Convention for the service abroad of 15 November 1965, it is also possible to resort to service of process according to the rules of the convention. To this purpose, especially for U.S plaintiffs, it is important to note that while service of process through the central authority as indicated in Article 5 of the Hague Convention is safe[19], a service of process by mail pursuant to Article 10 of the Convention, made directly by the plaintiff's lawyer and in accordance with the rules of the country of the plaintiff, is not recommended. In fact, in such a case it may be quite difficult to obtain evidence of the service of process, and an affidavit of the plaintiff's lawyer may not suffice or, in any event, may give rise to debates and questions.

In addition to the circumstances mentioned above, Article 64 of Law 218/95 bars the exequatur when the defendant, due to the peculiarities of the foreign judicial process (or of the specific case), could not effectively exercise its right to adequate defence. This clause is often used with reference to the issue of the adequacy of the time granted by the foreign legislation to respond to the petition of the plaintiff.

Certain jurisdictions have very limited deadlines for responding to an action[20], and those deadlines are significantly shorter than the equivalent Italian rules.[21] Although the respect of

[17] Note that If the document to be served is for the appearance before a foreign court, service of process must be authorized by the Public Prosecutor office

[18] Article 136ff of the Code of Civil Procedure indicates a long list of alternative method of process for the bailiff. The alternatives are in sequential order and method no. 2 cannot be used until method no. 1 proves ineffective.

[19] Note that the Hague Convention does not necessarily require the translation of the petition to be served abroad. In any event, it is always better to serve the petition together with a translation to avoid claims of improper service at the time of enforcement.

[20] I have seen many cases with a deadline of 20 days

Italian deadlines is not required, it is suggested that the plaintiff takes into account, to the extent permitted by the foreign law, the circumstance that receiving a petition from abroad, understanding its content, selecting a lawyer abroad, etc. is a process than can easily take a few weeks. If the deadline is too short and, because of this circumstance, the defendant was not given a fair opportunity to defend, this circumstance may later bar the enforcement of the action.[22]

C) Appearance of the parties

If the defendant did not appear before the foreign court, such a failure must be declared by the court pursuant to the foreign law. Regardless of what the foreign law provides with respect to this issue, it is strongly recommended that the plaintiff asks the court to mention directly in the decision that the defendant was duly served and failed to appear.

The key problem posed by default judgment is that, under Italian law, the plaintiff is always obliged to demonstrate, with reasonable evidence, that his case is grounded, regardless of whether the defendant appears in court. Failure to appear will not be considered as admission of the allegations made by the plaintiff. Some jurisdictions, however, accept the opposite principle and the failure to appear will automatically trigger a decision against the defendant based on the uncontested allegations of the plaintiff. It is unclear whether a decision of this type may be declared enforceable in Italy. [23]

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[21] According to Article 163 of the Italian Code of Civil Procedure, the first hearing must be at least 120 days from the date of service of process if the defendant is abroad, and the defendant must file its response 20 days in advance of the hearing.

[22] There is limited jurisprudence on this issue with reference to collection matters, for the very simple reason that, as mentioned above, Italian defendants used not to appear before the foreign court, however the contention that the deadline to respond was a very short is often made to try to stop enforcement under the new legislation. For the time being, most of those cases relate to litigation where the Italian party did not even try to appear and, as such, the contention that the deadline was too short is rejected by the court. In one case where the failure to appear was not relevant for the enforcement (the case being on a family law matter for which different rules apply), the Supreme Court determined that a period of 40 days granted to an Italian defendant to appear in Switzerland was sufficient (see. Cass. 19 January 1993, no. 606, Foro it. Rep 1993, Delibazione, no. 606. Furthermore, according to the court of Milan, 30 days to appear before a US court are not enough (App. Milano 25 January 1994, Riv.dir.int.priv.proc. 1995, 697).

[23] In the past, the defendant always requested the review of the merit of the case and the problem was therefore not sufficiently analyzed. Among the few cases that have dealt with the some facets of the argument see. App. Bari 28 October 1983, Foro it. Repertorio 1984, Delibazione, 15, according to which a foreign legislation may use presumptions based on the failure to appear of a party as evidence to award a decision, and such a procedure is not contrary to Italian public order. Among the commentators, for the opinion that a decision based on the sole circumstance that the defendant did not appear should not be

D) Res Judicata

The foreign decision should be final. From a conceptual point of view this requirement does not pose any problem. From a practical point of view, it is sometime complicated to present evidence that the decision is no longer subject to any appeal. Affidavits are not normally introduced in Italian proceedings, and the best way for proving compliance with the requirement is that of supplying the relevant section of the rules of civil procedure of the foreign jurisdiction, translated into Italian, together with the petition for exequatur. If possible, it is better to obtain a declaration by the court (or by the clerk of the court) that the decision is res judicata under the local laws. Interlocutory orders or procedural decisions are not recognized under Article 64.

E) Conflicting Italian decisions

The foreign decision will not be recognized in Italy if in conflict with a final Italian decision (res judicata). It is unclear whether the Italian decision, in order to prevent the enforcement of the foreign decision, must be already final at the time the foreign decision is issued, or it is sufficient that it be final at the time the plaintiff seeks to obtain the enforcement of the foreign decision in Italy.

According to Article 64 of Law 218/95 the foreign decision is recognized per se, without the need of a special procedure, and this may support the theory that a prior foreign decision should prevail on a later Italian decision. On the other hand, in order to enforce the foreign decision, a special exequatur procedure in Italy is always requested and such a procedure would be in violation of the Italian res judicata. If it were possible for a foreign decision to overcome an Italian res judicata, this would create a great deal of confusion and would assume a level of integration among the various legal systems which is not yet in place.[24]

The most reasonable answer is, in my opinion, that the decision which was issued first should prevail. However, if the enforcement of a foreign decision is sought after an Italian decision has become, the foreign decision cannot prevail until the Italian decision is revoked pursuant to Article 395 of the Code of Civil Procedure.[25]

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recognized see Maresca, Commentary to Article 64-66 of Law 218/95, Nuove leggi civili commentate, 1996, pag. 1475.

[24] see Maresca, Commentary to Article 64-66 of Law 218/95, Nuove leggi civili commentate, 1996, pag. 1475

[25] Article 395 indicates certain cases in which a res judicata may be revoked. Paragraph (5) of Article 395 indicates that a final decision may be revoked if it is later found that it conflicts with a prior final

F) Conflicting Italian proceeding

While the conflicts between res judicata is quite unusual, the existence of two legal proceedings on the same subject matter is quite frequent.

As already mentioned above, in the past it was possible, for the Italian defendant, to commence an action in Italy upon ascertaining that the foreign proceeding was not progressing satisfactorily, thereby preventing the enforcement of the foreign decision. Law 218/95 has modified this principle by providing that the Italian proceedings will prevent the recognition only if it is commenced prior to the commencement of the foreign proceedings. This rule shall apply as long as the Italian proceeding is in place; if completed with a final decision the comments under paragraph f) shall apply.

It is important to note that the Italian code of civil procedure includes various type of proceedings which are commenced with different formalities. Without going into many details, there are two main ways of initiating a proceeding: (i) filing a petition upon the defendant and then filing the case in court, and (ii) filing the case in court and then serving the petition upon the defendant. In both cases, the proceeding is deemed pending only as of the date the petition is served upon the defendant.[26]

G) Public order

The foreign decision will not be recognized if against public order. The decision may be against public order due to the peculiarities of the procedure or for the nature of the substantive law applied.

Except for family law matters, Italian courts are very reluctant to use the concept of public order to deny enforcement of a foreign decision (both for procedural and substantive reasons), unless there is a violation of an Italian fundamental principles, as indicated in the Italian Constitution, or a violation of principles embodied in international conventions. Considering

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decision, provided that this conflict was not made known to the judge of the second decision. Therefore, in our example, the holder of the foreign decision should seek the revokation of the Italian res judicata based on the allegation that the same matter was already adjudicated in another proceeding abroad. As already mentioned above, the revocation proceeding is not admissible when the existence of the foreign res judicata was already raised as a defence in the Italian case. In fact, in such a case, the Italian judge has either taken care of the foreign proceeding or considered it as being irrelevant, which decision would be subject only to ordinary appellate remedies.

[26] Article 39 of the code of civil procedure makes reference to the date of service of process for ordinary proceedings, where the first activity is that of serving the petition to the defendant, however this principle is extended to the other structure by the courts: see. Cass. 29 October 1998, no. 10784, Foro it. Rep. 1998, Competenza civile, no 198.

such a restrictive meaning to public order, it is almost impossible to have a collection judgment in violation of a rule of public order[27]. Problems may arise with reference to the collection of punitive damages, for which serious doubts of violation of Italian public order rules exist.

VII. EXEQUATUR - MAIN PROCEDURE

According to Article 67 of Law 218/95 "*in the event of non compliance with, or challenge to the recognition of, the foreign decision … or when it is necessary to proceed with judicial enforcement, any interested party may request that the Court of Appeals of the place of performance of the decision ascertain the existence of the requirements for the recognition".*

The applicable procedure is the same provided for ordinary litigation. Plaintiff must serve the petition to the defendant to appear before the court at a given hearing.[28] The minimum window between the date the petition is served and the date of the hearing is 90 days.[29] Due to the nature of the procedure, which is designed for different purposes, one hearing is not sufficient to define the case and, given the time which normally lasts from one hearing to the other, it is usually impossible to obtain a decision by the Court of Appeals in less than one or two years, depending on the backlog of the specific court.

Once the favourable decision of the court is obtained, the foreign decision, together with the decision of the Court of Appeals, constitutes a "titolo esecutivo", i.e. a document for which a party may request the use of judicial enforcement remedies if not spontaneously performed by the debtor.[30]

Supporting documentation to be submitted together with the request for exequatur

Ten days after the petition is served upon the defendant, the plaintiff must file the petition in court, together with supporting documentation.[31] Those documents will evidence fulfilment of the conditions indicated in Article 64 (a) through (g) of Law 218/95. In order to expedite the matter and obtain the decision without too many delays (in addition to the ones inherent in the

[27] One exception related to a case where the exequatur was refused to a decision awarding damages for breach of a contract entered into by an Italian resident in violation of Italian legislation on exchange control (see Cass. 6 April 1995, no., 4033, Foro it. Rep.1996, Delibazione no. 23). It is doubtful that exchange control laws should be considered of public order, given the restrictive interpretation usually given su such term, however the court clearly did not want to allow an easy way out from the very restrictive exchange control legislation in force at that time.

[28] See Article 163 of the code of civil procedure

[29] See Article 163bis and 342 of the Code of Civil Procedure

[30] See Article 67(2) of Law 218/95.

use of the ordinary litigation procedure) the plaintiff must be very precise in its submissions, to avoid unnecessary discovery activities by the court.

Requirements under (a), (e), (f) and (g) do not usually represent a problem and, in any event, are for the defendant to raise.

The other requirements sometimes pose evidentiary problems, due to the differences between the procedures of the country where the decision was issued and the Italian procedures, and will be examined below.

Regarding the requirements sub (b) - service of process, it is certainly recommended that the case be initiated by serving the petition in accordance with the Hague convention of 15 November 1965 or, if not available,[32] in accordance with Italian law. Although not specifically requested by the Hague convention[33], if the defendant is an Italian citizen, it is also desirable to translate the petition into Italian, even in circumstances where the defendant is able to understand the foreign language, as it is difficult to demonstrate fluency in a foreign language if the interested party does not cooperate.

It is also very important to obtain evidence that the petition was actually served upon the other party. If the petition is served under Italian rules of civil procedure, the bailiff will always return a report, attached to the petition, with an indication of the party to whom the petition was served and date of service. The original of that document is required to later enforce the decision in Italy. If the petition is served through the Hague convention, the central authority will issue a report that the petition was forwarded to the defendant, usually by certified mail. This statement is not sufficient to prove service of process, which is proven only when the return receipt of the certified mail is received by the plaintiff and the receipt indicates that the petition was actually delivered to the defendant. This receipt often gets lost in the international mail system and the plaintiff must be very careful and renew service of process, if the receipt is not received in a reasonable period of time.

Another issue to consider is that Italian law does not necessarily require personal service of process and that judicial acts are often delivered to relatives, maids, doorkeepers, office

[31] See Article 165 of the code of civil procedure

[32] The Hague convention is in force in the following countries: Antigua & Barbados, Bahamas, Barbados, Belarus, Belgium, Botswana, Canada, China, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Malawi, Netherlands, Norway, Pakistan, Poland, Portugal, Seychelles, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, USA, Venezuela.

secretary and the like.[34] For this reason, it is recommended that, prior to executing service of process, the plaintiff obtains official evidence of the correct address of the defendant. This address is recorded, for individuals, in the municipal office and for companies at the local chamber of commerce. Official certification may be requested and may be filed together with the application for enforcement to demonstrate that the petition was served at the correct place.

The petition should give enough time to the defendant to select a lawyer in the foreign country and appear. A reasonable suggestion is to provide for at least 60 days, to avoid problems.

Regarding the requirement under (c) - appearance, the best thing is to have the court indicate the point in the decision. If this is not possible, plaintiff will have to file documents evidencing that the defendant appeared in court (for example, a brief filed by the defendant). If the defendant failed to appear, such a failure must be noted in the decision.

The requirement under (d) - res judicata is one that often creates problems, due to the differences in the various jurisdictions and to the reluctance of Italian court to accept affidavits to explain foreign legislation. The best possible solution is that of filing a certification issued by the court to the effect that the decision is res judicata. Alternatively, plaintiff will have to submit a copy of the statute indicating the time after which the decision becomes res judicata.

Formalities regarding the documentation

Italian courts will not accept a simple copy of the foreign decision and will require the original of the decision or a certified copy. Some courts require that the decision must be apostilled according to the Hague convention on the abolition of legalization of 5 October 1961. The decision must be translated and the translation sworn.

With reference to the other documents, the original or a notarized copy is required and the signature of the notary must be completed with an Apostille pursuant to the Hague convention of 5 October 1961. For countries which have not ratified the Hague conventions,[35] copies must be certified by the closest Italian consulate.

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[33] Only a few countries, such as Japan, have specifically requested, at the time of ratifying the convention, that the petition be translated.

[34] This is even more the case when the Hague Convention is used, as the service of process is always made by mail.

[35] For example, Canada.

VIII. EXEQUATUR - INCIDENTAL PROCEDURE

As already mentioned above, under the new regulation the foreign decision is recognized per se. It may happen that one party, while litigating a case in Italy, has an interest in relying on a foreign decision. This may happen, for example, to show that the matter was finally adjudicated by such a foreign decision or when the Italian case is dependent on a legal or factual element adjudicated by the foreign decision. In those cases, the law provides that the interested party may request the court which is hearing the case to ascertain, *incidenter tantum*, the existence of a recognized foreign decision, without commencing an ordinary action pursuant to Article 64 of Law 218/95.[36]

There is no special procedure for this type of incidental exequatur and the interested party will simply file the foreign decision to the judge, together with all documents indicating that the requirements provided for under Article 64 of Law 218/95 are met. If the other party challenges the decision, the judge will issue an order, which will be valid only within that proceeding, regarding the existence/non existence of the conditions for the recognition of the foreign decision.

In order for the judge to issue the order, the interested party must file a specific request,[37] and the foreign decision must be final.[38]

It is important to note that the decision of the judge will affect exclusively the proceeding during which the request for incidental recognition was filed. As a consequence, if the petition is rejected, the party may nevertheless commence an ordinary action pursuant under Article 64, or try to use the same foreign decision in some other proceeding. Similarly, if the request is granted, it may not be used for other proceedings.

IX. The judicial enforcement of the foreign decision

As soon as the exequatur is obtained, the plaintiff will be requested to pay registration tax. The registration tax is due for the sole fact that the decision is issued and must be paid regardless of whether the plaintiff is ultimately able to obtain any money from the defendant. Upon payment of the registration tax, the court will release an enforceable copy of the

[36] Se Article 67(3) of Law 218/95. A similar provision was included in the old regulation under Article 799 of the code of civil procedure.

[37] See Trib.Milano 17 March 1969, Riv.dir.int. priv.proc. 1969, 1027.

[38] App. Napoli 17 February 1975, Riv.dir.int.priv.proc 1977, 424

exequatur which, together with the foreign decision, will constitute legal title to obtain whatever is indicated in the decision and to request judicial assistance for the enforcement of the decision.

The enforcement of the foreign decision will follow exactly the same steps that must be undertaken to enforce an Italian decision.

The first thing to do is to serve the defendant with a copy of the exequatur together with a copy of the foreign decision. If the defendant does not pay and the party wants to initiate an enforcement procedure, the first step is that of serving upon the defendant a formal request for payment, called *precetto*, which includes a request of payment[39] within a term of not less than ten days and makes reference to the judicial title.[40] If the debtor does not pay within the term indicated in the *precetto,* the creditor can commence the foreclosure procedure[41].

There are various types of foreclosure procedures depending on whether the creditor wants to enforce the judgment on real estate, movable properties or credits towards third parties. In general, the foreclosure starts with an act called *pignoramento*[42] which is an order, issued by a bailiff, not to dispose of certain assets which are identified by the bailiff at the time of executing the *pignoramento.* Those assets are later sold in judicial auctions[43], unless the debtor pays the due amount. The process is not exactly fast and can take years for real estate.

X. Conclusions

The entering into force has certainly remedied certain large loopholes in the Italian legislation relating to the enforcement of foreign decisions. The circumstance that the ordinary legal proceeding is to be used prevents, however, an expedited enforcement of the foreign decision and this circumstance, coupled with the traditional slow pace of Italian judicial enforcement procedures, which are extremely protective for the debtor, still constitutes an obstacle to an

[39] The amount to indicate on the *precetto* will include the amount awarded by the court, plus fees and expenses for the precetto.

[40] See Article 480 of the code of civil procedure. Normally, foreign decision, exequatur and precetto are served all together, to save time. Note that service must be made to the party personally and not to his lawyer.

[41] The foreclosure procedure must be commenced within 90 days from the date of service of the *precetto.* If such a term elapses and the procedure is not commenced, a new *precetto* must be served.

[42] See article 491ff of the code of civil procedure. The *pignoramento* will be for the amount indicated in the *precetto*, plus estimated amount for foreclosure costs and fees.

[43] See Article 501 f of the code of civil procedure

effective enforcement of decisions rendered in countries outside the scope of applicability of Brussels and Lugano convention.