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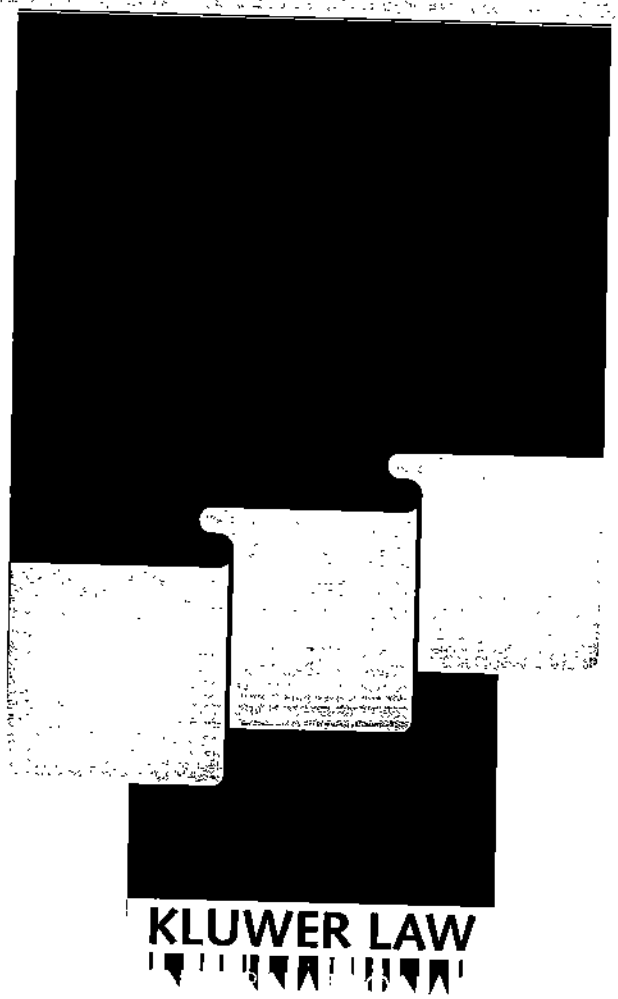

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29
2007
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Italian Conflict-of-Law Rules

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Introduction

The Italian rules on conflict of laws were set forth in the Preliminary Provisions to the Civil Code (*Disposizioni Preliminari al Codice Civile*), which remained substantially unchanged for approximately half a century. The first attack on this ancient set of rules was the enactment of Law Number 613 of 14 October 1985, implementing the Rome Convention of 19 June 1980 on the Applicable Law for Contractual Obligations, which entered into force in 1991.

The Rome Convention was drafted to become the common law of European Union (EU) member countries and, as such, applies regardless of whether the contracting parties are citizens of, or reside in, one of the EU member states. Article 18 of the Rome Convention indicates that a uniform interpretation is a desired intent of the Convention and, through a separate protocol, several countries have agreed to recognize the jurisdiction of the European Court of Justice with respect to the interpretation of the conflict-of-law rules of the Convention.

The Rome Convention has been amended on various occasions when new countries became members of the EU, and its provisions were "refreshed" on these occasions. A vast effort to disseminate information regarding the interpretation of the Convention rules on conflict of laws was undertaken and most data are now available online.[1]

The effects of both the enactment of the Convention and the decisions taken by the European Court of Justice were remarkable.

The previous Italian rules on conflict of laws provided for very formalistic "contact criteria", which often did not take into account

1 For a fairly comprehensive review of developments in the Rome Convention, the web site http://www.rome-convention.org is an excellent starting point, although it is no longer updated.

the peculiarities of the case. Those criterion could be derogated by the consent of the parties, which is in line with the general principles of freedom of choice in the Rome Convention. However, there were no rules for the protection of special relationships, for example, for customer relationships or employment contracts. Those rules were introduced by the Rome Convention.

After a few years, the conflict-of-law rules contained in the Preliminary Provisions to the Italian Civil Code became substantially obsolete and not applicable, at least for the portion regarding contractual obligations. This exposure to new ideas and the need for European harmonization soon evidenced that the remaining conflict-of-law rules also needed revision, and a comprehensive reform was issued in 1995, with the enactment of Law Number 218 of 31 May 1995.

Article 1 of Law Number 218 explicitly indicates that the purpose of the law is "determining the scope of Italian jurisdiction, dictating the criteria for the selection of the applicable law and providing rules for the recognition of foreign decisions".

The underlying idea is to provide a comprehensive regulation touching on all facets of international relationships, from applicable laws to jurisdiction and recognition of foreign decisions.

The new legislation is particularly keen to avoid possible differences in interpretations that often reduce the harmonizing effect of international legislative efforts, and Article 2 of Law Number 218 explicitly provides that international conventions will prevail over Law Number 218 (which is to be expected) and that the judges, while interpreting those conventions, will take the desire for uniform interpretation into account. In practice, the legislator indicates that judges should adhere to the decisions of the European Court of Justice, and also should take into account, as precedents, decisions issued in other countries (in practice, cases involving contracts and quasi-contracts in other EU member states).

The purpose of this chapter is to review, in some detail, the conflict-of-law rules regarding business relationships. Consequently, it will examine the general conflict-of-law principles and then review the rules applicable to companies, real estate, commercial contracts, employment relations, and torts. This is followed by a brief discussion of the rules regarding jurisdiction over the matters mentioned above, and the recognition of foreign judgments.

General Provisions

Renvoi

As usual, the first issue to settle when determining conflict-of-law rules is to clarify what happens if the applicable conflict-of-law rule indicates a specific law and that law provides for a different conflict-of-law rule.

The solution accepted by the 1980 Rome Convention is that of excluding a *renvoi*, and Article 15 of the Convention indicates that:

> ". . . the application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law".

However, a more varied solution was accepted by the Italian legislator and set forth in Article 13 of Law Number 218. Under this law, when the conflict-of-law rules for the applicability of the laws of another country (*renvoi*), those other conflict rules will apply to the extent that:

(1) The *renvoi* reflects back to Italian legislation; or
(2) The *renvoi* is acceptable under the laws of the third country.

No *renvoi* is possible, however, according to the second paragraph of Article 13 of Law Number 218 when:

(1) The parties have expressed their consent to a specific applicable law;
(2) The matter relates to the formalities of legal acts;
(3) The matter relates to tort obligations or other obligations arising out of a statutory provision; or
(4) The relevant matter is covered by an international convention, in which case the conflict-of-law rules of the applicable convention will solely apply.

Additionally, no *renvoi* is possible if the case involves a contractual matter covered by the Rome Convention.[2]

2 According to Law Number 218, Article 57, contractual matters are mandatorily governed by the Rome Convention. Refer the matter to the laws of a country whose conflict rules call.

Knowledge and Interpretation of the Foreign Law

According to the prevailing interpretation of the statute in place prior to the enactment of Law Number 218, it was up to the interested party to demonstrate that the applicable law pursuant to the conflict-of-law rules was different from Italian law. Basically, a foreign law was treated as a factual element rather than as legislation.[3]

This interpretation has always been criticized by most commentators, and by a minority of courts, based on the principle that it is up to the judge to apply the appropriate legal rules. Article 14 of Law Number 218 now provides that it is up to the judge to ascertain the content of the foreign law applicable to the case.[4] To this purpose, the judge may rely on information provided by the Department of Justice and may retain experts or request information from specific institutions.

The judge also may rely on evidence provided by the parties.[5] If the judge is nevertheless unable to acquire information regarding the content of applicable law, Italian law will apply.

In practice, the acquisition of precise information regarding foreign law is often very complicated, and a judge will tend to apply Italian law unless the foreign law is undisputedly different, and such a difference may be clearly identified by reviewing statutes or case law. In addition, in the event of proceedings for interlocutory measures, the need for an expedited decision can make it impossible to acquire knowledge regarding the foreign law without delay, and the judge may end up applying Italian law.[6]

According to Article 15 of Law Number 218, the foreign law must be interpreted by applying its own interpretative standards.

3 As a consequence of this "factual" relevance of a foreign law, an error in the content of the foreign law was not accepted as a legitimate ground for challenging the decision before the Supreme Court for error of law; Cass., 1 August 2002, n. 11434, *Rivista dir. Int. privato e proc.* (2003) 205. The opposite principle now applies to cases covered by Law Number 218; Cass., 21 April 2005, n. 8360, *Foro it. Rep.* (2005) *Contratto in genere*, n. 43.

4 The new principle only applies to proceedings started in first instance after the entering into force of Law Number 218; Cass., 9 January 2004, n. 111, *Foro it. Rep.* (2004) *Procedimento civile*, n. 139.

5 With respect to the intervention of the parties, affidavits by foreign lawyers are often introduced, although seldom relied on by the judge, in the event that the content is disputed between the parties. An Italian judge will normally like to see statutes, textbooks, and court decisions.

6 Trib. Modena, 12 August 1996, *Foro it. Rep.* (1997) *Procedimento civile*, n. 191.

Federal Countries

In the event that the law identified through the conflict-of-law rules is that of a country characterized by several statutory systems (as is usually the case for federal states), the applicable legislation will be selected by applying the criteria identified by the foreign country to determine which set of rules will apply.

If these criteria cannot be identified by the judge, the set of rules with the closest connection to the case will apply (usually, either the law applicable in the place of residence of the parties or the law applicable in the place of performance of the contract).

Substantive Law versus Procedural Rules

Conflict-of-law rules only apply to substantive matters, not to procedural matters, which are always subject to the laws of the place where the proceeding is commenced (*lex fori*). This principle, quite simple in theory, is often more complicated in practice, for two primary reasons.

First, it is not clear whether the judge should look at the law governing the substance of the case or the law of the forum to determine whether a certain issue should be regarded as a substantive or a procedural matter. Second, these issues are often ambiguous even within one jurisdiction. Law Number 218 does not provide an indication on this point, and some cases remain disputed.

The most notable case is probably the one regarding a statute of limitations, which is normally regarded as a procedural issue.[7] However, if the foreign law indicates that the local statute of limitations rules have a substantive nature, it is not unlikely that those foreign rules will be deemed applicable.[8]

The Italian statutory rules, offering certain pre-emptive rights to commercial agents for the protection of their credits toward their

7 In one case regarding a claim for damages after a car accident, the Italian Supreme Court indicated that the shorter statute of limitations provided by Italian law should apply if the case is introduced before an Italian court, due to the procedural nature of the defense; Cass., 1 August 2000, n. 10026, *Foro it. Rep.* (2000) *Diritto Internazionale Privato*, n. 59.

8 App. Firenze, 5 October 1989, *Foro it. Rep.* (1991) *Trasporto marittimo*, n. 88. However, in this case, the Court ultimately ruled for the applicability of the Italian statute of limitations only because no evidence existed that the foreign law on the payment of checks contained a different rule.

principals, also have been interpreted as having a procedural nature and, therefore, were deemed applicable in the case of an agency contract subject to a foreign law,[9] and the same interpretation was applied for an arbitration clause included in a contract subject to a foreign law.[10]

Applicability of a Foreign Law

Articles 16 and 17 of Law Number 218 provide for two barriers to the full enforceability of foreign law provisions, namely, public order and rules of mandatory application.

The limit of public order is explicitly set forth in Article 16 of Law Number 218, according to which "the foreign law is not applied when its effects are against public order". In such a case, the judge should initially ascertain whether the applicable conflict-of-law rule refers to an alternative law that is not in conflict with public order. If no such alternative indication exists, Italian law will apply.

The rules of mandatory application are mentioned in Article 17 of Law Number 218, according to which the provisions of Italian law will prevail if it is clear that they must be applied regardless of the fact that a foreign law governs the case, taking into account their scope and purpose.

The two-fold limit ended a very long debate that stemmed out of Article 31 of the Preliminary Provisions to the Civil Code, which only included the limit of public order. The courts were always divided on the interpretation of the principle of public order that, according to some judges, referred to the basic principles of Italian legislation with respect to the matter at bar,[11] while other decisions indicated that the judge should look at the basic principles of the Italian system, compare those principles with the principles accepted by the majority of the other countries, and reject the foreign law only if it is in conflict with those principles that are generally accepted internationally (the so-called "international public order").[12]

9 Trib. Ferrara, 20 February 1998, *Foro it. Rep.* (2001) *Diritto Internazionale Privato*, n.36.

10 App. Milano, 5 February 1999, *Rivista dir. Int. privato e proc.* (1999) 327.

11 Cass., 11 November 2002, n. 15822, *Foro it. Rep.* (2003) I, n. 484.

12 Cass., 26 November 2004, n. 22332, *Foro it. Rep.* (2004) *Lavoro (rapporto)*, n. 744.

Under Articles 16 and 17 of Law Number 218, it is now clear that certain mandatory rules of Italian legislation will always apply if, based on the circumstances of the case, it is clear that the foreign law may deprive one party of a protection that is deemed essential by the Italian system.

Based on the above principles, and with more than one reversal, the courts have therefore disregarded, for example, the foreign rules regarding punitive damages,[13] or the rules prohibiting the foreclosure on assets owned by the foreign state.[14] One decision also has held that certain special Italian rules applicable to damage proceedings following a car accident should apply to an accident eventuated abroad, when the two parties involved were both Italian nationals, due to the public interest factor in the applicability of those special provisions.[15]

Several cases have been proposed with reference to foreign law applicable to an employment relationship to be performed abroad.[16] According to one decision, the United States rules permitting the free termination of the employee are in contrast with Italian rules of public order.[17]

In another instance, the court rejected the allegation that a foreign legislation that permits termination without the payment of a termination indemnity, as mandatorily provided by Italian law, should not be applied by an Italian court,[18] unless the claimant is able to demonstrate that the overall compensation is inadequate (i.e., in practice, lower than Italian minimum wages) and, therefore, in violation of Italian constitutional principles.[19]

13 App. Venezia, 15 October 2001, *Rivista dir. Int. privato e proc.* (2002) 1021. The decision relates to the exequatur of a foreign decision; however, the legal principles are the same.

14 Trib. Venezia, 6 July 1998, *Foro it. Rep.* (1999) *Diritto Internazionale Privato*, n. 43.

15 Trib. Venezia, 21 May 2002, *Foro it. Rep.* (2003) I, n. 2181.

16 If the work is to be performed in Italy, mandatory Italian rules will apply, irrespective of the law governing the employment agreement, pursuant to Article 6 of the Rome Convention on the law applicable to contractual relations. This law is applicable irrespective of whether the two parties are members of the countries that are signatories to the Rome Convention.

17 Cass., 11 November 2002, n. 15822, *Foro it. Rep.* (2003) I, n. 484; App. Aquila, 22 July 2004, *Foro it. Rep.* (2004) *Diritto Internazionale Privato*, n. 34.

18 Cass., 11 November 2000, n. 14662, *Foro it. Rep.* (2001) *Diritto Internazionale Privato*, n. 35.

19 Cass., 26 November 2004, n. 22332, *Foro it. Rep.* (2004) *Lavoro* (*rapporto*), n. 744.

Legal Entities

The conflict-of-law rules regarding legal entities have been substantially innovated by Law Number 218. The Law has clarified a number of issues highly debated under the previous legislation, which did not contain a specific provision on the subject matter.[20]

Organizational Rules

Article 25 of Law Number 218 now provides that companies, associations, foundations, and every other entity, public or private, will be regulated according to the laws of the place of incorporation, unless the head administrative office or the principal object of their activity is in Italy, in which case Italian law will apply.

Notably, the law explicitly includes both commercial entities and non-commercial entities. In the past, while it was fairly accepted that foreign companies were subject exclusively to the laws of the country of incorporation, the matter was rather unclear for non-profit organizations that, under Italian law, were required to receive a special authorization, and were subject to special rules and control with respect to activities and the acquisition of certain assets.

It is now clear that all those facets must be regulated by the laws of the country of incorporation[21] and, for the avoidance of doubts, Article 25 of Law Number 218 also includes the following sample list of issues that are covered by the conflict-of-law rule:

(1) Legal structure of the entity;
(2) Corporate name;[22]
(3) Rules regarding incorporation, transformation, and dissolution;
(4) Capacity to undertake legal acts;[23]

20 The Preliminary Provisions to the Civil Code only touched on the issue of capacity, even though the principle that the law of incorporation was to govern the foreign entity was widely accepted. Italy is signatory to the Brussels Convention of 1968 regarding the mutual recognition of companies and bodies corporate, ratified by Law Number 220 of 1971, which did not enter into force due to lack of sufficient ratifications.

21 Cass., 18 March 2003, n. 3968, *Foro it. Rep.* (2003) *Diritto Internazionale Privato*, n. 31.

22 Trib. Venezia, 6 July 1998, *Foro it. Rep.* (1999) *Diritto Internazionale Privato*, n. 35.

23 For example, it was ruled that a Russian joint venture is a separate legal entity pursuant to the laws of Russia, and it therefore has legal capacity to commence legal proceedings in Italy; App. Milano, 14 January 2000, *Foro it. Rep.* (2000) *Diritto Internazionale Privato*, n. 43.

(5) Appointment, powers, and functioning of the representative bodies of the entity;[24]
(6) Right to represent the entity;
(7) Rights and obligations of the shareholders;
(8) Liability for the obligations incurred by the entity; and
(9) Consequences for violation of applicable statutes or entity by-laws.

A foreign entity is treated as an incorporated person if so considered by its country of incorporation, regardless of the "distance" from Italian rules.[25]

As indicated above, the laws of the country of incorporation will not apply when the company is, in fact, managed from Italy or operates mainly in Italy. It is unclear what the consequences of this rule may be, as there are no reported cases. If the rule were to be strictly interpreted, it would imply that a company incorporated abroad by an Italian resident, and managed from Italy, or a foreign company that is managed from abroad and operating primarily in the Italian market, should comply with the incorporation rules of Italian law. Lacking this compliance, the company should be treated as not incorporated.

There are no records of any court having accepted this extreme approach, and the requirement of "actual place of business" has been used only with respect to specific substantive issues, to avoid elusion of protective rules, and always in cases of transfer of the legal seat of the company.

In summary, as of today, the issue of applicable law is most likely to be regarded as a mere formalistic issue, which will only look at the country of incorporation.

Transfer of Registered Office

The last paragraph of Article 25 of Law Number 218 explicitly authorizes the transfer of a registered office from one country to another, as

24 Trib. Genova, 11 September 1997, *Foro it. Rep.* (1999) *Diritto Internazionale Privato*, n. 36, which decided that the preliminary issue regarding shareholders' authorization to initiate an action against the administrators of a company incorporated in the Netherlands Antilles is to be discussed under the laws of the country.

25 Therefore, after much debate, a *Liechtenstein Anstalt* (i.e., an entity that has no members, participants, or shareholders, with some features of a trust, but no corporate personality) is now definitively treated as a legal entity; Cass., 16 November 2000, n. 14870, *Giur. It.* (2001) 306.

well as international mergers, to the extent that those acts are implemented in compliance with the applicable laws of the countries involved. While this provision is very clear, the practical viability of the mentioned activities is far from clear.

First, it is not settled whether the transfer of the registered office from one country to another will cause a change of the law applicable to the issues indicated under the previous section, "Organizational Rules".

In one case, it was decided that, following a transfer of its registered office, it is for the new country of residence to exercise supervision over the company.[26] However, other courts have decided that, following the transfer of the registered office abroad, an Italian company will continue to be governed by Italian law,[27] and the transfer abroad will not exclude the obligation of the company to comply with Italian corporate rules.[28]

In case of transfer of a registered office from abroad into Italy, the foreign company must comply with Italian corporate rules. However, this is still a rather theoretical issue, since there are so many practical bureaucratic difficulties that make it almost impossible to transfer a registered office into Italy.[29]

Foreign Companies Operating in Italy

If a foreign company operates in Italy through a branch office, Article 2508 of the Italian Civil Code will require compliance with certain Italian corporate rules with respect to that branch. Consequently, the foreign company will be obligated to file the documentation regarding the setting up of the branch with the Register of Companies held by the Chamber of Commerce, including the name and details of the person in charge of the branch, and related powers granted to that representative.

Any modification to those documents also must be filed in Italy, as filings made abroad are not binding if not filed in Italy. All

26 Trib. Monza, 5 April 2002, *Societé* (2002) 1265.

27 Trib. Udine, 8 December 1997, *Foro it. Rep.* (1999) *Societé* 1097.

28 Trib. Verona, 5 December 1996, *Societé* (1997), 574. According to this decision, the company was still obligated to submit all mandatory reports to the Italian Register of Companies.

29 Notably, there have been various attempts to allege that companies are free to transfer their legal seat throughout the EU, based on the principle of freedom of establishment. At present, the European Court of Justice has not yet fully accepted this theory when companies, and not individuals, are involved.

letterheads used by the branch must indicate the details of the Italian registration, and the branch must have its own VAT (Value Added Tax) number, unless it is an EU company, in which case it may use its home-country VAT number. From the tax and accounting point of view, the Italian branch of a foreign company is treated as a separate entity, and is therefore obligated to keep accounting books and file taxes as if it were an Italian company.

Inheritance Rights

According to Article 46(1) of Law Number 218, inheritance rights are governed by the laws of the country of citizenship of the deceased at the time of his death, irrespective of the location of his assets. In case of dual citizenship, if the deceased had Italian citizenship, Italian law will prevail.[30]

A person may change applicable law only by way of an explicit testamentary provision, and only to the extent that the selected law is the law of the country of residence of the deceased and the deceased resided there at the time of death.

One peculiarity of Italian inheritance law is that it includes certain "forced heirship" rules. Those rules are statutory, mandatory provisions reserving a certain portion of the estate to the spouse, children, and, sometimes, ancestors. For a long time, there was a debate as to whether those rules were to be treated as rules of public order or not.[31] A Supreme Court decision of 1996 decided that those rules should not be considered as relating to public order.[32]

The last sentence of Article 46(2) of Law Number 218 fosters this interpretation. This provision deals with the case of an Italian citizen who has elected to subject his inheritance to another legislation and indicates that the Italian forced-heirship rules will

30 Cass., 19 June 1995, n. 6925, *Foro it. Rep.* (1996) *Diritto Internazionale Privato*, n. 49.

31 App Milano, 4 December 1992, *Foro it. Rep.* (1995) I, n. 590, which denied the enforceability of a will made in Canada by a Canadian citizen, as it was in conflict with Italian forced heirship rules.

32 Cass., 24 June 1996, n. 5832, *Giust civ.* (1997) I, n. 1668. The reasoning was that Article 42 of the Italian Constitution gives ample liberty to the Italian Parliament with reference to inheritance and, as such, the matter is not a constitutional matter and may be changed at any time. Therefore, forced heirship rules cannot be regarded as a firm principle of the Italian system.

prevail over the foreign law selected by the party only if the entitled parties (i.e., spouse and/or children and/or ancestors) are residents of Italy.

The legal capacity to write, revoke, or modify a will is subject to the national law of the testator at the time the will was formed, revoked, or modified, as applicable.[33]

No exclusive conflict-of-law rule exists for testamentary formalities, and Article 48 of Law Number 218 provides that a will is valid if it complies with the formalities dictated by the laws of:

(1) The country where the will was made;
(2) The country of citizenship at the time the will was made or at the time of the testator's death, or
(3) The country of residence or domicile at the time the will was made or at the time of the testator's death. The overall idea is to preserve the will of the testator to the largest extent possible.

Property Rights

Article 51 of Law Number 218 provides that property rights are governed by the laws of the country where the assets are located. The same legislation will govern the issues regarding the acquisition or the loss of property rights, except for cases involving inheritance rights, family relations, or contracts, which will be subject to the conflict-of-law rules applicable to inheritance, family relations and contracts, as appropriate.[34]

Article 51 applies both to movable and immovable assets; however, in the event of a movable asset that is only "in transit" in Italy, the applicable law will be that of the country of final destination.[35]

Property rights and security rights over vessels and aircraft are covered by the special provision of the Navigation Code and are

33 Law Number 218, Article 47.

34 The principles dictated for property rights also will apply to issues arising out of possession. Under Article 1140 of the Italian Civil Code, possession is the exercise, *de facto*, of the rights and prerogatives usually recognized as applicable to the holder of a property right. Possession is very important as, under Italian law, it constitutes the main criterion for settling claims regarding movable properties, as movable properties are recorded in a public registry only in exceptional cases (mainly motor vehicles and vessels).

35 Law Number 218, Article 52.

always subject to the national law of the vessel.[36] Therefore, cases involving property rights over a vessel must be decided in accordance with the laws of the flag of the vessel.[37]

Acquisition of property rights on movable assets by means of adverse possession is governed by the laws of the country where the assets are located on expiration of the term required to exercise adverse possession.[38]

Property rights on immaterial rights (basically all intellectual property rights) are governed by the laws of the country where those rights are exercised, irrespective of the laws of the country of registration.[39]

The rules insuring the public knowledge of documents regarding property rights are those of the country where the asset is located at the time the relevant document is formed.[40]

The above rules are quite clear and have caused little interpretative problems. Some uncertainty may arise in the event of foreign laws that contradict Italian property rights. The Italian Civil Code recognizes a fixed number of property rights,[41] which do not necessarily coincide with the property-rights structure in other countries.

For example, ownership is normally exclusive, and Italian legislation does not differentiate between title ownership and beneficial ownership, which is widely known in all Anglo-Saxon countries and which offers the legal base for the concept of a trust. In case of doubt, judges will tend to "assimilate" the foreign rule to the closest Italian rule, and decide accordingly.

Prior to the signing of the Hague Convention of 1 July 1985,[42] it was not uncommon to make reference to usufruct. In one case, involving the right to the economic exploitation of a vessel sailing under the flag of Ukraine, the Court decided that those rights were sufficiently similar to Italian ownership rights and decided to apply the relevant conflict-of-law rule.[43]

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36 Navigation Code, Article 6.

37 Trib. Venezia, 6 July 1998, *Rivista dir. Int. privato e proc.* (1999) 98.

38 Law Number 218, Article 53.

39 Law Number 218, Article 54.

40 Law Number 218, Article 55.

41 Full ownership, superficial ownership, perpetual lease, usufruct, usage, housing, and several types of easement and attachment rights.

42 The Hague Convention on the Law Applicable to Trusts and on their Recognition, 1 July 1985, ratified by Italy through Law Number 364 of 16 October 1989.

43 Trib. Genova, 25 May 2001, *Dir. Marittimo* (2002) 636.

Contractual Obligations

In General

According to Article 57 of Law Number 218, contractual obligations will be governed by the law that is applicable pursuant to the Rome Convention of 19 June 1980 (as ratified by the Italian Parliament through Law Number 975 of 18 December 1984), unless another special international treaty applies.[44]

Choice-of-Law Clause

According to Article 3 of the Rome Convention, parties to a contract have freedom of choice regarding the law that is to govern the agreement and the selected law is not required to have any connection to the contract or the parties, with the exceptions noted below. The parties also have the freedom to subject certain parts of the contract to one law and certain other parts to a different law.[45]

The choice of law must normally be expressed; however, an implied choice is acceptable when the intention of the parties to select a particular law may be demonstrated with reasonable certainty by looking at the terms of the contract,[46] or based on the circumstances of the case.

44 The previous regulation was set forth by the Preliminary Provisions to the Civil Code, Article 25, according to which the contractual obligations were governed by the national law of the parties, if common to the parties (*lex patriae communis*), or by the law of the place where the contract was signed (*lex loci contractus*), unless otherwise agreed by the parties.

45 Cass., 21 April 2005, n. 8360, *Foro it. Rep.* 2005, *Contratto in genere*, n. 43. This decision further clarifies that, under the new legislation, the content of a foreign law is no longer a factual issue and becomes a "legal" issue. As such, it is possible to ask the Supreme Court to review a Court of Appeal decision on the ground that it erroneously interpreted or applied a foreign law.

46 For example, if the parties have made reference to certain specific legal provisions or remedies, it is possible to assume that they intended that the relevant law was the governing law of the contract; App. Milano, 5 February 1999, *Foro it. Rep.* (1999) *Vendita* 6990, n. 44; Trib. d'Arrondissement [Luxembourg], 14 November 1990, *Foro it. Rep.* (1992) *Diritto Internazionale Privato*, n. 45. On the contrary, the selection of a certain forum does not normally imply the selection of the substantive laws of that forum.

The choice of law will normally be made at the time of executing the contract. However, it is expressly provided that the parties may, at any time, select the applicable law or modify their choice.[47]

The freedom of choice of the governing law encounters two general limitations, which are applicable to all contracts, and certain specific limitations, which are applicable to specific types of contracts.

The first general limitation is indicated by Article 3(3) of the Rome Convention, and provides that in the event that all other elements relevant to the situation are connected with one country only, the choice of a foreign law will not prejudice the applicability of the mandatory rules of that country. The identification of those relevant elements is left to the judiciary, and normally includes nationality of the parties, place of performance of the agreement, and the like.

The purpose of the limitation is to avoid any easy elusion of the mandatory rules of a country in a situation when, in practice, there should not be any need to resort to rules on conflict of laws since all factual elements of the contract relate to one country only.[48]

The second general limitation is set forth in Article 7(1) of the Rome Convention and provides that even if a contract is subject to the laws of a certain country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and insofar as, under the law of the latter country, those rules must be applied irrespective of the law applicable to the contract. This provision is aimed at preserving the widespread habit of national courts to apply certain fundamental principles of national law, irrespective of a foreign law choice, when the contract has a close connection with that country.[49]

Article 7(2) of the Rome Convention further clarifies that, in any case, the Convention cannot restrict the application of the rules of the law of the forum in a situation when their applicability is mandatory, irrespective of the law applicable to the contract. This is the case, for

47 Rome Convention, Article 3(2).

48 This solution was the result of a compromise between the countries that wished to limit the parties' "freedom of choice" in situations when no foreign element was identifiable, and the countries wishing to insure as much freedom as possible; the *Giuliano Lagarde* official report on the Rome Convention, at p. 17. The report is available at http://www.rome-convention.org/.

49 A review of some national cases is found in the Giuliano Lagarde official report on the Rome Convention, at p. 27. The report is available at http://www.rome-convention.org/.

example, regarding rules applicable to the judicial process, tax rules, rules against unfair competition, and the like, which have a relevance not limited to the contractual relationship between the parties and also are issued for the benefit of third parties.[50]

Special limitations that apply to employment agreements are consumer contracts, which will be discussed separately below.

Law Applicable in Absence of a Choice

If no choice of law was expressed by the parties, Article 4(1) of the Rome Convention provides that the contract will be governed by the laws of the country with which it is most closely connected, and Article 4(2) provides for two general criteria clarifying the general principle of 4(1).[51]

The first general criterion is that the contract is deemed most closely connected with the country where the party that must effect the performance that is characteristic of the contract had his habitual residence at the time of closing the contract.[52]

However, in the event of contracts in the course of business, whether commercial trade or profession, the place of business of the party making the characteristic performance becomes relevant. This is normally the party's main place of business, unless the contract is to be performed through another place of business, in which case the applicable law will be that of this secondary place of business.

The rule is hardly simple, as it includes several tests.

First of all, it is important to identify the performance that characterizes the contract. In a commercial agency agreement, the

50 A brief review of the actual judicial cases will show, however, that the vast majority of the cases relate to employment or quasi-employment relationships, which will be discussed separately, as they are covered by Article 6 of the Rome Convention.

51 Those criteria are not mandatory and constitute only a presumption, which may be rebutted. In fact, Article 4(5) of the Rome Convention gives judges a margin of discretion, by providing for the possibility of disregarding the presumptions in Article 4 Paragraphs 2, 3, and 4 of the Rome Convention when all the circumstances show that the contract has a closer connection with another country. According to Trib. Udine, 2 August 2002, *Foro it. Rep.* (2004) *Diritto Internazionale Privato*, n. 3, a construction contract, although clearly characterized by the activities of the construction company, is subject to the laws of the place of performance of the construction activities.

52 In the event of legal entities, reference will be made to the place where the central administration is located, irrespective of the formal registered office.

characteristic performance is the promotion of sales, and reference is, therefore, to be made to the residence of the agent.

The identification of the characteristic performance in a contract of distribution was debated, as one could argue that the distribution activity characterizes that contract. However, the Italian Supreme Court has ruled that the performance characterizing the contract is that of the supplier, the characteristic performance must be identified with the supply of goods and, therefore, the national law of the supplier is to be applied.[53]

Service agreements are governed by the laws of the country from where the service is rendered.[54]

If the reciprocal obligations of the contracting parties are such that it is difficult to identify the "characterizing obligation",[55] it will be up to the courts to identify which country has the closest connection with the "characteristic performance".

Once the characteristic performance is identified, the issue of habitual residence or, in most cases, place of administration or business becomes relevant.

Under Italian law, it is presumed that a company has its main place of administration at its registered address. However, this presumption may be rebutted by proving that the main place of administration or the main place of business is elsewhere. Those other locations will normally be evidenced by the appropriate Chamber of Commerce certification.

A review of judicial cases shows that there is sometimes a certain confusion between "place of performance" and "place of business", and the courts sometimes tend to decide that, in case of prolonged performance activities in one place, that place constitutes a fixed business base and, as such, the law of that place will apply. For example, in a case involving a sales agreement, for which the characteristic performance is the delivery of goods by the seller, it was decided that when the seller's obligations include installation activities to be performed abroad, the laws of the country of installation would apply.[56] A similar

53 Cass., 11 June 2001, n. 7860, *Foro it. Rep.* (2001) *Giurisdizione civile*, n. 105.

54 Court of Appeal [Great Britain], 28 June 2002, *Rivista dir. Int. privato e proc.* (2003) 258.

55 This may happen, for example, in contracts with several reciprocal obligations, or when the obligations of the parties are almost exactly the same, for example, in a barter agreement.

56 In a dispute regarding the termination of the contract between an Italian buyer and a German company (the seller), which provided for the sale and delivery of machines and their installation at the Italian factory, the Supreme Court considered that the contract was closely connected with Italy; *Cass.*; 10 March 2000, n.58, *Foro it. Rep.* (2000) *Giurisdizione civile*, n. 92.

decision was taken with reference to a construction contract.[57] Special rules will apply in two cases:

(1) If the contract relates to the rights in immovable property or to the rights to use an immovable property, it will be presumed that the contract is most closely connected with the country where the property is situated;[58] and

(2) If the contract concerns the carriage of goods, Article 4(2) will not apply and the immediate presumption is for the law of the carrier's place of business, if the place of loading or unloading is within the same jurisdiction.[59]

As there are several international conventions on the carriage of goods, this chapter will not further examine this issue.

As the identification of the applicable law will basically depend on factual elements, the burden of proof regarding the existence of those factual elements is on the party making the claim.[60]

Consumer Contracts

Protective rules govern consumer contracts, to avoid the risk that freedom of choice be used by one party for the purpose of depriving consumers of local statutory protections.

If no choice of law was made by the parties in their contract, a consumer contract is governed by the laws of the country where the consumer is habitually resident.

If a law was contractually chosen, Article 5(2) of the Rome Convention provides that the choice of law is valid; however, that choice shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence if:

(1) In that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he

57 Trib. Udine, 2 August 2002, *Foro it. Rep.* (2004) *Diritto Internazionale Privato*, n. 3, based on the theory that the Rome Convention, Article 4(2), only provides for presumptive criteria for the identification of the country most closely connected.

58 As it is a presumption, it may be rebutted and the parties may demonstrate that the contract has a closest connection with another country.

59 Genoa Court of Appeal, 2 June 1997, *Foro it. Rep.* (2000), n. 51, applied the law of the country in which the carrier had its place of business.

60 Cass., 14 November 2002, n. 16036, *Foro it. Rep.* (2003) *Diritto Internazionale Privato*, n. 30.

had taken, in that country, all the steps necessary on his part for the conclusion of the contract;

(2) The other party or its agent received the consumer's order in that country; or

(3) The contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy the goods.

In practice, the chosen law must be applied, subject to the mandatory legal requirements dictated by the laws of the country of the consumer for his protection.

In Italy, the protection of consumers is a relatively new branch of law and was prompted by the implementation of several EU Directives, including Directive 93/13/EEC on unfair terms in consumer contracts, which was enacted by Law Number 52 of 1996, and Directive 85/577/EEC on the protection of the consumer in respect of contracts negotiated away from business premises, which was enacted by Legislative Decree Number 50 of 1992. A comprehensive Consumer Code was enacted in 2005.[61]

A consumer is defined as a natural person who acts for purposes that can be regarded as outside his trade or profession.[62] A company is never treated as a consumer, under Italian law. A "professional" means a natural or legal person who acts in its commercial or professional capacity and anyone acting in the name of or on behalf of a trader.[63]

The courts have clarified the concept of a "consumer" by including in the definition a professional or an entrepreneur with reference to contracts not related to their business,[64] as well as the party that executes a contract in view of its future business.[65]

The only traditional protective provision was the one included in Article 1341 of the Civil Code, regarding standard terms and conditions in boilerplate form agreements, according to which certain

61 Legislative Decree Number 206 of 6 September 2005.

62 Consumer Code, Article 3.

63 Trib. Roma, 2 April 1998, *Rass. giur. Enel* (1998) 432.

64 Trib. Roma, 20 October 1999, *Foro it. Rep.* (2000) *Contratti*, 382. This case involved a sculptor who executed a transport contract to send his sculpture for a competition.

65 Trib. Terni, 13 July 1999, *Giur. It.* (2001) 9.

clauses had to be drawn specifically to the attention of the other party and specifically accepted by it.[66]

The most recent consumer regulation, issued in 1996[67] and amended in 2006 by the new Consumer Code, shifted from this "liberal" approach and identified a certain number of clauses which, if included in a consumer contract, are presumed unfair and not enforceable.

The unfair clauses are listed in Article 33 of the Consumer Code, which substantially reproduces the previous Article 1469 *bis* of the Civil Code, and include, *inter alia*, clauses limiting the liability of a professional in the event of default, clauses imposing excessive penalties on the consumer in case of default, clauses that allow the professional to cancel the agreement without paying damages while the consumer is bound to it, and clauses allowing the professional to determine whether the goods or services supplied are in conformity with the contract, or giving it the exclusive right to interpret any term of the contract,[68] and providing for a forum other than a court where the consumer has its residency or domicile.

Furthermore, a court may void any other clause that, although not specifically listed in Article 33, evidences a great disproportion of rights and obligations between the parties.[69]

The professional may prove that the clauses listed in Article 33 of the Consumer Code are not unfair given the circumstances of the case.[70] The

66 Civil Code, Article 1341, provides that "standard conditions prepared by one of the parties are effective for the other if at the time of execution of the contract the latter knew them or should have known them by using ordinary diligence. Unless specifically approved in writing, conditions that establish, in favor of whoever prepared them, limitation of liability, the power of withdrawing from the contract or of suspending its performance, or which impose time limits on the other party, limitations on the power to raise defenses, restriction on contractual freedom in relation with third parties, tacit extension or renewal of the contract, arbitration clauses, or derogation from the competence of courts, are ineffective".

67 Law Number 52 of 6 February 1996, which was introduced by the Civil Code, Article 1469 *bis* through 1469 *sexies*.

68 Trib. Palermo, 11 July 2000, *Contratti* (2001) 62, in a case in which, in the absence of an official classification of a hotel, the tour operator had the right to unilaterally determine the classification, thereby precluding the tourist from any censure over the accommodation and its standards.

69 Consumer Code, Article 33(1).

70 To this purpose, the judge will take into account, according to the Consumer Code, Article 34, "the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. Assessment of the unfair nature of the terms does not relate either to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, in so far as these terms are in intelligible language".

most likely situation, explicitly provided by the law,[71] is when the clauses were specifically and individually negotiated between the parties. The "negotiated" exemption does not apply, however, to clauses limiting liability in the event of death of the consumer, limiting liability of the professional following its breach of contract, or that provide for the consent by the consumer to clauses that he did not have the chance to review prior to the conclusion of the contract.

In case of a boilerplate agreement, it is up to the professional to provide evidence that there was individual, clause-by-clause negotiation.

Unfair clauses are not enforceable, while the remaining part of the contract remains valid.

Special provisions apply to contracts concluded outside the business premises of the professional. The main protection tool is the so-called "cooling-off period", which allows the consumer to cancel the contract, without cause, by sending a notice within seven days from the date of signature of the order or from the date of receipt of the goods. The term is respected if the letter with the notice of cancellation was mailed within seven days. The goods may be returned later.[72]

The professional must clearly inform the consumer, in writing, of his right of cancellation and the procedure for cancellation. If this is not done, the contract may be cancelled within sixty days.[73]

Individual Employment Agreements

Absent a different choice of law by the parties, employment agreements[74] are normally governed by the law of the country where the employee habitually carries out his work.[75] If the above conflict-of-law rule is not applicable, due to the reason that the employee does not have a permanent place of work, reference is made to the laws of the country where the employer has its place of business, through which the employee was engaged.[76]

71 Consumer Code, Article 34(4).

72 *Giudice di Pace Bologna*, 3 April 2000, *Foro it. Rep.* (2000) *Contratto in genere*, n. 388.

73 Article 6(2) of Legislative Decree Number 50 of 1992 provides that the sixty-day term starts from the day of delivery, in case of purchase of merchandise, or from the rendering of service, in case of service contracts.

74 Article 6 applies to individual employment contracts and not to collective agreements. It also covers cases of void contracts and *de facto* employment relationships.

75 The reference is to "habitual place of work". A temporary assignment to another country will not change the applicable law.

76 This is not necessarily the head office of the employer. If the employee was engaged by a branch, reference is made to the laws of the place where the branch is located.

The above conflict-of-law rules may be disregarded by a court if, given the circumstances of the case, it appears that the relationship is most closely connected to another country, in which case the laws of that country will apply.

Like any other contract, the parties are free to select another law to govern the relationship. However, the choice of law made by the parties will not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law that would be applicable in the absence of choice.[77]

Therefore, an employee working in Italy, although hired by a foreign company, will be entitled to several protective remedies provided for by Italian labor law, irrespective of the law governing the employment relation.[78]

The Italian labor law, for example, provides certain mandatory rights for employees, relating to health care, union negotiations, termination, and notice periods for disciplinary actions or dismissal.

Except for some basic rights, which are provided by statute, the bulk of regulation is included in National Collective Agreements (NCAs) entered into by and between the unions and the employers' associations. Traditionally, unions have strong political connections, and the right to form a union or to join a union is a constitutional right.

The protection against the termination of an employment relationship is one of the cornerstones of the Italian legislation. The general theoretical principle is that each party can terminate the employment agreement with prior notice. In practice, however, this is true only in the event the employee wants to leave. If the termination is sought by the employer, there are severe limitations and strict procedures to follow.

An employee[79] may be terminated only for cause. If the termination is unjustified, the consequence will depend on the number of

77 Rome Convention, Article 6(1).

78 Even if Italian law does not apply, the courts are reluctant to apply foreign rules that are manifestly in contrast with basic Italian employment law principles. For example, in one case (Cass., 11 November 2002, n. 15822, *Foro it. Rep.* (2003) *Lavoro*, n. 1500), the Court refused to apply US law in a dispute relating to the termination of an Italian employee, who carried out his work in the US, and based its reasoning on the assumption that the US law on freedom to terminate employment contracts is manifestly incompatible with the Italian public order.

79 Workers are not all of the same designation, and relevant legislation contains various differences depending on the services performed. The most important differentiation is that between regular employees and "*dirigenti*" (executives). The two categories have different NCAs and different social security schemes. Furthermore, the protection against termination is based on completely different principles.

employees within the plant. If the employer has more than 15 employees, the employee is entitled to reinstatement, to receive compensation from the date of termination to the date of reinstatement, and to damages. Employers with less than 15 employees have an easier fate and must only pay damages in an amount equivalent to a sum ranging between two to six months of the employee's monthly salary.

Traditionally, courts and commentators indicate that there are two main reasons for termination: just cause, and justified motive. A "just cause" is a cause that is so serious that it immediately precludes the maintaining of the employment relationship; in practice, it is a very serious breach of the employee's duties. A "justified motive" is either a violation of contract duty of a lesser degree or an economic or organizational reason.

From a practical point of view, the distinction is now mostly theoretical, due to the very strict interpretation of the courts of the requirement for just cause. For this reason, it is probably better to make a distinction between disciplinary termination (for breach of contract)[80] and non-disciplinary termination (for causes related to the organization of the employer or its economic situation).[81]

Special rules apply to *dirigenti* (executives). While they have very little statutory protection, *dirigenti* have been able to obtain more substantial protection through collective agreements (which provide for substantial termination packages) and, to a certain extent, through court decisions. An executive may be dismissed, but this is going to

80 An employer wishing to terminate an employee for a disciplinary violation must inform the employee of the violation committed, in writing and usually by registered letter, and request the employee to provide an explanation within five days. The employer also may decide to suspend the employee during this period, provided that there is no suspension of salary. The employee may provide the explanation in writing, or request a meeting, and may be counseled by the union. Following the expiration of the five-day period, the employer may terminate the agreement with a written notice, which must specifically indicate the reason for termination. This is extremely important, as any challenge to the termination will involve only a review of the reasons stated. The termination may be challenged by the employee within six months.

81 An employee may be terminated when he becomes redundant because of plant reorganization, economic crisis, closing of a business unit, and similar business-related reasons. The termination must be in writing and it must precisely state the reasons for the termination. In order for the termination to be lawful, the employee being dismissed must be linked directly to the circumstances justifying the termination and it must be impossible to relocate the employee in another position. Non-disciplinary dismissals require a prior notice, during which the employee's usual work benefits and rights are maintained, including the right not to be terminated during sick leave.

be an expensive exercise. The first provision is that the compensation for terminating an executive is the equivalent of between six and twelve months of his salary, depending on seniority, and on the terms of the applicable NCA. Furthermore, if the termination is deemed unjustified (as is often the case), an additional indemnity, equivalent to an amount ranging between the applicable compensation for the notice period and up to 18 months' salary, also is due. Finally, most contracts provide that additional payments may be due, depending on the age of the executive.

The receipt of adequate salary is a constitutional right and the courts normally look at the applicable NCA to ascertain whether the salary is adequate. Normally, in Italy, an employee receives thirteen or fourteen monthly installments, as well as a certain amount as deferred salary, at the end of the employment relationship. The Supreme Court has indicated that the fact that a foreign law does not have the same salary scheme is irrelevant, provided that the total compensation package is not lower than the "adequate" compensation as provided by Italian law (i.e., by the applicable NCA).[82]

Non-Contractual or Quasi-Contractual Obligations

In General

The section of Law Number 218 dealing with non-contractual obligations covers a variety of different legal schemes and instruments, from bank checks to tort liability, including unilateral promises, representation issues, credit instruments, and statutory obligations.

Existing legislation may be changed in the future, in the event that the EU ultimately enacts a new regulation regarding non-contractual obligations, which is still under discussion and that will supplement the Rome Convention on the law applicable to contractual obligations.[83]

82 Cass., 26 November 2004, n. 22322, *Foro it. Rep.* (2004) *Lavoro*, n. 744.

83 The reference is to the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (known as Rome II), which was presented on 22 July 2003, and is still in the formative stage.

Unilateral Promises

Unilateral promises are governed by the law of the state where the promise is made.[84] The Supreme Court has confirmed that the above conflict-of-law rule applies irrespective of the circumstance that the unilateral promise becomes binding on the promisor only when the promise is delivered to the other party.[85]

Under Italian law, a unilateral promise is enforceable only in the specific cases permitted by law and only to the extent provided by the relevant legal provision.[86]

The main cases relate to the promise of payment and acknowledgment of debt, which has the effect of exonerating the person in whose favor it is made from the burden of proving the substantive obligation,[87] and a promise to the general public when one party, addressing the public, promises a reward in favor of whoever is found in a specific situation or performs a specific action.[88]

The above principles apply only in the event that the unilateral promise is not part of a more complex contractual relationship, in which case the rules on contracts will apply. For example, a debt acknowledgment given in exchange of another obligation is a contractual, bilateral agreement, and is governed by the relevant conflict-of-law rules.

Credit Instruments

Credit instruments are subject to the laws of the country where the credit instrument is issued.[89]

In the event of additional obligations, for example, in case of endorsement of the instrument by a third party, the additional obligation is governed by the laws of the place where the obligation was undertaken. Bank checks and promissory notes are governed by the Conventions held in Geneva, dated 7 June 1930 and 19 March 1931, on conflict of laws.

84 Law Number 218, Article 58.

85 Cass., 6 May 2003, n. 6866, *Foro it. Rep.* (2003) *Diritto Internazionale Privato*, n. 28.

86 Civil Code, Article 1987.

87 Civil Code, Article 1988. This is only a presumption, and the promising party may always prove that the obligation, despite the acknowledgment, did not exist.

88 Civil Code, Article 1989.

89 Law Number 218, Article 59.

Voluntary Representation

The issuance of a proxy for the purpose of entrusting a representative with the power to conduct a business or execute a legal document falls within the boundaries of voluntary representation. The applicable law is that of the country in which the representative has its office, provided that the representative acts in its professional capacity and the office is known to the third parties. If the above conditions are not met, reference is made to the laws of the state where the representative exercises its powers with respect to the specific case.[90]

As to the formal validity of the proxy, Article 60(2) of Law Number 218 provides that the proxy is enforceable if it is so considered by the laws that regulate the substantive obligation or, alternatively, by the laws of the country where it was issued.

In practice, both the reference to the laws of the country where the representative has its main office, and the reference to the validity rules of the place where the proxy was issued, are limited to the relationship between principal and representative, and encounter a number of limitations with respect to the possibility of operating *vis-à-vis* a third party. This will cause, in most cases, the application of Italian law if the powers must be exercised in Italy, as discussed below.

First of all, under Italian law, a power of attorney issued for the execution of a contract must be conferred with the same formalities prescribed to execute the contract.[91] This means that the proxy must always be in writing (irrespective of whether the foreign law accepts a verbal proxy) and, in most cases, the signature must be mandatorily certified by a notary public, in order for the representative to be able to execute certain contracts in Italy (for example, transactions involving real estate and incorporation of companies).

Also, it is undisputed that a litigation power of attorney must be issued with the formalities required by the Italian Code of Civil Procedure, that is, a notarized power of attorney, or a proxy with the signature of the client certified by the attorney acting in court.[92]

90 Law Number 218, Article 60.

91 Civil Code, Article 1392.

92 This provision is based on the theory that a litigation power of attorney is a procedural act, which is therefore subject to the law of the place where the proceeding takes place.

Finally, the obligations of a representative *vis-à-vis* a third party (e.g., the liability of a representative that exceeds its powers) are statutory obligations and are therefore subject to the law of the place of performance (see text, below).

Statutory Obligations

This is a residual category that covers voluntary management of the affairs of another person, undue payment, unjust enrichment, and any other obligation provided by law and not regulated by a specific provision.

The conflict-of-law rules refer to the laws of the state where the fact that gave rise to the obligation occurred.

Tort Liability

Under Italian law, tort is any fraudulent or negligent act that causes an unjustified injury to another party.[93] The concept of tort liability also will include all matters regulated by Articles 2044 to 2054 of the Civil Code, which are:

(1) Injury caused by a person lacking capacity;
(2) Liability of parents, guardians, and teachers;
(3) Liability of masters and employers;
(4) Liability arising from participation in dangerous activities;
(5) Damage caused by persons or articles in custody and by animals; and
(6) Damage caused by vehicles.

It also includes the statutory liability for unfair competition, violation of environment, and damages arising from violation of privacy. Product liability also is a tort, but it is separately regulated and will be discussed in the following section.

The conflict-of-law rule for tort liability makes reference to the laws of the country where the event occurred.[94] The legal provision refers only to an "event" and not to a "harmful event", in the attempt to avoid interpretative doubts in cases when the "proximate cause" of the injury is in one country and the injury eventuated in another country. The underlying idea was that of making reference only to the laws

93 Civil Code, Article 2043.
94 Law Number 218, Article 62(1).

of the country of eventuation of the injury and not to the country where the proximate cause occurred.[95]

This approach, however, obliges the judge to qualify the place of the tort as the place of the event and produces the result of a "fragmentation" of the case when the event triggers damages in several countries. However, the injured party may elect to apply the law of the country where the proximate cause occurred.[96]

Statute-of-limitations rules for the commencement of tort recovery litigation are deemed procedural, not substantive rules, and the procedural law governing the process will therefore apply.[97]

The above conflict-of-law rules will not apply in the event that the parties involved are citizens of the same country and resident there. In such a case, the law of the country of common citizenship and residence will apply.[98]

Product Liability

A specific rule is laid down for non-contractual obligations in the event of damage caused by a defective product. This provision is the

95 This solution is different from the one contained in the Brussels Convention of 1968, replaced by the EC Regulation 44/2001, Article 5(3), which refers to the "place where the harmful event occurred". In interpreting Article 5(3) of the EC Regulation 44/2001 in a case of libel, the Court of Justice in the Judgment of 7 March 1995(C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd* vs. *Presse Alliance SA*, 1995, ECR I-00415), stated that "the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised".

96 Law Number 218, Article 62(1). This election right is solely for the injured party. There are different opinions as to the deadline for exercising the option. According to some authors, the election of applicable law must be made with the writ of summons served to the injurer, while other authors allow the party the right to make the choice until the evidentiary phase begins. There are no reported cases on this issue, which fact confirms the opinion that the option is not commonly exercised.

97 Cass., 1 August 2000, n. 10026, *Foro it. Rep.* (2000) *Diritto Internazionale Privato*, n 59., which stated that a case regarding a claim for damages after a car accident brought by an Italian citizen before an Italian judge, is subject to the Italian statute of limitations, even thought the tort itself is subject to a foreign law.

98 Law Number 218, Article 62(2).

result of the harmonization of the laws of the EU member states as provided by EC Directive 85/374/EEC (concerning liability for defective products, called the Product Liability Directive) of 25 July 1985, enacted in Italy by the *Decreto del Presidente della Repubblica* (DPR) Number 224 of 24 May 1988.[99]

The definition of "producer" includes:

(1) Any participant in the production process;
(2) The importer of the defective product;
(3) Any person putting its name, trade mark, or other distinguishing feature on the product; and
(4) Any person supplying a product, the producer of which cannot be identified, or when the supplier does not reveal to the injured person the identity of the producer.

According to Article 63 of Law Number 218, the injured party may choose that the matter be governed by the law of the state where the producer has its domicile or administrative headquarters, or by the law of the state where the product was purchased, unless the producer proves that the product was marketed in that country without its consent.[100]

The prevailing Italian doctrine is of the opinion that the plaintiff has the obligation to select applicable law in the petition and that judge cannot decide, by default, to apply Italian law if a choice is not made. According to some authors, lack of choice in the petition will cause the petition to be null and void for lack of specificity. In practice, if the petition refers to Italian legal cases or provisions, the judge will impute that the party has elected Italian law. In case of doubt, the

99 Since the Directive provides for liability without fault, it is not necessary to prove the negligence or fault of the producer or importer, but the injured party must prove the damage, the defect in the product, and the causal relationship between damage and defect.

100 Directive 85/374/EEC, Article 7, provides certain exemptions for the producer, who is free from liability if he proves that: (1) he did not put the product into circulation; (2) the defect causing the damage came into being after the product was put into circulation by him; (3) the product was not manufactured for profit-making sale; (4) the product was neither manufactured nor distributed in the course of his business; (5) the defect is due to compliance of the product with mandatory regulations issued by the public authorities; (6) the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the defect to be discovered; and (7) in the case of a manufacturer of a component of the final product, that the defect is attributable to the design of the product or to the instructions given by the product manufacturer.

judge will ask the party to clarify the choice and only if the party does not respond to such a request may a nullity problem arise.

The specific conflict-of-law rule contained in Article 63 of Law Number 218 is considered an exception to the general rule contained in Article 62 relating to tort liability, but this provision does not prevent the injured person from exercising the ordinary action by applying the rule of Article 62. In practice, an action based both on product liability rules and general tort rules is quite common, as the strict liability rules applicable to product liability do not include non-material damages that may be sought only by resorting to general tort principles and to the relevant applicable law.

Enforcement of Foreign Decisions

In General

As present, Italy has two sets of procedures applicable to foreign decisions, the first being applicable to decisions issued by a court of an EU member state, and the second being the procedure applicable to all other foreign courts and introduced by Article 64 *et seq.* of Law Number 218.[101]

The basic advantage of the EU enforcement procedure is that it is an *ex parte* procedure, the exequatur is obtained in a few weeks, and the creditor may ask for the interlocutory seizure of the assets of the debtor, regardless of whether the debtor filed an opposition against the exequatur. The procedure involving non-EU states is much longer (due to imprecise drafting of the relevant rules), and a seizure pending the procedure is subject to ordinary rules for interlocutory orders.

It is important to stress that, both under the EU procedure and under the procedure set out by Law Number 218, the foreign decision is immediately recognized by the Italian judicial system, and the exequatur procedure is only used to obtain the judicial enforcement of a decision already recognized and valid.

101 Italy has entered into a number of bilateral conventions for the reciprocal recognition of judicial decisions; however, the relevant procedure is not substantially different from the one discussed below. In most cases, those conventions are quite old and the procedure is more burdensome than the one provided under Law Number 218, and plaintiffs will therefore prefer to rely on the more modern provisions of Law Number 218.

Enforcement of Court Decisions involving European Union Member States

Enforcement of foreign court decisions involving EU member states is regulated by Council Regulation (EC) Number 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (called the Brussels 1 Regulation), which entered into force on 1 March 2002, and applies to all member states of the EU, with the exception of Denmark, to which the Brussels Convention of 1968 still applies.

This Regulation aims to simplify all the formalities for recognition and swift enforcement and provides, in Article 33, that a judgment issued by a court of a member state is recognized in the other member states without any special procedure being required, while Article 38 provides that a judgment given in a member state and enforceable in that state may be enforced in another member state when, on the application of any interested party, it has been declared enforceable there.

According to Article 34 of EC Regulation 44/2001, recognition is denied:

(1) If such recognition is manifestly contrary to public policy in the member state in which recognition is required;
(2) When the judgment 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 defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
(3) If the judgment is irreconcilable with a judgment given in a dispute between the same parties in the member state in which recognition is required; and
(4) If the judgment 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 fulfills 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. 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. The order will be served on the defendant, who

will have one month to file an opposition contesting the enforcement order. Pending the opposition, the party seeking enforcement may nevertheless obtain a lien on the assets of the defendant to insure payment of the final award.

Enforcement of Court Decisions Involving Non-European Union Member States

As mentioned above, there must be differentiation between rules on recognition of a foreign judgment and rules regarding judicial enforcement in the event the party fails to comply with the decision and a foreclosure is required.

Principles for Recognition of Foreign Judgments

The relevant principles are dictated by Article 64 of Law Number 218, according to which a foreign decision is recognized in Italy without any proceedings in the following cases.[102]

First, the foreign court had jurisdiction to issue the judgment, according to Italian rules on jurisdiction. Those rules are now contained in Law Number 218, Articles 3 and 4, according to which:

(1) 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 the Code of Civil Procedure, Article 77;
(2) Jurisdiction exists pursuant to the criteria established by the Brussels Convention, Title 2, Sections 2, 3, or 4; or
(3) The defendant has accepted the jurisdiction of the foreign court either in writing or by appearing before the foreign court without challenging its jurisdiction.

Second, the original summons was validly served on the defendant, pursuant to the rules in force in the foreign jurisdiction and there was no violation of the right of the party to defend its case. The possible disputes regarding the notification requirement relate to the

102 In practice, in case of decisions awarding damages, a proceeding is always required, unless the debtor pays spontaneously. In fact, pursuant to Law Number 218, Article 67, a proceeding must be held when the defendant 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.

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 and the judicial act does not need to be served in person. The bailiff can leave the summons at the defendant's home or office or, if he cannot get access to those places, he can leave the summons with the doorman, or a similar person. If the plaintiff is from a country that is a party to the Hague Convention on the service abroad of judicial and extrajudicial documents in civil and commercial matters, dated 15 November 1965, it also is possible to resort to service of process according to the rules of that Convention.

Third, 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. 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.

Fourth, the judgment is *res judicata* according to the foreign law. 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 sometimes 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 to prove compliance with the requirement is by 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 preferable 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 Law Number 218, Article 64.

Fifth, there is no Italian judgment with the effect of *res judicata* relating to the same matter. According to the Italian Code of Civil Procedure, a matter is deemed *res judicata* if no ordinary appeal or recourses against the decision is available.

Furthermore, no proceeding between the same parties for the same matter was started before an Italian court prior to the commencement of the foreign proceeding. The Italian Code of Civil Procedure includes various types of proceedings, which are commenced with

different formalities. Without going into detail, there are two primary means of initiating a proceeding:

(1) Serving a petition on the defendant and then filing the case in court; and

(2) Filing the case in court and then serving the petition on the defendant. In both cases, the proceeding is deemed pending only as of the date the petition is served on the defendant.

Lastly, the foreign judgment is not contrary to public order.

Judicial Enforcement and Foreclosure

According to Article 67 of Law Number 218:

> ". . . 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 procedure is an ordinary litigation procedure that, unfortunately, takes some time.

The plaintiff must file the documentation evidencing fulfillment of the requirements indicated under Article 64(a) through (g) of Law Number 218 and mentioned above. Requirements under Article 64(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 for 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 applicable,[103]

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

in accordance with Italian law. Although not specifically requested by the Hague Convention,[104] if the defendant is an Italian citizen, it also is 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 also is very important to obtain evidence that the petition was actually served on 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 the date of service.

The original of that document is required, to later enforce the decision in Italy. If the petition is served in accordance with 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.

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

Regarding the requirement regarding appearance, the best thing is to have the court indicate this in the decision. If this is not possible, the 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 concerning *res judicata* is one that often creates problems, due to the differences in the various jurisdictions and due to the reluctance of Italian courts to accept affidavits with reference to foreign legislation. The best possible solution is to file a certification issued by the foreign court to the effect that the decision is *res judicata*. Alternatively, the plaintiff will have to submit a copy of the statute indicating the time when the decision became final.

104 Only a few countries, such as Japan, have specifically requested, at the time of ratifying the Convention, that the petition be translated.

Once the favorable 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).[105]

The decision of the Court of Appeals is subject to recourse before the Supreme Court and there are conflicting practices in the various courts as to whether the filing of the recourse delays the foreclosure proceeding.

Judicial Recognition Incidenter Tantum

If the foreign court decision is relevant for an Italian case regarding the same matter or a dependent matter whereby either party may have an interest in proving that a certain situation was finally adjudicated between the parties in a foreign litigation, Article 67(3) of Law Number 218 provides that the interested party may request the court hearing the Italian case to ascertain, *incidenter tantum*, the existence of the recognized foreign decision, without commencing an ordinary action pursuant to Article 64 of Law Number 218.

Conclusion

The trend in international commerce is toward a closer harmonization of legal rules, but significant differences yet exist and make it necessary to resort to conflict-of-law rules to identify applicable law.

Also, conflict-of-law rules vary from country to country, and it is not easy to define common standards, as is evidenced by the time required to enact the Rome Convention and by the difficulties that the EU is encountering with Rome II regarding non-contractual obligations.

This article offers a basic review of the Italian conflict-of-law rules and related judicial cases applicable to international business and commercial matters and hopes to provide at least an initial insight into the issues at stake.

105 Law Number 218, Article 67(2).