UNIVERSITÀ DEGLI STUDI DI MILANO
DIPARTIMENTO DI STUDI INTERNAZIONALI, GIURIDICI E STORICO-POLITICI

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Report on Italian case-law

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Summary of contents

I. Pre-selection

In this introductory paragraph, the reader may find some indications on the Italian legal system useful to read the collection of case-law, object of this Report. The relevant case-law has been collected and selected on the basis of the cases published in journals (most notably the *Rivista di diritto internazionale privato e processuale*) and on legal online databases (*De Jure, Leggi d'Italia, Pluris, CED Cassazione*).

1) Legislation

Italian Code of Civil Procedure, also referred to as "c.p.c." or "cod. proc. civ.", available in Italian here. Translation of the relevant provisions has been provided in the footnotes.

Italian Civil code, also referred to as "c.c." or "cod. civ.", available in Italian here. Translation of the relevant provisions has been provided in the footnotes.

2) The Italian court system in brief

For the purposes of the present report, it may be useful to recall that, when addressing jurisdictional competence within the Italian civil procedural law system, relevant courts are: *Giudice di pace*, *Tribunale*, *Corte d'appello*, *Corte di cassazione*.

Giudice di pace — The *Giudice di pace* is a first-instance judicial body composed of honorary judges, i.e. non-professional judges. The offices of the *Giudice di pace* are located throughout the territory mostly mirroring the offices of the *Tribunale*: one office for each district, grouped into regional districts according to the territorial competence of the *Corte d'appello*.

Tribunale — The *Tribunale* is a district court composed of professional judges competent to hear all the claims that do not fall within the competence of the *Giudice di pace*. The *Tribunale* is also the appellate court competent to receive appeals against first-instance judgments

of the *Giudice di pace*. It can be said that practically the vast majority of the civil claims are submitted to the competent *Tribunale* ([1]).

Corte d'appello — The *Corte d'appello* is the appellate court competent for appeals against the decisions of the *Tribunale* and, in some cases, court competent to hear first-instance claims in particular matters. At a territorial level, there is more than one *Corte d'appello* compared to the number of the *Regioni* (29 courts – and thus 29 regional districts for civil jurisdiction – but 20 regions).

Corte di cassazione — The Italian *Corte di cassazione* is the court competent to receive challenges on the interpretation or application of the law by the judges of first or second instance. To appear before the *Corte di cassazione*, counsels have to be registered in a special record; registration is received after passing an exam that lawyers may apply for only after some years of professional experience in lower courts.

3) Relevant indications on some types of civil proceedings different than the ordinary civil proceeding (*Procedimento ordinario*) and types of challenges to judgements

<u>*Procedimento camerale* (Arts. 737 ff. c.p.c.)</u>

In brief, the *procedimento camerale* (literally "proceedings in chambers") is a simplified proceeding for expedite decisions on simplified objects. It is discussed the jurisdictional or administrative nature of the procedure. Even if in certain cases the jurisdictional nature of the proceedings is not disputed, the final decision (given in the form of a decree) does not properly have a *res judicata* effect similar to an ordinary judgment; however, it is final unless further circumstances emerge. The proceedings are introduced by a complaint to be submitted to the court and follow a simplified structure. The final decision may alternatively be challenged before the *Tribunale* or before the *Corte d'appello*, depending on the content and the object of the decision of first instance.

<u>Summary order "*decreto ingiuntivo*" (Arts. 633 ff. c.p.c.)</u>

A creditor may file a complaint to the competent court in order to obtain an order for payment or delivery of a certain mobile object or of a certain quantity of fungible goods.

For the claim to be admissible the creditor needs written proof of the credit. Such procedure is characterized by the absence of the debtor in the first part. If the conditions are met, the judge issues the payment order (*decreto ingiuntivo*), which must be served on the debtor within 60 days with the indication that the debtor has then 40 days from service to file an opposition claim. Such opposition would then mark the beginning of the second part of the proceedings, in which the original claimant acts as plaintiff and the debtor served with the order acts as the defendant, as if they were parties to an ordinary proceeding before civil courts having as an object the claim object of the original complaint. If such opposition is not filed on time or is not filed at all, the order for payment is final. Enforceability of the payment order normally occurs when the decree is final (lack of regular opposition) but the issuing judge may grant provisional enforceability under certain urgency requirements.

Expedite ordinary proceedings (Arts. 702 *bis* ff. c.p.c.)

The procedure regulated by Arts. 702 *bis* c.p.c. is an alternative to the ordinary civil proceeding to bring a civil claim before the courts, when certain requirements are met. Such proceedings are simplified and aim to achieve the final judgement faster if compared to ordinary civil proceedings. The main features may be summarized as follows. After the pleading is filed, the court sets by decree the date for appearance of the parties and the complaint, together with the decree, must be served, upon request of the claimant, by the bailiff to the defendant at least 30 days before the date of the hearing. The defendant must file an entry for appearance not later than 10 days before the date of the hearing. If the defendant files the answer belatedly, s/he automatically waives the right to any counterclaim, request for third party joinder and/or procedural or merits objections that cannot be raised by the judge *ex officio*. Proceedings according to Arts. 702 *bis* ff. c.p.c. are simplified and mostly written with regard to the procedure, and the final decision takes the form of an ordonnance. The final decision may be challenged by appeal within 30 days from its communication to the parties by the court clerk or service by one of the parties to the other(s). The decision by the appellate court may also be challenged by complaint to the *Corte di cassazione*; the deadline for the complaint, in this case, is 30 days and not the 60 days usually set for challenges of ordinary judgements before the *Corte di cassazione* outside of expedite proceedings. For all the other elements, said proceedings follow the general rules of civil procedural law.

Ricorso per cassazione

The *ricorso per cassazione* under Art. 360 c.p.c. is, to put it simply, the complaint to bring a challenge before the *Corte di cassazione*. Art. 360 c.p.c. lists five grounds on which the complaint to the Court may be based: (1) competence for jurisdiction (either international or national); (2) competence for venue; (3) false application or violation of substantive law or of collective labour agreements; (4) nullity of the final decision or of acts of the procedure (i.e. breach of procedural rules); (5) lack of reasoning on a point of the factual background that was essential to solve the dispute and was object of the parties' exercise of their procedural rights to a fair discussion during the proceedings. Usually, such challenge addresses judgement of second instance (either by the *Corte d'appello* or by the *Tribunale*), unless by provision of the law or agreement of the parties, a party may directly challenge with the *ricorso per cassazione* a decision of first instance (so-called complaint *per saltum*, which is most uncommon in practice).

Regolamento di competenza

The *Regolamento di competenza* is a challenge that is brought directly before the *Corte di cassazione* in the form of a complaint ("*ricorso*"). It is regulated by Arts. 42 to 50 c.p.c. Decisions subject to such challenge are the ones that decided procedural issues on the competence of the court or on the stay of the proceedings. The decision to stay the proceedings is regulated, in general, by Arts. 295 ff. c.p.c. and by other provisions of the law. Although the issue is not explicitly regulated by the rules on suspension, it is derived from the general rules of civil procedure that the decision on the issue of suspension is taken in the form of an ordonnance. Ordonnances of the court are regulated, in general, by Arts. 176-179 c.p.c. The general rule is that, unless otherwise specified, decisions of the judge are taken in such form. An ordonnance differs from a judgement, given in the form of a ruling, on formal aspects and on the rules that govern its challenge. In particular, an ordonnance may be modified/revoked by the same judge that issued it, unless it falls in the genres of ordonnances listed in Art. 177 co. 3 c.p.c. The ordonnance on stay of the proceedings is one of those ordonnances that, according to Art. 177 co. 3 c.p.c., is not subject to modification/revocation by the same judge that issued them, being that there is a special procedure for its challenge (the *Regolamento di competenza*, hereby briefly described) (Art. 177 co. 3 n. 3) c.p.c.). Going back to the procedure to challenge the stay of the proceedings, if the *Corte di cassazione* grants the complaint and revokes the ordonnance, it would consequently order the parties to resume the proceedings within the deadline it sets or, lacking such indication, within 3 months from its decision (Art. 50 c.p.c.). If the parties fail to resume proceedings in a timely manner, they are terminated. Rather, if the *Corte di cassazione* rejects the complaint, the proceedings stay until the cause of their suspension is settled. If the

ordonnance does not contain any provision on the hearing to summon the parties to resume the proceedings, any party may petition the court to fix such hearing (see Art. 297 c.p.c. and the procedure it sets forth). During the suspension of the proceedings no acts, motions, petitions, hearings, etc. can be made and procedural deadlines do not apply until the hearing to resume procedure just mentioned (Art. 298 c.p.c.).

4) Glossary

Cass. civ. The *Corte di cassazione* is organized in divisions that address civil or criminal matters. Each judge of the Court is assigned to a specific division. When the case is quoted as "Cass. civ." (lit. *cassazione civile*) it means that the claim has been decided by one of the six sections designated to decide civil matters (a case in criminal matters would be decided by one of the other seven sections and referred to as "Cass. pen", lit. *Cassazione penale*). The number of the division is usually deemed optional in quoting a case, according to practice in doctrine and court documents. If mentioned, "Roman numerals" are the most appropriate according to practice (for example, Cass. civ., *IV Section*, [case date and number] or Cass. pen., VII Section, …).

Sez. un. Lit. *Sezioni unite*. The "sezioni unite" (grand chamber) composition of the *Corte di cassazione* is a special composition of the Court, composed of nine judges and presided over by the president of the Court, designated to decide particular matters. Regarding civil matters, the united sections of the Court decide, *inter alia*, cases relating to jurisdiction of the Italian courts. Thus, in matters covered by this Report, cases will likely be decided by the Court in a grand chamber composition.

Ord. Lit. *Ordinanza*. Judicial decisions in the Italian civil procedural system may have the form of a judgement ("*sentenza*"), of an ordonnance ("*ordinanza*") or of a ("decree"). If not specified, the case was decided with a judgement. Albeit it would be difficult to give to the reader a thorough description of the various cases in which one court or another has to decide via judgement, ordonnance or decree, it is anyway possible to say that, generally, the rule is different for lower courts (i.e. *Giudice di pace*, *Tribunale* and *Corte d'appello*) and for the *Corte*

di cassazione. (A) Courts that decide the merits of the case adopt the form of a judgement, generally, when they decide the dispute on its merits (granting or rejecting the claim) or, more in general, when they give a final decision of the dispute, even if it is grounded on procedural issues (for example, when the claim is rejected because the Italian courts lack jurisdiction to hear the claim). Also, they generally issue an ordonnance when they give orders as to procedural aspects of the proceedings (for example, when the judge sets a deadline for briefs or when the court orders the stay of the proceedings because of *lis pendens*). Lastly, in general, decrees are adopted as mere procedural decisions (for example, scheduling or delaying a hearing, ordering to pay the costs of a court-appointed expert). Important exceptions to these rules include the final judgement that rejects the claim for issues related to the venue of the court, which is taken in the form of an ordonnance (Art. 279 co. 1 c.p.c.) and the order to pay or deliver a certain good or a certain amount of fungible goods, which is taken in the form of a decree (Art. 641 c.p.c. – see the above-mentioned *decreto ingiuntivo*): in both these cases the decision, even if taken in a different form, has effects comparable to those of a final judgement ([1]). (B) When the *Corte di cassazione* decides on the claim, the rules that govern proceedings before such court dictate a specific form of the decision for different cases. However, the form does not correspond to certain effects of the decision, meaning that the decision has not different effects in relation to the form *itself* (judgement or ordonnance) in which it is taken, but rather relating to its content.

5) Pending reform of the civil process

On 26 November 2021, the Italian Parliament approved the law no. 206/2021which delegates the Government to issue within one year a legislative reform for the efficiency of

[1] However, exceptions apply in both cases, relating more to the content of the decision than to its form. For example, the decision on the competence is subject to the challenge via *Regolamento di competenza* and the injunctive decree must be served to the debtor for its consideration regarding a possible opposition to be filed before the court in the form of a claim to review the merits of the asserted obligation to pay or to deliver (Arts. 633 ff. c.p.c.).

the civil process and for the reorganization of the rules on alternative disputes resolution mechanisms and urgent measures for the rationalization of the procedures regarding family and individual matters as well as regarding enforcement of civil claims.

The law, which can be found in Italian here, indicates the principles and general rules for the reform of the civil proceedings. At the moment the reform is pending. It is, however, to be underlined that some of the modifications that will be adopted by the Government will be relevant for the rules and the procedures that govern ingoing and outgoing judgements under the EFFORTS Regulations. It goes without saying that such reform may have, firstly, an *indirect* relevance, in a way that the claims and the procedures brought before Italian courts relating to a EU transnational claim, as well as any other claim brought before Italian courts, will be governed by the new rules. For example, the law for the reform of the civil process dictates that the expedite summary proceedings have to be adopted in a larger number of cases than the actual scope of application of such procedure; therefore, insofar as the claim for refusal of recognition of an EU judgement under the Regulation Brussels I^{bis} falls under the scope of application of the expedite ordinary proceedings, it has to follow its rules.

Secondly, and more specifically, the reform of the civil process could have direct relevance for the enforcement of claims under the Regulations covered by the EFFORTS Project, considering, amongst others, matters such as the following. (*i*) The legislative reform will have to abrogate all rules relating to the so-called "*formula esecutiva*" (*execution formula*), a formula which had to be placed on enforcement titles for their enforcement; on this regard, there had been some doubts if foreign EU titles had to be endorsed with the formula, and the prevailing view was that they had not. (*ii*) The legislative reform will have to provide criteria for determining the amount as well as the duration of the penalty measures for non-performance (indirect coercion or *astreinte*) referred to in Article 614-*bis* of the Code of Civil Procedure and provide for also the attribution to the judge of execution of the power to order such measures when the enforcement title is different from a judgement to order performance (*sentenza di condanna*) or when the measure has not been requested to the judge who issued such judgement ([2]). (*iii*) The legislative reform will have to regulate the claims for refusal of recognition and enforcement of judgements under the Reg. (EU) No 1215/2012 so that they are decided with the expedite ordinary proceedings and that the competent court is the *corte d'appello*.

[2] The Italian version of Art. 1 co. 12 lett. *o*) of the law no. 206/2021 is unclear in its wording and could be of difficult interpretation. The translation hereby drafted under point *ii*) is almost literal and non-official.

II. Brussels I bis Regulation and its predecessor Brussels I Regulation

Part A: Case-law

The relevant case law is displayed in chronological order by way of a summary. A further critical assessment of recurring issues is provided in "Part B" of this chapter.

1) Cass. civ., 10.04.2002, n. 5127, sez. unite, ord. ([3])

The *Corte di cassazione* receives a challenge under Art. 42 c.p.c. (so called *Regolamento di competenza*) against the decision (ordonnance) of the *Tribunale* of Milan that ordered the stay of the proceeding under the rule of *lis pendens* set forth in Art. 21 of the Brussels Convention ([4]). In fact, proceedings with the same object and between the same parties were pending before Italian and Greek courts. The *Corte di cassazione* rejects the challenge, thus confirming the decision to stay issued by the court of first instance, with modification of the reasoning of the ordonnance (pursuant to Art. 384 co. 4 c.p.c.) ([5]). In fact, at the time in which the ordonnance of the *Tribunale* of Milan was issued, the Greek judge had already issued a decision ascertaining the existence of all the elements for the *lis pendens* under Art. 21 of the Brussels Convention with a declaration that the first seised court was, in fact, the Greek one and that such courts have jurisdiction to hear the claim. The *Corte di cassazione* states that, according to the scope of the Convention, such decision was to be recognized with the effect to prevent any further decision on the same (procedural) object. Indeed, the Convention embraces a broad definition of "decision", thus including judicial decisions that have a *procedural object*, such as those that do not form a judgement on the merits of the case, but rather on issues such as *lis pendens*.

[3] Published in *Rivista di diritto internazionale privato e processuale*, 2002, issue 3, p. 708.
[4] Art. 27 Reg. (CE) No 44/2001; Art. 29 Reg. (EU) No 1215/2012.
[5] According to Art. 384 co. 4 c.p.c. the *Corte di cassazione* may reject the challenge and confirm the appealed decision but at the same time modify the reasoning of the decision.

2) Cass. civ., 23.05.2008, n. 13425, sez. I [6] (7)

The *Corte di cassazione* receives a challenge against the decision of the *Corte d'appello* of Milan, which granted an opposition to an *exequatur* of a German judgement. The opposition to the *exequatur* was raised under Art. 34(2) Reg. (EC) No 44/2001 (8). The debtor based its opposition asserting that it did not receive regular service of the original claim and that, considering its failure to appear before the German courts, such decision could not be recognized. The *Corte d'appello* of Milan granted such opposition, stating that service of the original claim, as resulted from the complaint, had been made in a place of *previous*, but not *actual*, *seat* and that the signature over the receipt was not readable, making it impossible to ascertain who received the documents. The German creditor presented a motion to challenge such decision and the *Corte di cassazione* grants such challenge. In particular, the Court states that the appeals court mistakenly applied Italian law in order to ascertain whether the original claim had been served regularly, while, as a matter of principle and commonly accepted in jurisprudence, in such cases courts must apply the law of the Member State in which the proceedings took place and the judgement was issued. For this reason, the Court annuls the decision of the *Corte d'appello* and refers the parties to the same court (9) for a renewed decision on the *exequatur*, this time based on such reasoning.

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[6] In another case decided by the *Corte di cassazione*, 9.5.2008, no. 11628, the Court decided the issue on the adequacy of the time limits to enable the defendant to arrange for her/his defense under the Brussels Convention 1968. In such decision, the Court stated that, according to the jurisprudence of the European Court of Justice, the scrutiny on such issue must take into account the all the relevant factual circumstances, including the overall relationship between the plaintiff and the defendant and facts or particular circumstances occurred after the service of the document that introduces the proceedings. After the annulment of the decision that refused recognition of a Dutch judgement, the *Corte d'appello* of Milan, in the judgement dated 26 April 2010 (published in the *Rivista di diritto internazionale privato e processuale*, 2010, issue 3, p. 764 ff.), decided to grant recognition to such judgement on the basis that, even if the regular service of the introductory document occurred only 26 days before the hearing, there had been another service 5 months prior. Such prior service occurred in a time sufficient for the defendant to organize its defense and the fact that the defendant knew the content of such document was also indirectly proven from the fact that the same defendant started another proceeding for the same object and against the same party before the Italian courts.

[7] Published in *Rivista di diritto internazionale privato e processuale*, 2009, issue 1, p. 137.

[8] Art. 45(1)(b) Reg. (EU) No 1215/2012.

[9] According to Italian civil procedural law, when the *Corte di cassazione* grants the challenge and annuls the decision of lower courts, it may either – in limited cases (Art. 384 c.p.c.) – decide the claim itself or refer the parties to the same court – but different judges – for a decision of the claim on the basis of the principle of law stated in the judgement of the Court. The difference between these two sets of cases, to put it simply, lays on the fact that the claim shall be decided with or without further examination of the factual background of the claim. This conclusion is correspondent to the accepted practice of the Court, being it that the *Corte di cassazione* declares its incompetence to evaluate issues pertaining to the factual background of the case. Unless, but such distinction falls outside the scope of this footnote, it is the factual background of procedural issues or

3) Cass. civ., 01.07.2009, n. 15386, sez. un. ([10])

The case examined by the *Corte di cassazione* concerns the recognition in Italy of a general order to pay costs ([11]) issued by the High Court of London, on which the winning party filed a lawsuit for quantification of said costs. Firstly, the Court decided on the issue of the court first sized, stating that only the "notice of commencement" ([12]), and not the "bill of costs" ([13]), is a document able to start the proceedings aimed at the issuance of an enforceable decision relevant for the purposes of determining the court first seised under Art. 30 Reg. (EC) No 44/2001. Secondly, the Court decided on the issue of recognition of an English order to pay costs for an indeterminate amount, under Art. 33 Reg. (EC) No 44/2001, stating that said order is automatically recognized in any Member State in which it is invoked, without any special procedure being required. In fact, on the one hand, the foreclosure provided for by Article 91 of the Code of Civil Procedure does not apply with respect to foreign proceedings at the end of which an order to pay costs for an indeterminate amount has been issued in accordance with the procedural rules of the relevant foreign legal system, and, on the other hand, the principle whereby the procedure for detailed assessment of costs before the cost judge – which is provided for by English law – constitutes the sole procedure for the determination of said costs applies only within the English legal system.

motions to be examined, so that the facts underlying such issue lie within the boundaries of the courts and may be ascertained via a direct contact with the documents and acts filed alongside with the motion to the Court (in other words, a distinction is made between the factual background of substantial issues and the factual background of procedural issues). Such rule – on the preclusion of the Court to evaluate the factual background of the claim – is typical of the *Corte di cassazione* and limited to the proceedings before such judicial body.

[10] Published in *Rivista di diritto internazionale privato e processuale*, 2010, issue 2, p. 447.

[11] In these cases, in fact, the judge rules on the obligation to reimburse expenses and postpones to a later date the quantification of the amount due under that title ("order for detailed assessment of costs"). The parties can then promote a specific procedure ("detailed assessment of costs proceedings"), within which, if they do not reach an agreement, they ask the judge to settle the amount due. The characteristic feature of the present case lies in the fact that both parties have decided to take legal action in order to obtain the quantification of legal costs. The winning party has, in fact, initiated the *detailed assessment of costs procedure* provided by Part. 47 of the English civil procedure rules. The other parties, instead, decided to take legal action in Italy, proposing an application to quantify the judicial costs of the proceedings, which, as decided by the English court, they were obliged to reimburse to the third party they had brought before the court.

[12] Pursuant to which a party summons the other party that lacking any objection the court will issue the requested enforceable order.

[13] Which is a mere note of costs that the party sends to the other to notify the amount that it deems fair in order to reach an agreement.

4) *Corte d'appello* of Milan, 26.04.2010 ([14])

Pursuant to Art. 27 no. 2 of the Brussels Convention 1968, a term of five months for appearance of the defendant seems to be more than sufficient. This consideration is further confirmed by the current technological means of communication, which make it extremely easy to find an attorney abroad and to transmit documents.

5) Cass. civ., 06.10.2010, n. 20761, sez. I, ord. ([15])

The *Corte di cassazione* confirms recognition of a judgment issued by the Court of Edinburgh (Scotland). In more detail, the applicant, with a single ground of appeal, complains on the violation or misapplication of Art. 34 Reg. (EC) No 44/2001 for not having the Italian courts, competent for the *exequatur*, considered the lack of valid service of an endoprocedural act. The service concerned the communication from the court's registry office aimed at the parties (the party left without a lawyer was invited to inform the court's registry office of its intention to continue the same proceeding within 14 days from service, under penalty of automatic abandonment of the proceeding); communication that the same party, however, declares to have received, although from a court bailiff allegedly incompetent. The Court states, firstly, that, notwithstanding formal invalidity of the service, substantial knowledge of the document must be taken into account; secondly, the Court also clarifies that the ground for refusal referred to in Art. 34 Reg. (EC) 44/2001 cannot even be invoked since, in the case under consideration, the provision in question refers to «the document which instituted the proceeding» or to «an equivalent document» and not to an endoprocedural act such as the one involved in this decision.

6) Cass. civ., 14.06.2011, n. 12963, sez. III ([16])

The *Corte di cassazione* decides upon a challenge against the decision of the competent court that granted the opposition to enforcement via Art. 615 c.p.c. Said opposition was raised against two parallel enforcement proceedings for expropriation (one having as an

[14] Published in *Rivista di diritto internazionale privato e processuale*, 2010, p. 764.
[15] Available on *DeJure*.
[16] Published in *Rivista di diritto internazionale privato e processuale*, 2012, issue 2, pp. 424-425.

object movable goods and the other having as an object unmovable goods) ([17]), for the enforcement of the same pecuniary claim, that were based on a German authentic instrument. Such authentic instrument contained a contract, concluded before a notary, for grant of a collateral security in the form of a lien (*Grundschuld*) with the stipulation that the debtor took on the obligation to pay the sum equivalent to the value of the good object of the lien. The opposition was based on the ground that such authentic instrument was not in compliance with the conditions set forth by Art. 474 cod. proc. civ. for enforcement proceedings based on authentic instruments. In particular, it was stated that the stipulation regarding the responsibility for payment was merely declaratory and did not contain an actual obligation. In other words, it was not possible for the creditor to purse enforcement in Italy since, under Italian procedural law, authentic instruments have to comply with certain requirements to be directly enforceable (contain an obligation for payment), which were not met in the case at stake. In fact, as it was asserted by the debtor filing the opposition, such contract was only enforceable under German procedural law. The *Corte di cassazione* grants the challenge and annuls the decision on the opposition, thus rejecting the opposition to enforcement proceedings raised by the debtor (as a consequence, the creditor may resume enforcement). The reasoning of the Court is based mainly on the law applicable to the enforcement of authentic instruments under Art. 50 of the Brussels Convention ([18]). In particular, the *Corte di cassazione* states that under such rule the law applicable to the enforceability issues of the authentic instruments is the law of the Member State in which such instrument was issued, and not the law of the Member State in which enforcement is sought. Thus, with regard to the case at stake, the Court states that the issue must be solved according to §794.1 no. 5 of the German ZPO (in the version prior to 1999), and it consequently grants the enforceability of the contract, and enforce the pecuniary claim. Indeed, the expert witness produced in the proceedings stated that under such rule of German law the mere declaration of a debt contained in an authentic instrument (under

[17] According to Art. 484 c.p.c., in principle the creditor may, at its own discretion, take advantage of multiple procedures for the expropriation of the debtor's goods. However, the debtor may file an opposition to the court in order to limit the enforcement proceedings to one expropriation procedure that the creditor chooses or, failing such choice, the one that the judge chooses at its own discretion. This provision sets the right of the creditor to avail her/himself of multiple procedures for the expropriation (foreclosure and subsequent forced sale) of the goods of the debtor, in order to satisfy her/his pecuniary claim. The provision does not limit its applicability to certain expropriation procedures, meaning that the creditor may start multiple expropriations of the same kind (e.g. expropriation of movable goods) or of different kind (e.g. expropriation of movable and unmovable goods). The right of the debtor to successfully file an opposition to multiple expropriation procedures depends on the fact that the sum of the value of the goods object of those procedures is excessively exceeding the sum object of the creditor's pecuniary claim.

[18] Art. 57 Reg. (EC) No 44/2001; Art. 58 Reg. (EU) 1215/2012.

prescribed formalities) is a sufficient requirement to pursue enforcement on the basis of the authentic instrument.

7) Cass. civ., 5.04.2012, no. 5487 ([19])

The *Corte di cassazione* receives the challenge against the *exequatur* of a Spanish judgement that declared the three partners of a company liable for a sum of money that the company owed to a third party. As a reason for refusal of recognition, the debtors stated that the Spanish judgement was issued in violation of fundamental principles of procedural law, under the public policy ground for refusal (Art. 34 Reg. (EC) No 44./2001), as the Spanish court did not explain with a clear and exhaustive reasoning the legal basis for their liability towards the third party creditor. It is, however, from the motion of the debtors themselves that the Supreme Court finds that the Spanish Court applied rules contained in Spanish company law, that mirror rules on liability of company partners contained in Italian company law and, therefore, rejects the motion and confirms recognition of the Spanish judgement for the payment of a sum of money.

8) Cass. civ., 17.01.2013, n. 1164, sez. I ([20])

The *Corte di cassazione* receives a challenge against the *exequatur* of a German notarial authentic instrument containing the recognition of a pecuniary claim. The debtor filed the opposition to the *exequatur*, in the first place, on the ground that German courts suspended enforceability of said authentic instrument upon an escrow deposit. The *Corte di cassazione* rejects the complaint and thus confirms the *exequatur* of the authentic instrument. The Court, in its reasoning, states that under Art. 22 n. 5 of the Reg. (EC) No 44/2001 ([21]) no effect can be given to court decisions on the enforcement of the authentic instruments made by courts of the Member States in which the instrument was issued. In fact, Art. 22 n. 5 of the Reg. (regarding the enforcement, *inter alia*, of authentic instruments), sets the principle of exclusive jurisdiction of the Member State in which enforcement is or is to be sought. The Court states

[19] Published in *Rivista di diritto internazionale privato e processuale*, 2013, issue 1, p. 152.
[20] Published in *Rivista di diritto internazionale privato e processuale*, 2013, issue 4, p. 966.
[21] Art. 24 n. 5 Reg. (EU) No 1215/2012.

that, according to such principle, the abovementioned order suspending the enforceability of the foreign instrument does not affect its enforceability in Italy ([22]).

9) Cass. civ., 9.05.2013, no. 11021 ([23])

The *Corte di cassazione* decides on the challenge to the decision of the *Corte d'appello* of Milan given in the well-known *Gambazzi* case ([24]), following the decision of the European Court of Justice, 2 April 2009, in case C-394/07. The Supreme Court upholds the judgement of the Appellate Court that granted recognition to an English judgement, in application of the principles laid down in the decision of the EUCJ. The Court states that it must be excluded that the measure of "exclusion" of the defendant from the proceedings decided by the English courts entailed the manifest and disproportionate violation of the defendant's right to a fair hearing (a ground for refusal, under public policy of the Member State of enforcement), on the basis of several circumstances of the case. In particular, the Court finds that the order of exclusion under the *contempt of court* rule had been issued again the defendant for default in observing provisional measures against which the defendant had had plural chances to raise arguments, also including the jurisdictional issue of the English courts. Thus, after having argued against the provisional measures, it cannot be stated that the defendant was prevented from a fair hearing in relation to his exclusion from the proceeding.

10) Cass. civ., 07.05.2014, n. 9862, sez. III ([25])

The *Corte di cassazione* states that the decision ordering the payment of interest on arrears, which indicates only the starting date and not also the nature and extent of them, is contrary to the principle of effectiveness of the European Union law, given that such judgement, pursuant to Art. 49 Reg. (EC) No 44/2001, is enforceable "only if the amount

[22] The Court, in its reasoning, states also that the extent of the control of the court – before which the opposition to the *exequatur* is filed – is limited to the enforceability of the authentic instrument and does not cover "extrinsic" events subsequent to the apposition of the executive formula. In other words, The aspects that are external to said instrument and that occurred after it has been declared enforceable in the Member State of issuance should be excluded from said control, whereas they can be challenged during the subsequent enforcement stage.

[23] Published in *Rivista di diritto internazionale privato e processuale*, 2014, issue 2, p. 393.

[24] See also *Corte d'appello* of Milan, judgement 24.11.2010, published in *Rivista di diritto internazionale privato e processuale*, 2011, p. 1057.

[25] Published in *Rivista di diritto internazionale privato e processuale*, 2015, issue 1, p. 175.

of the payment has been finally determined by the courts of the Member State of origin". Therefore, the *Corte di cassazione* clarifies that the decision of the Italian *Corte d'appello* of Turin that only indicated the effective date of such interests without specifying their nature and their amount must be annulled and a new decision issued with the indication of the nature and amount of the interests.

11) Corte d'appello of Bologna, 13.05.2014 ([26])

In a claim for the opposition to the *exeqatur* decree of an English judgement order issued against a party that failed to appear before the English Court, the *Corte d'appello* of Bologna declares that the foreign judgement shall be given recognition since the lack of appearance and the procedural consequences of such conduct are not in violation of Italian public policy procedural principles, since such violation would occur only in case the party is objectively barred from appearing before the court against its will. On the contrary, the Court states that it is not possible to infer a violation of fundamental principles of procedural law from the fact that the lack of participation of the defendant to the proceeding has consequences such as that the judge needs not to examine the merits of the case to uphold the request of the plaintiff, when such lack of participation did not depend on an objective obstacle and the defendant was served with the document that instituted the proceeding, a fact from which the Court inferred that it was the defendant's choice to abstain from appearing before the English Court. Furthermore, the Court finds that the recognition of the English judgement order, in the case at stake, is in line with the jurisprudence of the European Court of Justice, 6 September 2012, in cause C-619/ 10, *Trade Agency*, since the debtor had never argued that it was prevented from challenging the judgement order.

12) Cass. civ., 16.05.2014, n. 10853, sez. II ([27])

The *Corte di cassazione* has to establish the *res judicata* effect of a German judgment issued on matters relating to the same dispute but on a different claim than the one brought before Italian courts. In fact, the first claim, brought before German courts, concerned the request for damages for the liability relating to the contract of sale of a building located in Italy. In particular, the plaintiff asked the Court of Munich firstly to ascertain his property

[26] Published in *Rivista di diritto internazionale privato e processuale*, 2015, issue 2, p. 394.
[27] Published in *Rivista di diritto internazionale privato e processuale*, 2015, issue 2, p. 440.

over the building and, in any case, to award damages for the loss of the property of the building. The German Court stated that it had no jurisdiction over the first claim and rejected the request for damages, stating that the contract of sale was, in fact, simulated, and thus the plaintiff could not ask damages for the property of something he was never owner of (since, again, the fictitious nature of the contract). Such judgement became final and the *res judicata* objection was raised in the Italian proceeding in which the same plaintiff asked the court to ascertain the invalidity of the same contract of sale. The *Corte d'appello* of Ancona stated that the German judgement, under Art. 34 of the Italian Code of Civil procedure, could not have a *res judicata* effect over the issue of the invalidity of the contract for its fraudulent nature, since Art. 34 dictates that an issue is covered by the objective scope of the *res judicata* only if a party explicitly claims (or the law explicitly requests) that the court adjudicates such issue. The *Corte di cassazione* annuls the judgement of the Appellate Court on this point, stating that the objective scope of the *res judicata* cannot be identified using the procedural rules of the law of the Member State in which the judgement must be recognized, but rather under the law of the Member State in which the judgement was issued. Therefore, the Supreme Court annulls the decision and refers the case to the same Appellate Court for a new decision on the matter, in line with the principle that application must be given to the procedural law rules of the Member State in which the judgement had been issued.

13) Cass. civ., 16.07.2014, n. 16272, sez. I ([28])

The *Corte di cassazione* receives a challenge against the judgement of the *Corte d'appello* of Turin, which confirmed the *exequatur* of a Spanish decision. The opposition to the exequatur was filed on the basis of Art. 34(2) Reg. (EC) No 44/2001 ([29]), in relation to the inadequacy-unfairness of two procedural deadlines: one for the appearance of the defendant before the court, set in 20 days, and another for the challenge of the final decision by the losing party, set in 5 days. The *Corte di cassazione* rejects the complaint and confirms the *exequatur*. The reasoning underlying such decision in focused on the extent of the power of the *Corte di cassazione* to receive complaints on the merits of the case, according to Italian civil procedural law. Usually, the Court shall not judge on the existence or the interpretation of the *facts* of the case and should limit its scrutiny to the reasoning adopted by the judge on such facts ([30]). Regarding the case at stake, relevance was given to Art. 34(2) Reg., where it

[28] Published in *Rivista di diritto internazionale privato e processuale*, 2015, issue 3, p. 629.

[29] Art. 45(1)(b) Reg. (EU) No 1215/2012.

[30] Proceedings before the *Corte di cassazione* are regulated by Arts. 360 ff. c.p.c. The Court may receive complaints as to procedural issues on the jurisdiction or on the competence of the court or procedural issues

attributes relevance to the fact that time limits are set "*in such a way as to enable [the defendant] to arrange for his defence*". Lower courts had rejected the opposition to the *exequatur* in that regard. In rejecting the challenge, the *Corte di cassazione* states, firstly, that an evaluation on the adequacy of procedural time limits (under such period of Art. 34(2) Reg.) concerns *facts*, and thus falls outside of the competence of the Court and, secondly, that, in any case, the challenged judgement has reasonably and adequately motivated on the issue of adequacy of time limits ([31]).

relating to nullity of acts of the proceedings (Art. 360 no. 1, 2 and 4 c.p.c.), thereby included the lack of reasoning (Artt. 360 no 4. and 112 c.p.c.), or as to the merits of the case, regarding the application or the interpretation of the law Art. 360 no. 3 c.p.c.). Furthermore, the Court may receive a complaint on the reasoning of the judgement only if the judge "failed to address a fact that was indispensable for the outcome of the decision" (Art. 360 no. 5 c.p.c.).

Regarding the judgement on the factual background of the matter, in all the other cases, apart from the one under no. 5 of Art. 360 c.p.c., the parties are precluded to petition the Court on the ground of existence or interpretation of the facts relating to the merits of the case. Under Art. 360 no. 5 the parties may petition the *Corte di cassazione* on grounds relating to the reasoning of lower courts, however with strict limitations. More precisely, no. 5 of Art. 360 has been interpreted as allowing a complaint only if the party indicates clearly which is the point of fact that has not been addressed by the court, when such fact has been discussed by the parties during the proceedings and how the decision on such fact is indispensable for the outcome of the decision.

To better understand, the jurisprudence of the *Corte di cassazione* has compared this ground for complaint with the one under no. 4, regarding the lack of reasoning; see the following passage from a judgement of the Grand Chambers, 07.04.2014, no. 8053: "Therefore, following the 2012 reform, the control on the reasoning with reference to the parameter of *sufficient reasoning* disappears, but there is still the control on the existence (in terms of absolute omission or mere appearance) and consistency (in terms of irreducible contradiction and manifest illogicality) of the reasoning, i.e. with reference to those parameters that determine the conversion of the defect of motivation into a defect of violation of the law, provided that the defect emerges immediately and directly from the text of the contested judgment. The check provided for by art. 360 c.p.c., new no. 5), concerns, instead, the failure to examine a historical fact, main or secondary, the existence of which emerges from the text of the judgment (relevance of the textual datum) or from the procedural acts (relevance also of the extra-textual datum), which has been the subject of discussion and is decisive (i.e. if examined would have determined a different outcome of the dispute). The omitted examination of evidence elements, as such, does not integrate the omitted examination of a decisive fact provided for by the rule, when such historical fact has been taken into consideration by the judge, even if s/he has not given account of all the evidence abstractly relevant".

[31] In particular, according to what has been reported in the decision of the *Corte di cassazione* here considered, in the case at stake the *Corte d'appello* of Turin stated that, firstly, the 20-days time limit was to be considered reasonable and adequate if compared to similar provisions of Italian civil procedural law (in particular, Art. 641 c.p.c.). Secondly, the 5-days time limit in order to challenge the final decision was already known to the defendant, since the parties opted for the application of Spanish law to regulate their controversies. For these two reasons, opposition under Art. 34(2) Reg. (EC) No 44/2001 was rejected. This has been qualified, by the *Corte di cassazione*, an evaluation of facts and, in any case, a reasonable reasoning.

14) Cass. civ., 24.11.2015, n. 23974, sez. I ([32])

The *Corte di cassazione* decides on a claim for the suspension, under Art. 46 Reg. (EC) No 44/2001, of the proceeding for the recognition of a French judgement. Such request for stay of the proceeding was put forward on the basis of the possibility that the other party (the creditor) became insolvent and this would later endanger a claim for restitution of the amount to be paid in execution of said French proceeding. The motion to stay proceeding was rejected by the *Corte d'appello* of Bologna, on the basis of the fact that (*i*) it was not joined with a request to revoke the *exequatur*, (*ii*) the French judgement had, in the meanwhile, become final and (*iii*) no grounded reasons for the stay had been put forward with the exception of the possible insolvency of the creditor. The *Corte di cassazione* confirms the reasoning of the Appellate Court and rejects the complaint, stating that the request to stay proceeding may not be the only object of a claim against the recognition or enforcement of a foreign judgement under the Brussels regime, but such motion/request must be joined to a claim for refusal of recognition (i.e., under Reg. (EC) No 44/2001, a claim to have the *exequatur* revoked).

15) Cass. civ., 18.11.2016, n. 23561, sez. VI - 1, ord. ([33])

The proceedings before the *Corte di cassazione* in the case at stake are concluded by declaration of extinction on the basis that the Plaintiff waived to its complaint (according to Art. 390 c.p.c.) ([34]). Nonetheless, it is of interest to consider this decision in light of the reasoning of the Court. At first, the complaint was brought as a challenge to the decision that confirmed the *exequatur* of a Belgian judgement. The debtor grounded its opposition to the *exequatur*, *inter alia*, on the fact that the creditor did not prove to have served him with the original claim in a timely manner such as to guarantee the defendant sufficient time to

[32] Published in *Rivista di diritto internazionale privato e processuale*, 2017, issue 2, p. 395.

[33] Available on *DeJure*.

[34] According to such rule, the party who challenged a judgement before the *Corte di cassazione* may waive its complaint with a writ that must be served upon the other parties. The Court, according to Art. 391 c.p.c., decides on the extinction with an ordonnance to be issued in chambers (without a hearing). In its decision the Court may charge the expenses of the proceedings on the party that waived its complaint unless the other parties endorsed the waiver (Art. 391 co. 2 and 4 c.p.c.). It may be of interest to note that the proceedings before the *Corte di cassazione* may be extinguished only upon 'waiver', while proceedings before lower courts may be extinguished also – according to the general rules in Arts. 306 ff. c.p.c. – upon 'inaction' of the parties, meaning that a party did not carry out an act deemed fundamental for the progression of the proceedings.

"arrange for his defence" (Art. 34(2) Reg. (EC) No 44/2001) ([35]). The *Corte d'appello* of Milan rejected the opposition on the grounds that, firstly, the opposing party raised such objection belatedly, only at the end of the proceedings, just before closing statements and, secondly, the adequacy of the time limit was implicitly confirmed by the fact that the opposing party itself appeared before the Belgian courts. In its reasoning, the *Corte di cassazione* states that the challenge to such judgement could have been rejected – but the proceedings have been declared extinct – on the ground that the Plaintiff complained about only one of the two reasonings adopted by the *Corte d'appello* of Milan (the belated objection issue). In fact, according to the accepted jurisprudence of the Court, if a decision is based on two (or more) different but autonomous grounds and they are not entirely challenged, the complaint before the *Corte di cassazione* must be declared inadmissible and thus the challenge is rejected and the challenged decision is confirmed ([36]).

16) Cass. civ., 18.01.2017, n. 1239, sez. VI, ord. ([37])

The *Corte di cassazione* confirms the exequatur of a German judgement. The complaint against the recognition of the foreign judgement was primarily concerned with the violation of Art. 34 (1) of Regulation (EC) No 44/2001 as regards the principles of procedural public policy due to the lack of an express and specific reasoning on a preliminary motion on witness evidence. The Court considers the reason groundless as, in such case, the lack of an express reasoning on the denial does not constitute a violation of Italian public policy. It is stated that the reason for the denial of a preliminary motion does not necessarily need to be express and specific, since the same rationale itself, on the merits of the dispute, may serve as implicit denial of the preliminary motion.

[35] Art. 45(1)(b) Reg. (EU) No 1215/2012.

[36] This principle can be found in the decision Cass. civ., sez. un., 29 March 2013, no. 7931, in which the Court stated the following: if the decision challenged before the *Corte di cassazione* is based on a variety of grounds, which are deemed as autonomous one to the other, and each one of them is sufficient to form the basis for the challenged decision, the complaint that failed to address all the grounds of the challenged decision must be declared inadmissible (and, thus, the challenge must be rejected).

[37] Published in *Rivista di diritto internazionale privato e processuale*, 2017, issue 4, p. 1042.

17) Cass. civ., 12.04.2017, n. 9350, sez. III ([38])

The *Corte di cassazione* receives a complaint against the *exequatur* of a decision of the German *Landgericht* of Hanau. Such controversy [hereinafter also "(*b*)"] originated from another one [hereinafter also: "(*a*)"], between the same parties. In the first previous litigation (*a*), the creditor obtained a decision by a German court that condemned a German notary to issue an authentic instrument for the payment of a certain sum of money (monetary credit). Such instrument was then enforced in Italy. Afterwards, the debtor filed both an opposition to the *exequatur* of the authentic instrument before the Italian courts (rejected) and then, starting the second litigation (*b*) in Germany between the same parties, filed a claim to have the authentic instrument revoked. The German Court granted the request (*b*) of the debtor and declared that, since the payment under such authentic instrument had been already satisfied ([39]), the official copy of the authentic instrument ought to be handed back to the notary. The debtor obtained the *exequatur* of such decision in Italy, hereby challenged before the *Corte di cassazione*.

The opposition to the *exequatur* (*b*) was based on Art. 22(5) and Art. 35 of the Reg. (EC) No 44/2001 ([40]). In particular, the creditor stated that the principle of exclusive jurisdiction over enforcement proceedings of the Member State "in which the judgment has been or is to be enforced" should preclude any party to file, before the courts of the Member State in which the authentic instrument has been issued, a claim whose object is identical to an opposition to enforcement proceedings; opposition that should have been filed before the courts of the Member State in which the authentic instrument is enforced ([41]). The creditor also stated that, according to Art. 35 Reg. (EC) No 44/2001, a decision in violation of such principle should not be recognized. In the case at stake, the second claim brought before the Court of Hanau was based on the fact that the obligation had already been paid (and, accordingly, the authentic instrument should have never been handed over to the

[38] Published in *Rivista di diritto internazionale privato e processuale*, 2018, issue 1, p. 145.

[39] From the text of the hereby mentioned decision of the *Corte di cassazione* it is possible to infer that the decision of the Court of Hanau was based on the fact that the payment had been satisfied even before the notary was forced to deliver the authentic instrument, and not on the fact that the payment has been satisfied between the time in which the authentic instrument was delivered and the beginning of the enforcement proceedings in Italy. It is important to underline this distinction, as it will be clearer below in the text.

[40] Art. 24(5) and 45(1)(e)(ii) Reg. (EU) No 1215/2012.

[41] More in detail, according to Italian civil procedural law, an objection to the validity of the enforcement title may be raised with the opposition to enforcement under Art. 615 c.p.c. For example, such is the case in which the obligation has been satisfied before commencement of enforcement proceedings. However, it must be noted that if the obligation had been satisfied during the course of civil proceedings and the debtor failed to raise such objection, s/he is precluded to do so afterwards, in light of the rules on preclusion that govern the *res judicata*.

alleged creditor from the beginning, and it had to be handed back, thus preventing enforcement proceedings) and, in the view of the creditor, such ground should have formed the object of opposition to enforcement proceedings under Art. 615 c.p.c. before Italian courts.

The *Corte di cassazione* rejects the challenge and confirms the *exequatur*. The Court states, firstly, that the principle contained in Art. 22(5) Reg. (EC) No 44/2001 should be interpreted, according also to the decision of the Court of Justice, 4 July 1985, case C-220/84, AS-Autoteile Service GmbH vs. Mahlè ([42]), in a way that the competent Member State has jurisdiction not only with regard to the enforcement procedure per se, but also for those procedures (typically challenges and oppositions) that express a judicial power to ascertain the right to proceed to enforcement and its extent. Secondly, the Court states that, however, the claim filed before the German Court was not dealing with the right to proceed to enforcement *itself* ([43]), nor it was – as asserted by the creditor – an opposition to enforcement identical to the one regulated by Art. 615 c.p.c. ([44]). In fact, the Court states that in principle

[42] Said judgement, referred to by the *Corte di cassazione* in its reasoning, dealt with Art. 16(5) of the Brussels Convention 1968, substantially identical to Art. 22(5) Reg. (EC) No 44/2001. In the case addressed by the CJEU, a German court raised the following question: if a credit that falls under the jurisdiction of another Contracting State may be presented as an objection to enforcement procedure in the forms of an opposition to enforcement (under §767 of the German Code of Civil Procedure). As stated by the CJEU, "that question concerns the point whether, in enforcement proceedings, a party may raise an objection based on a debt over which the courts of the Contracting State in which enforcement is to take place would have no jurisdiction if an independent action were brought on that debt". In its answer to such question, the CJEU reads Art. 16(5) of the Convention in light of Art. 2 and states that a party may not invoke the principle of exclsive jurisdiction in enforcement matters to force the general rules on allocation of jurisdiction set by Arts. 2 ff. of the Convention itself. If such principle is applicable to the case hereby commented, decided by the *Corte di cassazione*, is dubitable. In fact, one thing is to assert that a claim may not be brought, under Art. 22(5) Reg. (EC) No 44/2001, before the courts of the Member State where enforcement is sought by way of objection because the same claim would fall under the jurisdiction of another Member State; another thing is to assert that, under Art. 22(5) Reg., the Member State in which the title is formed is not prevented to receive a claim that could have been brought before the courts of the Member State where enforcement is sought by way of opposition to enforcement.

[43] It could be possible to assume – but the point is not directly addressed in the decision of the Court – that the conclusion would have been different if the claim of the debtor had been based, for example, on the fact that s/he paid the due amount *after* the authentic instrument was released to the creditor. In this scenario, in fact, the opposition would have had as object the right to proceed with enforcement (more precisely, it would have had as object the actual existence of the pecuniary claim itself, which is prejudicial to the existence of the right to proceed with enforcement).

[44] It could be noted that, an opposition motivated on the basis of the enforceability of the title, and not on the basis of the absence of the right to proceed with enforcement, would take the forms of an opposition under Art. 615 c.p.c. In fact, an opposition to enforcement under Art. 615 c.p.c. has a variety of possible grounds, partly relating to the right to proceed with enforcement, partly relating to the enforceability of the title and partly relating to the possibility to put under foreclosure certain goods of the debtor. In general, Italian doctrine states that the request that the debtor presents to the judge under Art. 615 c.p.c. is to declare that the enforcement proceedings are, in some way, unlawful (while with a motion under Art. 617 c.p.c. the debtor

it would be illogical to assume that the rule on exclusive jurisdiction prevents the Member State in which enforcement is sought to recognize a decision, rendered by the courts of the Member State in which the title was formed, that deprives the title of its enforceability ([45]). For these reasons, the opposition to *exequatur* is rejected and recognition is given to the German judgement that orders to hand back the authentic instrument (*b*), with the effect to deprive the creditor with the title to proceed with the enforcement proceedings (*a*).

18) Cass. civ., 20.02.2018, n. 4025, sez. III ([46])

The *Corte di cassazione* receives a challenge against the ruling of the lower courts ([47]) that granted an opposition to enforcement of a German judgement. Such opposition was filed by the debtor under Art. 615 c.p.c. and grounded on the fact that the German judgment was a judgement to order payment (*sentenza di condanna*) with enforcement suspended *under the condition that the creditor performs, first, another payment* (so-called "*sentenza di condanna condizionata*" or "*condizionale*") ([48]) and that, as such, could not be enforced without proof of

would seek to ground her/his claim on the basis of procedural formal irregularities or cases of nullity of the proceeding or its acts). However, it wouldn't be possible for a debtor to contest the validity of the title itself (but only its enforceability); for example, when dealing with judicial titles, its validity may be contested only via challenges provided by the procedural law.

[45] The whole reasoning of the decision, albeit the distinction is not really dealt with sufficiently, is based on the distinction between the object of opposition to enforcement under Art. 615 c.p.c. and the proceedings before the Court of Hanau with which the debtor asked the court to recognize that the pecuniary claim did not exist, and that, accordingly, the authentic instrument should have not been handed over to the creditor in the first place.

[46] Availabe on *DeJure*.

[47] The proceedings may be summarized as follows. The *Tribunale* of Belluno received an opposition against enforcement under Art. 615 c.p.c. and granted the remedy to the opposing debtor. The creditor filed a challenge by appeals to the competent *Corte d'appello* (of Venice), which in turn declared the challenge inadmissible for it lacked reasonable probability to be granted, under the provision of Art. 348 *bis* of the Italian Code of Civil Procedure. Such decision of the Court, taken in the form of an ordonnance, allows the challenging party to file a complaint before the *Corte di cassazione* against the decision of first instance. The ordonnance itself (which constitutes the decision of second instance) may be challenged (before the *Corte di cassazione*) only in limited cases, such as those in which the ordonnance itself violates rules of procedural law. Thus, the mechanism set forth by Art. 348 *bis* c.p.c. allows the courts of appeals to reject unmerited challenges but safeguards the party's right to challenge the decision of first instance on its merits.

[48] This particular type of judgement is not explicitly regulated by the law, but generally admitted by jurisprudence. It is therefore more difficult to define its characteristics and the rules that govern it. It has been stated by the *Corte di cassazione* that: "The conditional judgement, with which the effectiveness [thereby including its enforceability, *editor's note*] of the ruling is subordinated to the occurrence of a certain future and uncertain event or to the prior fulfilment of a service, is generally admitted in our legal system, as long as the judgement declares the current existence of the obligation to perform something and the fact that such performance is

the first payment. In other words, the contractual relationship between the parties was such that the debtor had to refund the creditor of a payment the latter had to perform to a third party; the debtor contested that such previous payment (from the creditor to the third party), had ever occurred or proved by the creditor. The opposition was granted; the *Corte di cassazione* rejects the challenge and confirms the opposition to enforcement proceedings. Amongst other points in its reasoning, the Court states that, first, there is no limit for the competent courts to evaluate the extent in which a foreign judgement is enforceable; second, such evaluation is an evaluation of fact and, in principle, the *Corte di cassazione* is precluded from evaluations relating to the facts of the case; and, third, even if the Court could evaluate the extent of the enforceability of such decision, in the case at stake it would conclude that the German decision cannot be enforced without previous actualization of the condition contained therein, i.e. the payment from the creditor to the third party. (1) As to the first point in the Court's reasoning, it is stated, and confirmed by the accepted jurisprudence, that the judge competent for the enforcement proceedings (i) has the power to define to which extent a foreign judgement is enforceable ([49]) in the requested Member State, and (ii) must do so according to the law of the Member State in which the title was formed. (2) As to the second point, the Court upholds the principle according to which, when the reasoning of the challenged decision is adequate and reasonable, the Court has no power to decide on the factual background of the merits of the case. (3) Lastly ([50]), the Court finds that, according to the view commonly taken in jurisprudence, it is possible to start enforcement proceedings based on a judgement to compel *subject to condition*, as if it was an ordinary judgement to compel ([51]), but only if the creditor proves that the condition has already occurred. If such

conditioned to the occurrence of a further circumstance whose existence is deferred and uncertain, so as not to require any further investigation other than that directed at verifying whether or not the aforementioned circumstance has occurred" (12.10.2010, no. 21013).

For a similar concept under German civil procedural law, see §726 ZPO *Vollstreckbare Ausfertigung bei bedingten Leistungen*.

[49] Albeit the issue is not specifically and accurately addressed in the decision of the Court, such examination carried out by the courts competent for the enforcement proceedings is focused on the enforceability of the title itself, i.e. on a procedural issue that addresses one of the preliminary conditions for a title to be enforced. Such condition is dealt by the law of each Member State. For example, in Italy, the issue of enforceability of a final judgement varies depending on the type of judgement issued (being it a judgement to ascertain, a judgement to compel or a judgement to constitute and modify).

[50] Premise: execution of the title without previous verification of the condition "payment" had been possible, under German proceedings, only with a previous intermediate claim to the German courts, at the end of which the court granted the creditor to proceed with execution without its previous payment. Such ulterior measure was explicitly granted only limited to Germany.

[51] In the Italian procedural law system a distinction is made on three types of final judgement. This distinction relates to the genre of command that the judge has the power to issue. First, there are the judgements to ascertain, with which the judge – to put it simply - declares that a certain right exists or doesn't exist, and in which structure, effects, etc. Second, there are the judgements to constrain, with which the judge compels the

preliminary issue is not proved by the creditor, the judgement cannot be enforced, and the enforcement claim must be rejected accordingly.

19) Cass. civ., 21.08.2018, no. 20841, ord. ([52])

The *Corte di cassazione* receives a challenge against the decision of the *Corte d'appello* of Trento that stated that, in light of the rule on *lis pendens* under Art. 27 Reg. (EC) No 44/2001, Italian courts did not have jurisdiction to hear a claim relating to damages for a car accident that caused the death of some of the people involved. The Supreme Court states that, first, the rule on *lis pendens* could not be applied since there was no formal identity and neither substantial identity of the parties (the latter notion being the one developed by the jurisprudence of the European Court of Justice in its judgement 19 May 1998, in case C- C-351/96, *Drouot assurances SA*: "*where there is such a degree of identity between their interests that a judgment delivered against one of them would have the force of res judicata as against the othe*r") and that, in any case, the court cannot stay proceedings under Art. 27 if the foreign proceeding was already concluded by a final judgement. In this case, the Italian court is bound to recognize the foreign judgement with the *res judicata* effect it has on the case pending in Italy: in fact, the two cases were identical as to the factual background (the car accident), but different as to the parties involved and the claim for damages (the Austrian one related to the economic loss that the damaged party suffered, while the Italian one related to the internal psychological end existential pain that the damaged party suffered from the accident and from the loss of beloved ones).

20) *Tribunale* of Syracuse, 5.12.2018, ord. ([53])

The *Tribunale* of Syracuse grants the claim for refusal of recognition of a Danish judgement on grounds of the violation of principles of public policy. The Danish judgement imposed a fine on an Italian employer for violation of the rules on social security contributions relating to its employees in a worksite situated in Denmark. The Court refused

losing party to abide by a certain rule of conduct. Third, there are judgements to constitute, with which the judge operates a direct modification on the substantial rights of the parties. For the purposes of this Report, it is sufficient to say that only the constraint judgements are deemed to be enforced with enforcement proceedings, while the other two types of judgements are not enforceable *per se*.

[52] Published in *Rivista di diritto internazionale privato e processuale*, 2019, p. 176.

[53] Published in *Rivista di diritto internazionale privato e processuale*, 2019, p. 434.

recognition on the basis of the qualification of the fine imposed by the Danish court as a criminal penalty and on the basis of the fact that such fine had been imposed in violation of the fundamental principles of legality and certainty that govern criminal matters under Italian constitutional law.

21) Cass. civ., 17.01.2019, n. 1216, sez. II ([54])

The *Corte di cassazione* receives a challenge against the *exequatur* of a Spanish judgement. The opposition was based, *inter alia*, on the fact that the debtor asserted to have never received service of the document which instituted the proceedings, according to Art. 34(2) Reg. (EC) No 44/2001 ([55]). The *Corte di cassazione* confirms the *exequatur* stating that the opposition is groundless since the debtor, defendant in the original proceedings, received a copy of the final judgement, to be issued *inaudita altera parte*, according to Spanish procedural law, and thus the condition for refusal laid down in Art. 34(2) is not met ([56]).

22) Cass. civ., 17.05.2019, no. 13412 ([57])

The *Corte di cassazione* receives a challenge against the *Corte d'appello* of Bari that granted recognition of a Rumanian judgement notwithstanding the fact that the same dispute was brought before Italian courts, that were the first seized with the matter. Albeit the decision concerns family related issues, and in particular children maintenance obligations, it applies the rule of incompatibility of judgements, as a ground for refusal of recognition. The Supreme Court, after the decision of the European Court of Justice, 16 January 2019, in case C-386/17, *Liberato*, states that the mere *lis pendens* of two proceedings does not constitute a valid ground to refuse recognition under Art. 34 Reg. (CE) No 44/2001 of another judgement by the courts of the Member State first seized of the dispute and, accordingly, rejects the challenge and confirms recognition of the foreign judgement.

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[54] Available on *DeJure*.

[55] Art. 45(1)(b) Reg. (EU) No 1215/2012.

[56] It could be noted that no mention is made, in the decision of the *Corte di cassazione*, of the last sentence of Art. 34(2) Reg. (EC) No 44/2001, which states that verification of regular and timely service of the "document which instituted the proceedings" in case of default of appearance is not necessary if the "defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so".

[57] Published in *Rivista di diritto internazionale privato e processuale*, 2020, p. 145.

23) Cass. civ., 26.02.2021, n. 5327, sez. I, ord. ([58])

The *Corte di cassazione* states that, when it comes to the enforceability of a foreign judgment, it constitutes a violation of the fundamental procedural right to evidence (public policy) (Art. 34 Reg. (EC) No 44/2001), the decision of the foreign judge who, in relation to an important asset of life (maintenance obligations arising from parentage), is based on an unquestionable reasoning (described as "apodictic"), made after having first ordered *ex officio* and then revoked the admission of DNA evidence.

24) Cass. civ., 26.04.2021, n. 10987, sez. I, ord. ([59])

A Maltese judgment may be enforced in Italy if an opposition to enforcement of an attachment (instrumental to the commencement of proceedings on the merits before the Maltese court) is pending in Italy between the same parties, since the fact that two sets of proceedings are simultaneously pending, within the meaning of Art. 27 of Reg. (EC) No 44/2001, does not in itself constitute a ground for refusal of recognition and, even if that conclusion was to be upheld, in any event there was no such reason in the present case.

25) Cass. civ., 23.07.2021, n. 21233 ([60])

The *Corte di cassazione* receives a challenge against the decision of the *Corte d'appello* of Venice that rejected the claim for refusal of recognition of two Romanian judgements (of the first and the second instance courts of Timisoara) on a monetary claim relating to a contract. The claim for refusal of recognition had been brought by the Italian debtor on the basis of the fact that a series of violations of procedural nature had occurred in the first and second instance proceedings before Romanian courts. In particular, the challenging party based its claim on the assertion that the Romanian courts, on one hand, ordered the joinder of such party (i.e. the Italian debtor) only after having already examined crucial witnesses and other evidence; and, on the other hand, declared his appeal inadmissible only because the party failed to pay court related taxes. Such challenge is refused by the *Corte di cassazione* and the decision of the lower court is confirmed, with the result of denial of the claim for refusal

[58] Published in *Rivista di diritto internazionale privato e processuale*, 2021, issue 3, p. 692.
[59] Available on *DeJure*.
[60] Currently under publication in *Rivista di diritto internazionale privato e processuale*, 2022, issue 1.

of recognition. The Supreme Court states that violation of rules of civil procedure may form a ground for refusal of recognition and enforcement only if such violations amount to violation of rules of public policy, and as such are of the kind of violations that undermine fundamental procedural guarantees; this threshold, states the Court, has not been met in the case at stake. First, with regard to the asserted violation of the right to cross-examine witnesses and argue on other pieces of evidence, the Court finds that the debtor failed to prove an actual and effective impossibility to exercise his procedural rights; i.e. he failed to prove that a belated joinder affected his possibilities to put forward his arguments for defence. Failing such proof of procedural damages, a mere formal violation of procedural rules could not amount to the violation of fundamental procedural guarantees. Second, with regard to the asserted violation of the right to appeal, the Court states that the right to appeal a decision before civil courts is not covered by the European Convention on Human Rights, which covers only such right in criminal cases; and, in any case, Member States are allowed to impose judicial taxes as a condition for admissibility of the claim or of the appeals, as long as it does not substantially preclude the party to bring its claim before the courts: in the case at stake, since the debtor failed to address a potential damage to its procedural rights (failing also to disclose the entity of such tax), it was not possible to assume a fundamental violation of procedural guarantees and conclude for a violation of public policy.

26) Cass. civ., 16.09.2021, no. 25067, ord. ([61])

The *Corte di cassazione* receives a challenge against the decision of the *Corte d'appello* of Bologna that confirmed recognition, under the Brussel I regime, of a Spanish judgement of first instance for a monetary claim relating to an employment contract. The ground for refusal of recognition put forward by the debtor regarded the fact that under Spanish law such judgement could be appealed only upon deposit of a security amount equal to the amount awarded by the judgement itself or, alternatively, of a warranty for the same amount (so-called "*consignation de cantidad*"). Such mechanism of Spanish procedural employment law was, in the arguments of the debtor, in contrast with procedural public policy principles: in violation of the principle of equality governed by Art. 3 of the Italian Constitution ([62]); in violation of the right of appeal of the European Convention on Human Rights; and in

[61] Currently under publication in *Rivista di diritto internazionale privato e processuale*, 2022, issue 1.

[62] *Article 3*: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.", official translation by the Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication.

violation of the principle of access to justice. The Supreme Court rejects the claim and upholds the decision to recognize and enforce the Spanish judgement. First, no violation of the principle of equal treatment of all citizens may be found in case of a procedural mechanism for admissibly of appeals, such as the one contained in Spanish procedural law, since it as been stated also by the Italian Constitutional Court that such mechanism tends, on the contrary, to assure an equal treatment of the parties, especially in employment-related matters, as it is aimed at reducing fictitious appeals and tends to guarantee the winning party that the judgement is enforced timely in case of rejection of the challenge. Second, there is no violation of the rule on the right of appeal since such right covers only criminal, and not civil, matters. Third, the right to appeal a decision may, according to the jurisprudence of the European Court of Human Rights, be subject to limitations as long as they are proportionate and have a legitimate objective.

Part B: Matters covered by jurisprudence and critical assessment

Notion of "decision" subject to recognition

*Cass. civ., 10.04.2002, n. 5127 [**A.1**]*

According to the case-law analyzed [**A.1**], the notion of decision to be recognized under the Brussels regime is a broad one, also including decisions that have a procedural object, such as the one on the issue of *lis pendens*, declaring which is the court first seized. This interpretation of the rule on judgements that have a binding effect on other courts under the Brussels regime must be put in comparison with the rule under Italian civil procedural law governing the same issue, according to which only judgements on the merits of the case are binding on other (Italian) courts, while judgements with a procedural object do not have, with limited exceptions, binding effects *outside of* the proceeding in which they are issued (meaning that, within the same proceeding, they are binding as far as they preclude the same court or the appellate courts to decide again on the same procedural issue that has already been decided).

Such notion of 'decision' is aligned with the one later expressed by the CJEU, 15 November 2012, case C-456/11, *Gothaer* (see §20 ff. on the interpretation of the rule of recognition of "any" judgement issued in another Member State, even those with a "procedural object").

Requirements of an Italian judgement for its circulation under the Brussels regime

*Cass. civ., 07.05.2014, n. 9862 [**A.10**]*

When an Italian judgement is issued in violation of the rules for its circulation laid down by the Brussels regulations, such judgement may, according to Italian jurisprudence, be annulled and the decision returned to the court competent to hear the merits of the case, so that another judgement is issued in compliance with the requirements for its recognitions in other Member States. This has been the case, for example, for a decision of the Court of Turin that awarded interests on a payment merely indicating their starting date, in violation of Art. 49 Reg. (EC) No 44/2001.

«Recognition must (…) have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given» ([63])

*Cass. civ., 01.07.2009, n. 15386 [**A.3**]; Cass. civ., 14.06.2011, n. 12963 [**A.6**]; Cass. civ., 16.05.2014, n. 10853 [**A.12**]; Cass. civ., 20.02.2018, n. 4025 [**A.18**]*

As regards the **subject matter covered and its limitations on the foreign *res judicata*** under the Brussels regime, the Italian *Corte di cassazione* [**A.12**] has stated that the issue is governed by the rules of procedural law of the Member State in which the decision was issued. The Italian courts, therefore, are generally precluded to apply Art. 34 Italian Code of Civil Procedure in order to ascertain the subject matter covered by the *res judicata*, but should rather decide on the issue according to the law of the Member State in which the judgement has been issued.

In line with the principle that the foreign judgement must be given the effects that it has according to the procedural law of the Member State in which it was issued, in another case the *Corte di cassazione* stated that such decision must be recognized even if an Italian hypothetical decision with the same content would be **contrary to Italian civil procedural law rules**. This principle was established [**A.3**] in relation to an English judgement on costs (order to pay costs), assertedly in contrast with the rule set forth in Article 91 of the Italian Code of Civil Procedure, according to which the only judge competent to decide on the issue of the awarding of the costs of the proceedings is the judge that decided on the merits of the case. In another case, the principle was applied in relation to the enforcement of a German authentic instrument containing a debt declaration, since under German law the mere declaration of a debt contained in an authentic instrument (under prescribed formalities) is a sufficient requirement to pursue enforcement on the basis of the authentic instrument.

In conclusion, it seems that Italian jurisprudence endorsed the principle that "**recognition must (…) have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given**". A minor exception may be found in a case [**A.18**] in which a foreign judgement subject to a conditional payment was denied enforcement in Italy without proof of the actualization of the payment set as a condition (according to a principle established by Italian jurisprudence), even if in another Member State such judgement would be enforced without proof of such payment ([64]).

[63] CJEU, 4 February 1988, case C-145/86, *Hoffmann*.

[64] The reasoning of the judgement of the Supreme Court in this case is, however, so tangled and linked to the specific circumstances of the case to be decided that it is difficult to establish if it really constitutes an exception of said principle and if such exception may reasonably be applied in other cases.

In proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced have exclusive jurisdiction

*Cass. civ., 17.01.2013, n. 1164 [**A.8**]; Cass. civ. 12.04.2017, n. 9350 [**A.17**]*

Two of the cases examined deal with the issue of the exclusive jurisdiction of the Member State of the enforcement (Art. 24 no. 5 Reg. (EU) No 1215/2012). Apparently, the application of the principle could seem, at a first glance, disharmonious, since one and the other decision state the opposite regarding recognition of a foreign decision depriving the foreign title of its enforceability. In one case [**A.8**], on strict application of the principle of exclusive jurisdiction, the *Corte di cassazione* denied recognition to a foreign judgement that suspended the enforceability of an authentic instrument under deposit of a security. Such suspension, in fact, could be asked only to the Member State in which the judgement is issued, according to the rules set forth in the Brussels regime.

However, in another case [**A.17**], the *Corte di cassazione* stated that the foreign decision that revoked an authentic instrument, depriving it of its enforceability, had to be recognized and given effect in Italy. The reasoning underlying this principle is that the decision to revoke an authentic instrument was based, in the case at stake, upon grounds different from the ones that constitute the object of an opposition to enforcement (opposition that, under the principle of exclusive jurisdiction set forth in Art. 24 of the Regulation, must be brought before the courts of the Member State in which enforcement is sought). Therefore, it seems that, according to the analyzed jurisprudence, the line that identifies the extension of the exclusive jurisdiction principle set forth in Art. 24 of the Brussels I^{bis} Regulation must be drafted according to the content of an opposition to enforcement: those grounds that fall outside such opposition, could form the object of a claim in the Member State in which the title was issued, and such decision would not violate said principle of exclusive jurisdiction. There is, however, too little case-law on this point to establish a principle.

Defendant not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence

*Corte d'appello Milano, 26.04.2010 [**A.4**]; Cass. civ., 06.10.2010, n. 20761 [**A.5**]; Cass. civ., 16.07.2014, n. 16272 [**A.13**]; Cass. civ., 18.11.2016, n. 23561 [**A.15**]; Cass. civ., 17.01.2019, n. 1216 [**A.21**]*

The case-law shows that Italian jurisprudence applies the principle of a substantial **scrutiny of the length of the time limit** for the defendant's defense, not limiting its evaluation merely to the length of the time limit, but also extending its evaluation to other elements. This tendency seems in line with the jurisprudence of the European Court of Justice. After a first decision that seemed to strictly encompass the principle of evaluation of the sole time (decision 16 June 1981, case C-166/80, *Klomps* ([65])), the Court stated the principle that "the court in which enforcement is sought may take account of exceptional circumstances which arose after service was duly effected" (decision 11 June 1985, case C-49/84, *Debaecker-Plouvier*). As an example of elements taken into account by Italian courts to sustain the adequacy of the service, other than the length of time-limit itself, one can mention the fact that the defendant actually appeared in the proceedings [**A.15**], even if service was "irregular" [**A.4**]; also, the fact that the parties knew or ought to have known the time limit (albeit, in this case, it was a deadline for challenging the final decision) since they opted for the application of such foreign law, even if such time limit was very short if compared to the one under Italian procedural law [**A.13**].

Other than the scrutiny on the length of the time limits, the courts have been invested with **other claims relating to the service of documents to the defendant**. Indicatively, foreign decisions are recognized and enforced by Italian courts. Grounds raised for refusal under this section related to non-service of the document that instituted the proceedings relating to a procedure that, according to the national law of the Member State of issuance, ought to take place *inaudita altera parte* (with service of the final decision and chance to challenge it afterwards) [**A.21**]. Another case concerned service of an act of the proceedings already commenced (i.e. not the act instituting the proceeding, but an act to be served afterwards) [**A.5**].

Fundamental procedural guarantees scrutiny for violation under public policy ground for refusal

*Cass. civ., 18.01.2017, n. 1239 [**A.16**]; Cass. civ., 26.02.2021, n. 5327 [**A.23**]; Cass. civ., 23.07.2021, n. 21233 [**A.25**]; Cass. civ., 16.09.2021, no. 25067 [**A.26**]*

[65] "3. In order to determine whether the defendant has been enabled to arrange for his defence as required by article 27, point 2, the court in which enforcement is sought must take account only of the time , such as that allowed under German law for submitting an objection (*Widerspruch*) to the order for payment , available to the defendant for the purposes of preventing the issue of a judgment in default which is enforceable under the convention".

As a matter of principle, Italian courts tend to interpret the **public policy** violation relating to procedural rights as follows: a **violation of the fundamental rights relating to defence** cannot be recognized in every failure to comply with a provision of foreign procedural law that protects the participation of the party in the proceedings, but only when, due to the significant impact of such violation, it has led to an infringement of the right of defence with respect to the entire trial, in contrast with the procedural public order referring to the inviolable principles that guarantee the right to act and resist in court. Thus, in line with European jurisprudence, the violation of the rules of civil procedural law of the Member State of enforcement cannot lie "solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seized of the dispute" ([66]) and "recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin (...) have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin" ([67]).

As an example of the application of the principle that a mere violation of procedural rules, even those who would be deemed of the utmost importance, such as the rule that imposes the courts to give a reasoning of their decision, the *Corte di cassazione* stated that there is not such fundamental violation in a case in which judgement lacked an express and specific reasoning on the denial of a preliminary motion on witness evidence [**A.16**]. The principle has been sustained also in relation to other procedural rights, for example stating that there is not such a fundamental violation when the joinder of the party against which the judgement is enforced was ordered, in the original proceedings, only after the examination of crucial witnesses and other evidence; or, similarly, such violation does not occur when the appeal of the decision is declared inadmissible in light of the fact that the party that filed the appeal failed to pay court related taxes [**A.25**]; or, lastly, such violation does not concern the case in which a party is compelled to deposit a sum equal to the amount awarded in the judgement as a condition for the admissibility of the appeal [**A.26**]. In all these cases, there is not a fundamental violation of procedural rights, since a mere obstacle (a procedural mechanism, or a procedural irregularity) does not mean *per se* that the party was fundamentally denied administration of justice.

However, in one isolated instance the *Corte di cassazione* found a violation of the fundamental procedural right to evidence, in a case concerning maintenance obligations arising from parentage in which the decision was based on a gravely insufficient reasoning,

[66] CJEU, 25 May 2016, case C-559/14, *Meroni.*
[67] CJEU, 28 March 2000, case C-7/98, *Krombach-Bamberski.*

made after having first ordered *ex officio* and then revoked the admission of crucial evidence [**A.23**].

III. European Enforcement Order Regulation (EEOR)

Part A: Case-law ([68])

The relevant case law is displayed in chronological order by way of a summary. A further critical assessment of recurring issues is provided in "Part B" of this chapter. The Reg. (EC) No 805/2004 will be cited as "EEO Reg.".

1) Tribunale of Milano, 30.11.2007

The *Tribunale* of Milano refuses to endorse with the execution formula under Art. 475 cod. proc. civ. ([69]) ([70]) a judgement with an EEO certificate issued by a German court, because the EEO Reg., prevents the courts of the Member State of enforcement to set additional conditions for the enforceability of an EEO judgement. In other words, the EEO judgement is directly enforceable in Italy without the previous endorsement with the execution formula, that would inversely be needed in case the creditor wanted to proceed with the enforcement of an Italian judgement.

[68] Where not specified otherwise, all the judgements are available alternatively on the following databases: *De Jure*, *Leggi d'Italia*, *Pluris*.

[69] Art. 475 cod. proc. civ. – *Endorsement with the execution formula*: "(1) Judgments and other measures of the judicial authority and authentic instruments by a notary or another public official, in order to be valid as a title for enforcement, must bear the execution formula, unless the law provides otherwise. // (2) The endorsement with the execution formula can only be made to the party in whose favour the measure was pronounced, or the obligation was stipulated, or to his successors, with an indication at the bottom of the page of the person to whom it is made. // (3) Endorsement with the execution formula consists of the heading «*Italian Republic - In the name of the law*» and the affixing by the clerk or notary or other public official, on the original or on the copy, of the following formula «*We command all judicial officers who are required to do so and anyone to whom it may pertain, to execute this title, the public prosecutor to assist in the execution, and all law enforcement officers to assist when legally required to do so*»." (*editor's unofficial translation*).

[70] Please refer to the introduction, under §Pending reform of the civil process, for the abrogation of the rules on the execution formula under the current reform of the civil process.

2) Tribunale of La Spezia, 7.02.2008, ord.

The *Tribunale* of La Spezia dismisses an application to stay the enforcement of two English judgements certified as EEOs in the United Kingdom. The application was filed together with an opposition to enforcement under Art. 615 co. 1 cod. proc. civ. and grounded on the fact that the credit should not have been certified as "uncontested" and, moreover, the debtor was not fully granted its right to be heard and right to a fair trial. The Court underlines that no stay or refusal of enforcement can be granted on these grounds in the Member State of enforcement provided that Art. 21 EEO Reg. prevents such courts from reviewing the judgment or the certificate as to its merits. The courts of the Member State of enforcement can stay the procceding, under Art. 23 EEO Reg., only if the debtor has applied for withdrawal under Art. 10 EEO Reg. or review under Art. 19 EEO Reg.

3) Tribunale of Milano, 23.04.2008, ord.

The president of the *Tribunale* of Milan orders the withdrawal of an EEO certificate issued by the clerk of the Court, because the check of compliance with the requirements set by Art. 3 EEO Reg. is not an administrative matter but implies a jurisdictional power and it is therefore reserved under Art. 6 EEO Reg. to the judge.

4) Giudice di Pace of Bari, 14.11.2008

The *Giudice di Pace* of Bari dismisses an application for the withdrawal of an EEO certificate (Art. 10 EEO Reg.) attached to a order for payment (Arts. 633 ff. cod. proc. civ.) issued against a French debtor. The application for withdrawal was grounded on the violation of the rules of service set forth in Arts. 4, 5 and 8 of the Reg. (EC) No 1348/2000, because the order was served in France without a French translation, without the warning that the debtor could refuse to accept the document for that reason and the list of filed documents was not attached to the order. According to the judge, the consequences of the violation of such rules must be tempered with the rule set forth in Art. 156 cod. proc. civ. ([71]), according

[71] Art. 156 cod. proc. civ. – *Procedural relevance of nullity*: "Nullity of a procedural act may not be pronounced on the ground of non-compliance with formal requirements if nullity is not explicitly provided for by the law. // (2) It may, however, be pronounced when the act lacks the formal requirements necessary to

to which nullity of procedural acts is cured if the act reached its purpose. In the case at stake, the judge derived the conclusion that the service had, in fact, reached its purpose by the fact that the French debtor has presented the application for withdrawal. It is possible to assume that the reasoning could be reported, in other words, as such: if the service had not reached its purpose, the French debtor would have not known about the existence of the same order certified as EEO against which it is filing the application for withdrawal. In the opinion of the judge, the French debtor could have filed, at best, a belated opposition to the order for payment which, under Art. 650 cod. proc. civ., may be filed by the debtor if a mere *irregularity* in the service of the order occurs.

5) Tribunale of Tolmezzo, 7.03.2009 ([72])

The *Tribunale* of Tolmezzo dismisses an opposition to the enforcement (Art. 615 cod. proc. civ.) of a German decision certified as an EEO, grounded on the lack of service of the German statement of claim and of the following procedural deeds; the Court underlines that pursuant to Art. 21(2) EEO Reg., the judge of the Member State of enforcement cannot review the EEO certificate nor the previous proceedings. The Court furthermore dismisses the opposition to the enforcement acts (Art. 617 cod. proc. civ.) grounded on the lack of Italian enforcement form on the German EEO certificate, ruling that the EEO certificate can be enforced in Italy without any further formal checks by national authorities.

6) Tribunale of Mantova, 24.09.2009 ([73])

The *Tribunale* of Mantova refuses to certify as an EEO a summary order for payment (*decreto ingiuntivo*) that has not been declared enforceable pursuant to Art. 647 cod. proc. civ. and has not been served to the debtor in accordance with the minimum rules set forth by Arts. 13 and 14 EEO Reg., because the envelope was returned with the statement "not claimed" and the date of return to the sender and without any evidence that the document was deposited in the mailbox of the debtor.

achieve its purpose. // (3) Nullity may never be pronounced if the act has achieved the purpose for which it was intended." (*editor's unofficial translation*).

[72] Published in the *Rivista dell'esecuzione forzata*, 2009, p. 477 ff.

[73] Published in the *Rivista di diritto internazionale privato e processuale*, 2010, p. 149 and p. 1168.

7) Tribunale of Monza, 1.02.2010

A debtor files before the *Tribunale* of Monza an opposition to an enforcement procedure based on a foreign judgment certified as a EEO; the debtor argues: *a*) that the claim should not have been regarded as "uncontested"; *b*) that the EEO certificate was not served at all; and *c*) that the writ of payment ("*precetto*") (Art. 480 cod. proc. civ.) ([74]) was not signed by a registered lawyer. The Court dismisses all the grounds of the opposition. Art. 21(2) EEO Reg. applies to argument (*a*) and the judge of the Member State of enforcement cannot review the conditions under which the EEO certificate has been issued; the interested party can only apply for rectification or withdrawal under Art. 10 before the court of the Member State of origin. (*b*) The Court deems that the party should have filed an opposition to enforcement acts under Art. 617 cod. proc. civ., and not an opposition to enforcement under Art. 615 cod. proc. civ. An opposition to enforcement acts, differently from the opposition to enforcement, must be filed under penalty of forfeiture within 20 days from the contested act. In the case at stake the opposition was presented later than 20 days from the contested act (which is the service of the enforcement title without additional service of the EEO certificate). (*c*) The Court furtherly rules that the parties must not be represented by registered counsels for the purposes of the service of the writ. Such latter conclusion is based on the fact that the writ is usually defined as an act previous to and outside of the enforcement proceeding itself (it is, in other words, an extrajudicial act). Thus, it does not apply the general rule of proceedings before civil courts that the parties must be represented by a registered counsel.

8) Tribunale of Modena, 8.11.2010

The *Tribunale* of Modena dismisses an application for withdrawal of an EEO certificate (Art. 10 EEO Reg.), grounded on the fact that the translation attached to the copy of the summary order for payment (*decreto ingiuntivo*) certified as EEO, previously served to

[74] Art. 480 cod. proc. civ. – *Forms of the writ*: "(1) The writ consists of a notice to perform the obligation resulting from the enforcement title within a period of not less than ten days, without prejudice to the authorisation referred to in article 482, with a warning that, failing performance, enforcement will take place. (*omissis*)" (*editor's unofficial translation*).

the debtor in compliance with Arts. 643 ([75])-644 ([76]) cod. proc. civ., did not include the indication of the court competent for the opposition to the order (while this information was included in the original version). Such irregularity was assumed to be in violation of both Art. 8 Reg. (EU) 1348/2000 and of the minimum standards set forth in Art. 17 EEO Reg. On this point, the Court finds that under Art. 18(2) Reg. such irregularity was cured by the fact that the debtor received service of the certificate in a sufficient time to prepare for its defense. According to the Court, the debtor could have verified which was the court competent to receive the opposition to the order for payment (Art. 645 cod. proc. civ.) ([77]) and that, in any case, it could have taken more time than the 50 days deadline set forth by Art. 641 co. 2 cod. proc. civ., because Art. 650 cod. proc. civ. ([78]) states that irregularities in the service of the order for payment (and this was the case) allow for a late opposition to the order. In conclusion, according to the Court, the debtor received service in a sufficient time to prepare for its defense and thus the EEO certification should not be revoked under Art. 10 EEO Reg. for violation of minimum standards of service.

9) Tribunale of Modena, 14.12.2010

The *Tribunale* of Modena withdraws the EEO certificate relating to a summary order for payment (*decreto ingiuntivo*) issued in Italy against a German company, which indicated the time limit for lodging an opposition (fifty days) and the consequences of the lack of opposition (enforcement), but not the form for lodging the opposition (summons) and the

[75] Art. 643 cod. proc. civ. – *Service of the order*: "(1) The original of the complaint and the original of the summary payment order shall remain lodged at the Registry of the Court. // (2) The complaint and the summary payment order shall be served by certified copies in accordance with Articles 137 et seq. // (3) Service determines *lis pendens*." (*editor's unofficial translation*).

[76] Art. 644 cod. proc. civ. – *Missing service of the order*: "(1) The summary payment order shall become ineffective if service is not effected within sixty days from issuance if it is to be effected within the territory of the Republic and ninety days in other cases; but the complaint may be filed again." (*editor's unofficial translation*).

[77] Art. 645 cod. proc. civ. – *Opposition*: "(1) The opposition is brought before the same court to which belongs the judge who issued the summary payment order, by means of a summons served on the claimant in the places referred to in Article 638. At the same time, the bailiff shall serve notice of the opposition to the clerk of the court so that he may note it on the original decree. // (2) Following the opposition, the proceedings are carried out according to the rules of ordinary proceedings before the court seized. (…)" (*editor's unofficial translation*).

[78] Art. 650 cod. proc. civ. – *Late opposition*: "(1) The debtor may appeal the summary payment order even after the time limit set in the order has expired if he proves that he did not have timely knowledge of it because of irregularity in service or accident or force majeure. // (2) In this case, enforceability may be suspended in accordance with the preceding article. // (3) No further opposition shall be filed after ten days from the first act of enforcement" (*editor's unofficial translation*).

need for technical representation. It may be noted that these latter profiles are the subject of general provisions dictated by the Code of Civil Procedure, respectively, in Arts. 645 and 82(2), which do not have to be contained in the summary order for payment pursuant to Art. 641 Code of Civil Procedure.

10) Tribunale of Prato, 30.11.2011

The *Tribunale* of Prato withdraws the EEO certificate attached to an Italian summary order for payment, because the claim cannot be considered "uncontested" (Art. 3 EEO Reg.) after the opposition to the order for payment under Art. 645 cod. proc. civ. ([79]) is filed by the debtor.

11) Corte d'appello of Turin, 23.02.2012

The *Corte d'appello* of Turin withdraws the EEO certificate of a summary order for payment. According to the Court, the challenge under Art. 739 cod. proc. civ. ([80]) before the *Corte d'appello* is the proper procedure in order to challenge the refusal by the issuing court to withdraw the EEO certificate (Art. 10 EEO Reg.). The Court orders the withdrawal of the EEO certificate because *a*) the service of the summary order for payment did not comply with the requirements listed under letters c) and d) Art. 14 EEO Reg. (no evidence of deposit in the mailbox of the debtor was available) and *b*) because the order for payment did not comply with the requirements set forth by Art. 17 EEO Reg. and merely stated that "the debtor is warned that within the mentioned deadline he can lodge a statement of opposition, otherwise res judicata rules will apply and the order will be enforced according to the law".

[79] Art. 645 cod. proc. civ. – *Opposition*: "(1) The opposition is brought before the same court to which belongs the judge who issued the summary payment order, by means of a summons served on the claimant in the places referred to in Article 638. At the same time, the bailiff shall serve notice of the opposition to the clerk of the court so that he may note it on the original decree. // (2) Following the opposition, the proceedings are carried out according to the rules of ordinary proceedings before the court seized. (…)" (*editor's unofficial translation*).

[80] Art. 739 cod. proc. civ. – *Challenge by the parties*: "(1) (…) A complaint against decrees pronounced by the *tribunale* in chambers, first instance, may be filed with the *corte d'appello*, which also pronounces in chambers. // (2) The appeal must be filed within ten days from service of the decree (…). // (3) Unless otherwise provided by the law, no appeal shall be made against decisions of the *corte d'appello* (…) pronounced on appeal" (*editor's unofficial translation*).

12) Tribunale of Novara, 23.05.2012

The *Tribunale* of Novara dismisses an appeal against the refusal, by the same Court ([81]), to certify a judgment as a EEO, ruling that competence lies not with the *Tribunale* but rather with the *Corte d'appello*, pursuant to Art. 739 cod. proc. civ. ([82]). Notwithstanding that, the Court adds in its reasoning that, if it were to decide on the merits of the request to certify as EEO, also judgments in default of the defendant can be certified as EEOs according to Art. 3 EEO Reg., despite the fact that under Italian procedural rules in case of default the claim is not strictly considered "uncontested". In fact, the rules on the default of the defendant dictate that the judge must consider every factual aspect of the claim as if it had been contested by the defendant.

13) Tribunale of Nocera Inferiore, 13.01.2013

The *Tribunale* of Nocera Inferiore dismisses the opposition to enforcement (Art. 615 cod. proc. civ.) lodged by the debtor in order to oppose the enforcement in Italy of an Austrian judgment by default. The opposition was grounded on the violation of the minimum standards for the service (Arts. 13 ff. EEO Reg.): the debtor argued that the claim had been served only in German language, without any notice about the possibility to refuse it, the Austrian court did not check the compliance with service requirements and only when the defendant was served the judgment translated into Italian he realized that it was a summary default judgment, which did not include any information about the possibility to contest the claim. The Court states that the court of enforcement can grant a stay of enforcement under Art. 23 only if the debtor proves that he actually challenged the decision before the courts of the Member State of origin, also by means of review under Art. 19, or requested the withdrawal of the EEO certificate under Art. 10, but under no circumstances

[81] In the case at stake the refusal to certificate the decision as an EEO was issued by the Court of Novara, under the *Employment and labour division*. The *Employment and labour division* of the Court is competent to decide certain disputes relating to employment and labor law. After such refusal, the claimant activated the procedure to challenge the decision before the same court in a different composition, under Art. 739 co. 1 cod. proc. civ. This means that different judges from the same court would decide the challenge, albeit it is not clear whether those judges should belong precisely to the same *Section* or may be selected from another one.

[82] The first part of Art. 739, left out from the translation provided in the footnote 80, reads: "(1) A complaint against a decree of a judge supervising cases concerning guardianship may be filed before the *tribunale*, which rules in chambers." (*editor's unofficial translation*).

can the court of enforcement refuse to enforce a foreign judgment certified as an EEO as a consequence of a review on the merits of the case.

14) Cass. civ., 22.05.2015, no. 10543 ([83])

The *Corte di Cassazione* rejects as "inadmissible" the extraordinary appeal lodged pursuant to Article 111(7) of the Constitution against the dismissal, by the appellate courts, of the challenge against the decision of the first instance court to deny the withdrawal of an EEO certificate (Art. 10 EEO Reg.). The certification is thus confirmed. The Court observes that the EEO certificate does not represent a ruling on the merits on the claim, but only a declaration of enforceability in the European judicial area and that, therefore, the EEO certificate itself does not affect substantive civil rights of the parties. This conclusion, the Court states, is in line with the jurisprudence of the Court, according to which the challenge under Art. 111 Cost. ([84]) against a decision issued with the *procedimento camerale* (Arts. 737 ff. cod. proc. civ.) may be granted only if such decision regards substantive rights of the parties. If not, the only remedy available is the challenge before the *Corte d'appello* under Art. 739 cod. proc. civ.

Even if the complaint is declared "inadmissible" and the challenge rejected, the Court furthermore rules on the merits of the complaint under Art. 363 cod. proc. civ. ([85]). The

[83] Published in *Rivista di diritto internazionale privato e processuale*, 2018, issue 4, p. 1192.

[84] Art. 111 co. 7 of the Constitution reads: "Against judgements (…) issued by courts (…) it is always granted the right to petition the *Corte di Cassazione* for the violation of the law. It is possible to derogate from such rule only with regard to military courts in times of war". Such rule has multiple applications, and it would not fit right to describe it thoroughly for the purposes of the present Report. It is however worth mentioning that one of the applications of said rule regards civil proceedings in general, for those cases in which, according to the rules of the Code of Civil Procedure, a final judgement, or – according to the accepted jurisprudence an practice – another decision (ordonnance or decree) that is final, is not subject to any other challenge.

[85] According to Art. 363 cod. proc. civ. the General Public prosecutor to the *Corte di cassazione* may petition the Court in order to declare the rule of law that should have been followed in a particular case, even if such case is not subject to challenge before the Court. In other words, the Court would pronounce the abstract rule to be followed in the case and its interpretation, even if such rule cannot actually be applied in such case (on that regard, the last paragraph of Art. 363 cod. proc. civ. states that "the ruling of the Court bears no effect on the decision of the lower courts in the case at stake", editor's unofficial translation). Such mechanism is governed by the principle that the *Corte di cassazione* has the duty to guide and protect the correct application of the law (so called *funzione nomofilattica*) and that its rulings are taken into account by lower courts in subsequent claims that must apply the same rule under similar circumstances. Art. 363 cod. proc. civ., on this regard, states that the Court rules "in the interest of the law", as opposed to the interest of the case at stake (which, as already said, cannot be decided on its merits). As to the reasons why the case cannot be decided on its merits, Art. 363 cod. proc. civ. states that it may be that the parties renounced to file the motion to the Court

debtor originally filed the application for the withdrawal of the EEO arguing that the order for payment had been served via postal service and not via the bailiff and was as such in violation of both the rules of service of the Reg. (EC) 1393/2007 and of the minimum standards set forth under Art. 14 EEO Reg. Also, the debtor argued that Art. 18(2) EEO Reg. was not applicable because the Reg. (EC) 1393/2007 superseded the EEO Reg. and the latter does not contain a similar rule: thus, Art. 18(2) EEO Reg. should be considered inapplicable. The Court states that such arguments could have been dismissed on their merits. In particular, postal service is theoretically compliant with the minimum standards under Arts. 13 ff. EEO Reg. and it is not per se inconsistent with those rules.

15) Tribunale of Mantova, 10.07.2015 ([86])

The *Tribunale* of Mantova dismisses the request to certify as a EEO an order for payment (Arts. 633 ff. cod. proc. civ.) issued against a company registered in the United Kingdom, despite the judge had granted interim enforceability pending the opposition proceedings (Art. 647 cod. proc. civ.). The judge observes that the claim is actually contested when the debtor files an opposition to an order for payment (Art. 645 cod. proc. civ.), as in the case at stake, and therefore it does not fulfill the requirement provided for by Art. 3(1) EEO Reg.

within the deadlines set by the law under penalty of forfeiture, or they did not timely file the motion under such deadlines or, more in general, in those cases in which the decision of lower courts is not subject to challenge of motion before the *Corte di cassazione* (that is, for example, under Art. 669 *terdecies* cod. proc. civ. for the decisions issued in proceedings for protective/precautionary measures by the judge competent to decide on the challenge of the ordonnance that granted or denied the precautionary measure). Art. 669 *terdecies* – Challenge against orders concerning provisional measures: "(1) A challenge against the order granting or refusing a protective measure may be lodged within a time limit of fifteen days from the date of the hearing or from the date of service, whichever is earlier. // (2) Challenges against measures taken by a single judge of the *Tribunale* shall be lodged with the panel of the *Tribunale*, which may not include the judge who issued the measure complained of. When the protective measure has been issued by the *Corte d'appello*, the complaint is lodged with another panel of the same court or, failing that, with the nearest court of appeal. // (3) (...) // (4) (...) // (5) The panel shall convene the parties and issue, no later than twenty days after the filing of the appeal, a non-appealable order confirming, modifying or revoking the protective measure. // (6) (...)." (*editor's unofficial translation*).

[86] Published in *Rivista di diritto internazionale privato e processuale*, 2017, issue 2, p. 420.

16) Corte d'appello of Bologna, 16.12.2015

The *Corte d'appello* of Bologna declares inadmissible an appeal against the refusal, by the first instance court, to certify a judgment as an EEO. The Court rules that there is no appeal available against such a refusal because the EEO certificate does not constitute a decision but only a statement by the court of origin that the judgment can be enforced in the European judicial area. The Court furtherly underlines that no appeal is available against the refusal to issue the certificate pursuant to Art. 10 EEO Reg., but only rectification or withdrawal; the debtor can apply for the review in exceptional cases provided for by Art. 19 only in order the challenge the judgment itself and not the certificate. The Court also observes that the creditor is always allowed to file a new request for the EEO certificate or request recognition and enforcement of the judgment pursuant to Reg. (EC) No 44/2001.

17) Corte d'appello of Bologna, 13.1.2016

The *Corte d'appello* of Bologna confirms an order of the first instance court that, according to the rule set forth in Art. 17 EEO Reg., withdrew the certification as a EEO of a summary order for payment because it was served on the defendant without mentioning the competent court for the opposition and without the communication of the need for the defendant to be represented by a lawyer in the opposition proceedings. According to the Court, a partial payment by the debtor cannot ground a cure of non-compliance with the minimum standards pursuant to Art. 18 EEO Reg because in any case letter *b*) of said article would be violated.

Part B: Matters covered by jurisprudence and critical assessment

Conditions for the certification as EEO (Art. 6 EEO Reg.): claim regarded as "uncontested" under Art. 3 EEO Reg.

*Tribunale of Prato, 30 november 2011 [**A.9**]; Tribunale of Novara, 23 May 2012 [**A.11**]; Tribunale of Mantova, 10 July 2015 [**A.14**]*

According to the Italian courts of first instance [**A.9** and **A.14**], a claim cannot be certified as "uncontested" if the debtor has filed an opposition against the order for payment. Such opposition may be filed by service of a claim within 40 days from service of the order for payment, pursuant to Art. 645 cod. proc. civ.

According to one ruling [**A.11**], when the defendant is in default and rules on the default of the defendant apply (Arts. 291 ff. cod. proc. civ.), the claim can be certified as "uncontested" for the purposes of the EEO Reg., even if the court, according to such rules on default, must consider all the factual background of the claim as "contested".

Rules on service and minimum standards under Arts. 13 ff. EEO Reg.

*Giudice di Pace of Bari, 14 November 2008 [**A.4**]; Tribunale of Mantova, 24 September 2009 [**A.6**]; Corte d'appello of Turin, 23 February 2012 [**A.10**]; Cass. civ., 22 May 2015, no. 10543 [**A.13**]; Corte d'appello of Bologna, 13 January 2016 [**A.16**].*

It can be derived from one decision [**A.4**] that irregularity of service according to Italian or European rules does not automatically entail a violation of the minimum standards under Art. 13 ff. EEO Reg. Similarly, according to the *Corte di cassazione* [**A.13**] service with postal service and not via the bailiff does not *per se* entail a violation of those minimum standards.

Cure of the noncompliance under Art. 18 EEO Reg.

*Corte d'appello of Bologna, 13 January 2016 [**A.16**].*

According to one decision [**A.16**], the partial payment of the debt after the service of an order for payment non-compliant with the minimum standards set forth in Art. 17 EEO Reg. cannot be regarded as a cure of noncompliance under Art. 18 EEO Reg.

Competence to issue the EEO Certificate (Art. 6 EEO Reg.)

*Tribunale of Milano, 23 April 2008 [**A.3**]*

According to one decision [**A.3**], the issuing of the EEO certificate is an activity of a judicial and not of an administrative nature and, as such, the certificate must be issued by the judge and not by the clerk of the court.

Challenge against the refusal to issue the EEO certificate

*Tribunale of Novara, 23 May 2012 [**A.11**]; Corte d'appello of Bologna, 16 December 2015 [**A.15**]*

According to one decision [**A.11**], since the applicable proceedings should be the *procedimento camerale* under Art. 737 ff. cod. proc. civ., the competent court to receive the challenge against the refusal is not the *Tribunale* under Art. 739 co. 1 cod. p.c. but rather the *Corte d'appello* under Art. 739 co. 2 cod. proc. civ.

An isolated precedent [**A.15**] found that there is no remedy against the refusal to issue the EEO certificate, motivated with the assumption that a party may present as many requests for such certificate as s/he wishes.

Challenge against the refusal to withdraw the certificate under Art. 10 EEO Reg.

*Corte d'appello of Turin, 23 February 2012 [**A.10**]; Cass. civ., 22 May 2015, no. 10543 [**A.13**]*

According to the limited case-law on the matter, since the applicable proceedings are – according to the Italian Government's communication – the *procedimento camerale* under Art. 737 ff. cod. proc. civ., the refusal to withdraw the EEO certificate may be challenged one time before the competent *Corte d'appello*, according to Art. 739 co. 2 cod. proc. civ. [**A.10**], but against the decision of the *Corte d'appello* no further appeal before the *Corte di Cassazione* is available [**A.13**].

Conditions for the enforcement under Art. 20 EEO Reg.: endorsement with the execution formula (Art. 475 cod. proc. civ.) not applicable to foreign judgements certified as EEOs

*Tribunale of Milano, 30 November 2007 [**A.1**]*

Albeit there is only one decision to be reported on this matter [**A.1**], it is also mainly accepted in practice that foreign decisions certified as EEOs must not be endorsed with the execution formula in order to proceed with enforcement.

It is worth mentioning that the endorsement with the execution formula will be abolished, also for national judgements, as a requirement for the enforcement. Please refer to the introductory paragraph on the pending reform of the civil process ([87]).

Conditions for the enforcement under Art. 20 EEO Reg.: service of the writ (Art. 480 cod. proc. civ.) and service of the EEO certificate together with service of the enforcement title

*Tribunale of Monza, 1 February 2010 [**A.7**]*

Before proceeding with enforcement, the decision must be served to the debtor together with the EEO certificate and the writ must also be served (Art. 480 cod. proc. civ.) with a 10-days minimum timeline for the debtor to spontaneously fulfill her/his obligations.

Stay of enforcement proceedings (Art. 23 EEO Reg.): opposition to enforcement and lack of competence to review the merits of the case and of the EEO certification

*Tribunale of La Spezia, 7 February 2008 [**A.2**]; Tribunale of Tolmezzo, 7 March 2009 [**A.5**]; Tribunale of Monza, 1 February 2010 [**A.7**]; Tribunale of Nocera Inferiore, 13 January 2013 [**A.12**]*

According to the limited case-law on the matter [**A.2** and **A.12**], it can be reported that Italian courts state the principle that, according to Art. 23 EEO Reg., stay of enforcement proceedings may be granted only if the debtor proves to have filed an application under Art. 10 or under Art. 19 EEO Reg. before the courts of the Member State in which the enforcement title was issued. However, it must be noted that such case-law regarded oppositions to enforcement (Arts. 615 ff. cod. proc. civ.) grounded on issues that pertain to the merits of the case and the conditions to certify the enforcement title as an EEO. In such cases, the courts motivated the principle of limitation of the stay of enforcement proceedings to the cases set forth in Art. 23 EEO Reg. by the fact that there is a general rule that prevents the courts of the Member State of enforcement to review the merits of the case and of the EEO certification conditions. It could be, however, in theory possible to ask for a stay of the enforcement proceedings under national rules in case the

[87] §*Pending reform of the civil process* at page 7 of the present report.

debtor successfully files an opposition to enforcement (Art. 615 cod. proc. civ.) or to enforcement acts (Art. 617 cod. proc. civ.) based on national grounds.

In fact, in other two cases [**A.5** and **A.7**] the opposition to enforcement or to enforcement acts were dismissed on the basis of the same principle of lack of competence of the courts of the Member State of enforcement to review the case on its merits.

IV. European Payment Order Regulation (EPOR)

Part A: Case-law ([88])

The relevant case law is displayed in chronological order by way of a summary. A further critical assessment of recurring issues is provided in "Part B" of this chapter. The Reg. (EC) No 1896/2006 will be cited as "EPO Reg.".

1) Tribunale of Firenze, 25.09.2009

According to Art. 17 EPO Reg., after the lodging of a statement of opposition to the payment order, the proceedings shall continue under the rules that govern ordinary civil proceedings. Therefore, in case of a "mere" ([89]) statement of opposition, the judge should issue an order with the date of the hearing and fix the deadline for the entry of appearance of the defendant; the claimant has to pay the applicable judicial taxes (if he has not paid them yet) and to serve the defendant with the court order.

2) Tribunale of Piacenza, 18.09.2010

The *Tribunale* of Piacenza rules on the effects of the lodging of a statement of opposition to the EPO and clarifies that, after the lodging of a statement of opposition, the judge should schedule the first hearing of the parties and order the creditor to serve the opponent with a writ of summons. Consequently, the opponent-debtor-defendant shall have the possibility to file a statement of defense (Art. 167 cod. proc. civ.) ([90]).

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[88] Where not specified otherwise, all the judgements are available alternatively on the following databases: *De Jure*, *Leggi d'Italia*, *Pluris*.

[89] The editors note that according to art. 16(3) EPO Reg. "The defendant shall indicate in the statement of opposition that he contests the claim, without having to specify the reasons for this", while, on the contrary, according to Art. 645 cod. proc. civ. the opposition to an Italian payment order (summary payment order or *decreto ingiuntivo*) has the contents of a writ of summons, which must contain "a statement of the facts and points of law which constitute the grounds for the claim, with the conclusions" (Art. 163 no. 4 cod. proc. civ.).

[90] Art. 167 cod. proc. civ. – *Statement of defense*: "In the statement of defense, the defendant must put forward all his defenses, stating his position on the facts put forward by the plaintiff as the grounds for the

3) Tribunale of Milano, 28.10.2010

The *Tribunale* of Milano rules on the effects of the lodging of a statement of opposition to the EPO and clarifies that, after the lodging of a statement of opposition, the judge has the power to, at the request of the creditor, reduce the deadline for the first hearing ([91]) and order the plaintiff-creditor to serve the opponent-defendant-debtor with the writ of summons. In this specific case, the judge recognizes the urgency of the matter and halves the minimum delay between the service of the statement of claim and the first hearing of the parties.

4) Tribunale of Varese, 12.11.2010

According to the *Tribunale* of Varese, after the timely lodging of a statement of opposition, the judge should transfer to ordinary civil proceedings and i) set a deadline for the creditor to complete the original application by filing a statement with the requirements that the national procedure rules provide for the writ of summons (Art. 163 cod. proc. civ.) ([92]); ii) set a deadline for the debtor to complete the opposition by filing a statement with the

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claim, indicating the evidence he intends to rely on and the documents he enters, and formulating his conclusions. (…)" (*editor's unofficial translation*).

[91] Art. 163 *bis* cod. proc. civ. – *Deadline for appearance*: "In cases requiring a rapid commencement of proceedings, the President of the Court may, on application by the plaintiff and with a reasoned order, attached below the original document and copies of the summons, shorten the time limits specified in the first paragraph by up to half" (*editor's unofficial translation*).

[92] Art. 163 cod. proc. civ. – *Writ of summons*: "The writ must contain:

1. the name of the court before which the application is made;

2. the name, surname, residence and fiscal code of the plaintiff, and the name, surname, fiscal code, residence or domicile or abode of the defendant and the persons who respectively represent or assist them. If the plaintiff or defendant is a legal person (…), the writ shall contain the name or registered name, with an indication of the body or office which represents it in court;

3. the determination of the subject matter of the claim;

4. a statement of the facts and points of law constituting the grounds for the claim, with the relevant conclusions;

5. a specific indication of the means of proof on which the plaintiff intends to rely, in particular the documents entered;

6. the name and forename of the lawyer and an indication of the power of attorney, where one has already been granted;

7. the date of the hearing; an invitation to the defendant to enter a statement of response for appearance within a period of 20 days before the date of the hearing indicated pursuant to 166, or ten days earlier in the case of shortened time limits, and to appear, at the hearing indicated, before the court designated in accordance with article 168-bis, with the warning that the lodging of the statement of response after the said time limits entails the forfeiture of the rights referred to in Articles 38 and 167." (*editor's unofficial translation*).

requirements that the national procedure rules provide for the statement of defense (Art. 167 cod. proc. civ.) ([93]).

5) Tribunale of Mantova, 14.07.2011 ([94])

The *Tribunale* of Mantova (acting as the court for challenge of provisional measures) ([95]) rejects the challenge against the denial of a provisional measure aimed at stopping the enforcement in Germany of an EPO issued by the same *Tribunale* of Mantova. In this particular case, the EPO had been served on the defendant without the Form F; however, the defendant sent to the Court a statement of opposition in German language by letter with registered receipt of receival; since the opposition had not reached the court, the judge issued the Form G. The *Tribunale* of Mantova states that a request for stay of enforcement could be made pursuant to Art. 649 cod. proc. civ. ([96]) and not pursuant to Art. 700 cod. proc. civ. ([97]) since said provision has a residual nature and therefore does not apply if specific remedies are given.

6) Tribunale of Milano, 18.07.2011 ([98])

The *Tribunale* of Milano states that an opposition to the European payment order need not be served upon the creditor but should only be filed with the court (the registry office). In light of this, the Court rejects the creditor's objection to the admissibility of the lodged opposition. Furthermore, the Court states that, after the lodging of a statement of opposition, the creditor has the burden of serving the defendant with a writ of summons meeting the same requirements as the writ of summons in the ordinary procedure (Art. 163

[93] See footnote no. 90.

[94] Published in the *Rivista di diritto internazionale privato e processuale*, 2012, p. 911.

[95] See footnote no. 85.

[96] Art. 649 cod. proc. civ. – *Stay of enforcement*: "If there are serious grounds for doing so, the court may, on application by the opposing party, by way of a non-appealable order, suspend the provisional enforcement of the decree previously granted pursuant to Article 642." (*editor's unofficial translation*).

[97] Art. 700 cod. proc. civ. – *Conditions for granting the measure*: "Apart from the cases governed by the preceding sections of this Chapter, a claimant who has a well-founded reason to fear that, during the time needed to claim his right in civil proceedings, it will be threatened by imminent and irreparable harm, may apply to the court for such measures of urgency that, according to the circumstances, appear to be most appropriate for securing provisionally the effects of the final judgment on the merits." (*editor's unofficial translation*).

[98] Published in *Foro Italiano*, 2012, issue 1, p. 275.

cod. proc. civ.) ([99]); however, the date of the first hearing shall be set by the court that received the opposition to the EPO.

7) Tribunale of Verona, 26.05.2012 ([100])

The *Tribunale* of Verona rules that, after the lodging of a statement of opposition to the European payment order pursuant to Art. 16 EPO Reg., the judge must: i) order the registry office of the court to serve the creditor with the statement of opposition; ii) set a final date for the creditor to file a memorandum in order to complete the claim object of the EPO; iii) schedule the first hearing; iv) allow the defendant to file a statement of defense no later than the twentieth day before the first hearing, warning him that a later appearance will entail the preclusions provided for by national procedural rules ([101]).

8) Tribunale of Torino, 30.08.2012 ([102])

The *Tribunale* of Torino rules on the opposition to a European payment order and clarifies that, as a result of a timely opposition, the EPO loses its effects and cannot, therefore, be declared enforceable, also in the event that the ordinary proceeding, filed pursuant to Art. 17 EPO Reg., is declared extinguished.

9) Tribunale of Forlì, 22.01.2013

The case concerns the opposition lodged by a German company (the debtor) against the European payment order issued in favor of an Italian company (the creditor). The *Tribunale* of Forlì grants the opposition and rules that pursuant to Art. 5 of the Regulation (EC) No 44/2001, Italian courts do not have jurisdiction over a case concerning the payment of goods that have to be delivered in Germany, regardless of the fact that the carrier is appointed and paid by the buyer to receive the goods in Italy and transport them to Germany.

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[99] See footnote 92.

[100] Published in *Int'l Lis*, 2012, p. 153.

[101] Art. 167 cod. proc. civ. – *Statement of defense*: "(*omissis*) (2) Under penalty of forfeiture, the defendant must submit any counterclaims and procedural or substantive objections which cannot be raised *ex officio*. (…)" (*editor's unofficial translation*).

[102] Published in in *Foro It.*, 2013, 1, p. 370.

10) Tribunale of Forlì, 18.06.2013

The *Tribunale* of Forlì rules that, after the lodging of a statement of opposition to the European payment order pursuant to Art. 16 EPO Reg., the judge must i) order the registry office of the court to serve the creditor with the statement of opposition; ii) set a final date for the creditor to file a memorandum in order to complete the claim object of the EPO; iii) schedule the first hearing; iv) allow the defendant to file a statement of defense no later than the twentieth day before the first hearing, warning him that a later appearance will entail the preclusions provided for by national procedural rules. The parties are obliged to be represented by a lawyer, except in those cases where personal appearance is permitted under national law and they must be advised that in case of late filing of the statement of defense preclusions provided for by the law shall apply.

11) Tribunale of Sant'Angelo dei Lombardi, 30.07.2013 ([103])

The *Tribunal*e of Sant'Angelo dei Lombardi rules on the opposition to a European payment order and states that the transfer to ordinary civil proceedings under Art. 17 EPO Reg. sets the commencement of ordinary civil proceedings in which the parties assume the role respectively of plaintiff (the creditor, original applicant for the EPO) and defendant (the debtor).

12) Tribunale of Mantova, 25.02.2014 ([104])

The *Tribunale* of Mantova rules over the opposition to the European payment order lodged without using standard form F as set out in Annex VI of the EPO Reg. The *Tribunale* of Mantova clarifies that the opposition is nonetheless valid pursuant to both recital no. 23 of EPO Reg. and Art. 121 cod. proc. civ. ([105]). The *Tribunale* furtherly finds that the opposition is entered within the time limit laid down in Art. 16 EPO Reg. and that the claimant has not requested the termination of proceedings. Therefore, the judge orders the Court's registry office to serve the creditor with the statement of opposition; schedules the first hearing of the parties and orders the creditor to serve the defendant (the debtor) a

[103] Published in in *Giur. It.*, 2014, 5, p. 1123.
[104] Published in *Giur. it*, 2015, p. 635.
[105] Art. 121 cod. proc. civ. – *Freedom of forms*: "Acts of proceedings, for which no specific form is required by law, may be performed in the form best suited to achieving their purpose" (*editor's unofficial translation*).

statement of claim pursuant to the national procedure rules applicable to the ordinary civil procedure; the defendant is then allowed to file his statement of defense within the time limits provided for the answer of the defendant by national procedure rules.

13) Tribunale of Milano, 8.04.2015

The *Tribunale* of Milano explains that the duty to file the application for an order for payment by electronic means, provided for by national procedure rules ([106]), is applicable only to the national order for payment procedure, while the application for a European payment order should be filed in paper form.

14) Cass. civ., 26.05.2015, n. 10799, sez. unite ([107])

The *Corte di cassazione* dismisses a request for review in exceptional cases of an EPO arguing that the review after the expiry of the time limit laid down in Art. 16 EPO Reg. is exceptional and the circumstances under which it is allowed by Art. 20 EPO Reg. should be interpreted restrictively. More in detail, upon request by an Italian company, the first instance court issued a European payment order against two French companies. After the enforcement procedure had started, the French companies submitted an application for review in exceptional cases to the issuing court, based on the lack of jurisdiction. The first instance and appellate courts upheld the review, but the *Corte di cassazione* rejects it on the following grounds. Art. 16(2) EPO Reg. provides for a final deadline to send the statement of opposition. Moreover, pursuant to Art. 20(2) EPO Reg., review in exceptional cases is allowed when an error of form of the EPO prevented the debtor from lodging a statement of opposition, or when violations of procedural rules could justify the extraordinary review of a final (national) order according to Art. 656 c.p.c. (i.e. fraud of the claimant on the defendant; use of forged documents; existence of a final judgment that ascertained the fraud/corruption of the judge).

[106] Art. 16 *bis* D.L. 179/2012 – *Compulsory electronic filing of procedural documents*: "1. (…), as of 30 June 2014 in contentious or non-contentious civil proceedings before the court, the filing of procedural documents and records by the lawyers of the parties already appeared before the court shall take place exclusively by electronic means, in compliance with the laws and regulations concerning the signing, transmission and receipt of electronic documents." (*editor's unofficial translation*).

[107] Published in *Int'l Lis*, 2015, p. 75.

15) Cass. civ., 26.05.2015, n. 10800, sez. unite ([108])

After the issuance of a European payment order by the *Tribunale* of Rimini upon application of an Italian airport holding, against an Irish airline, the debtor lodged a statement of opposition and then challenged the jurisdiction of the Italian courts in the statement of defence, based on the existence of an arbitration clause. The *Corte di Cassazione* rules that the challenge of jurisdiction within the statement of defence is timely, on the following grounds: i) Italian Private International Law Act (Law no. 218/1995, Art. 4) provides that Italian courts shall have jurisdiction if the defendant appears without challenging the jurisdiction in the statement of defence; ii) however, nor the creditor for an EPO has to specify in detail the factual and legal grounds supporting the claim, neither the defendant has to give any grounds for his opposition according to Art. 16(2) EPO Reg.; iii) and in both cases no legal representation is required according to Art. 24 EPO Reg. Therefore, the time limit for the challenge of jurisdiction is the timely statement of defence that follows the lodging of a statement of opposition.

16) Cass. civ., 15.06.2015, n. 12380, sez. unite ([109])

The *Corte di Cassazione*, according to the principle of equivalence and to the «fundamental right to access to justice as per Art. 47 of the EU Charter of fundamental rights», rules that even if the claimant chooses to apply for a national payment injunction instead of an EPO, the same criteria (i.e., those of the Regulation (EC) No 44/2001) apply as far as international jurisdiction is concerned. Under Article 23 of the Regulation (EC) No 44/2001, Italian courts have jurisdiction when both the contracts entered into by the parties contain an express and undisputed jurisdiction clause in favor of Italian courts and no other court has jurisdiction (on the grounds of the defendant's tacit acceptance of jurisdiction) in accordance with Article 24 of the same Regulation.

17) Tribunale of Verona, 10.05.2016

The *Tribunale* of Verona upholds the claim made by an Italian lawyer against a Romanian company for the payment of professional bills. In the present case, after the issuance of an EPO for the payment of non-litigation activities, a statement of opposition

[108] Published in *Giur. it.*, 2016, p. 1196.
[109] Published n *Rivista di diritto internazionale privato e processuale*, 2017, p. 378.

had been lodged pursuant to Art. 16 EPO Reg. In the context of the opposition, the judge has ordered the transformation of the procedure from the European to the ordinary one, assigning the time limits to the creditor for the lodging of supplementary documents and the service of the statement of claim; and has set out the first hearing of the parties.

18) Tribunale of Rovereto, 8.06.2016

The *Tribunale* of Rovereto rules on the opposition to the European payment order filed pursuant to Art. 16 EPO Reg. and provides that the proceedings shall continue according to the rules governing the ordinary proceedings. Namely, after the lodging of a statement of opposition, the judge must set a final date for the creditor to resume the process, by serving the defendant with a writ of summons with the requirements applicable to the statement of claim in the ordinary civil procedure (Art. 163 cod. proc. civ.) and after the filing of such act the court's registry office must proceed to register the dispute and to collect the applicable judicial taxes.

19) Tribunale of Taranto, 15.09.2016

The *Tribunale* of Taranto provides that the proceedings shall continue in the forms proper to ordinary proceedings. Precisely, after the lodging of a statement of opposition, the judge must set a final date for the creditor to resume the process, by serving the defendant with a writ of summons with the requirements applicable to the statement of claim in the ordinary civil procedure (Art. 163 cod. proc. civ.).

20) Tribunale of Prato, 1.12.2016

The *Tribunale* of Prato clarifies that, when the judge fixes a final term for the creditor to start the national procedure after the lodging of a statement of opposition, the belated service of the writ of summons does not imply the forfeiture of the claim, because the law does not explicitly provide for such effect. After specifying this, the *Tribunale* upholds the objection of lack of jurisdiction and rules that Italian courts do not have jurisdiction over a claim concerning the payment of fabrics by a French buyer. In fact, in the case in question, there was no explicit contractual agreement on the place of delivery of the goods, but the judge finds that they had been *de facto* delivered in France or in other European and non-

European countries; accordingly, the court underlines that the delivery of the goods by the seller to the carrier in Italy is not relevant as far as jurisdiction is concerned.

21) Cass. civ., 20.03.2017, n. 7075, sez. unite ([110])

The *Corte di cassazione* decides upon a review in exceptional cases of a European payment order pursuant to Art. 20(1) EPO Reg. The first instance and appellate courts dismissed the application as belated, since the Austrian judicial authorization to enforcement has been served on the Austrian debtor more than 10 days before the filing of the application for review of the EPO. The *Corte di cassazione* upholds the decision of the lower courts, ruling that the deadline for the review pursuant to Art. 20(1) EPO Reg. has to be determined by reference to the national procedural law. Therefore, the same deadlines applicable to the review of a final national order for payment apply also to the EPO: the deadline is 10 days from the first act of the enforcement procedure that is legally known to the defendant or, if there is no enforcement, 40 days from the moment when the party is in a position to oppose the order (i.e. from the time when the situation preventing the opposition has ceased). The *Corte di Cassazione* remarks that the short deadline of 10 days does not affect the right of defense because the defendant does not have to give arguments on the merits, but only on the requirements set by Art. 20 EPO Reg.

22) Tribunale of Firenze, 02.11.2017

The *Tribunale* of Firenze upholds an opposition to an EPO ruling that Italian courts do not have jurisdiction over a claim for the payment of goods delivered in Germany. The *Tribunale* clarifies that invoices indicating Germany as the place of delivery cannot ground a prorogation of jurisdiction pursuant to Art. 23 of Regulation (EC) No 44/2001, given that it lacks the due form. However, jurisdiction of the German courts is grounded on Art. 5 of Regulation (EC) No 44/2001, which prevails over the Vienna Convention on Contracts for the International Sale of Goods.

[110] Published in *Rivista di diritto processuale*, 2018, p. 275.

23) Cass. civ., 31.01.2019, n. 2841, sez. unite ([111])

The *Corte di cassazione* finally solves the debated issue among Italian lower courts about the continuation of the proceedings after a statement of opposition has been lodged according to Art. 17 EPO Reg. (literally «the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event»). Precisely, in this regard the Court states that this is not a matter left to national law, but it is directly governed by the Regulation through the reference to the national provisions that apply to ordinary civil proceedings, thus the Member State is required to ensure the ordinary and "normal" form of national proceedings which apply to the disputed claim. Accordingly, in the absence of national implementing rules governing the transfer of the specific ordinary civil proceedings initiated by the opposition, the *Corte di cassazione* offers the following solution: above all, the judge who issued the order shall inform the claimant of the opposition and set a term for the claimant to bring the action under the ordinary procedural rules; secondly, the claimant may choose, amongst the ordinary civil proceedings, those that better suit the claim for which he has made use of the European order for payment procedure.

24) Tribunale of Arezzo, 26.02.2019

A European order for payment issued on the basis of documents translated from German into Italian without a sworn expert report is lawful within the meaning of Article 7 EPO Reg. Although it was disputed in the opposition proceedings that there was no adequate written proof for the issue of a European order for payment, the requirements for issuing an EPO are not the same as those for a national order for payment, since Article 7 EPO Reg. does not require any particular documents to be submitted in support of the application and Articles 8 and 12 of that regulation do not provide, for the issue of an order for payment, for the examination of any special preliminary enquiries and the statement of opposition is, in turn, extremely deformed, since Article 16 requires only the expression of the intention to contest the claim.

The European order for payment issued in that manner can be declared provisionally enforceable pursuant to Article 648 cod. proc. civ. ([112]) in the absence of written proof, since

[111] Published in *Giurisprudenza Italiana*, 2019, p. 1551.

[112] Art. 648 cod. proc. civ. – *Provisional enforcement pending opposition*: "The court, if the objection is not based on written evidence or readily resolvable evidence, may, by way of a non-appealable order, grant the

the national rules on opposition apply to the European order for payment to the extent that they are compatible. The Court states that, despite the fact that the introductory phase of the opposition to the European order for payment is "clearly derogatory" from that laid down in Article 645 cod. proc. civ., "there can be no doubt that the rules to be referred to are those of the proceedings for opposition to an order for payment and that, in particular, Article 648 of the Code of Civil Procedure can and must also be applied where the conditions are met".

provisional enforceability of the summary order, if it has not already been granted under article 642." (*editor's unofficial translation*).

Part B: Matters covered by jurisprudence and critical assessment

Opposition to the European payment order and effects of the opposition (Arts. 16, 17 EPO Reg.)

The main issue that the European payment order raises lies in the opposition phase. This is confirmed by the fact that almost all the above-mentioned judgments deal with this matter.

More in detail, pursuant to Art. 17 EPO Reg. «If a statement of opposition is entered within the time limit laid down in Article 16(2), the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event» and «The transfer to ordinary civil proceedings within the meaning of paragraph 1 shall be governed by the law of the Member State of origin».

In this regard, it is worth noting right from the outset that Italy, differently from other Member States, has not enacted any legislation to adapt its national procedural rules to the European procedural provisions. Therefore, the transfer from the European to the national procedure after the opposition is still a debated issue.

As regards Italian case-law, the study of the decisions issued to date about the effects of the lodging of a statement of opposition to the European payment order reveals three proposed solutions:

I. recourse, to the forms of the act to resume the proceeding pursuant to Art. 125 disp. att. c.p.c. ([113]), with the setting of a time limit by the judge, by means of an *ordonnance* communicated to both parties, for the creditor to resume the

[113] Art. 125 disp. att. c.p.c. – Reinstatement of the proceedings: "Unless otherwise provided by law, the reinstatement of a case is made by a statement of appearance, which must contain: 1. the name of the court before which the case is to be appeared; 2. the names of the parties and of their counsel with power of attorney; 3. a reference to the document instituting the proceedings; 4. an indication of the hearing at which the parties must appear, observing the time limits established by Article 163 *bis* of the Code; 5. the invitation to enter an appearance within the terms established by Article 166 of the Code; 6. the indication of the order of the court on the basis of which the reinstatement is made, and, in the case of Article 307, co. 1, of the Code, an indication of the date of service of the writ of summons, which was not followed by the appearance of the parties, or of the order of the court removing the case from the register. // (2) If, prior to the reinstatement, the judge has held the hearing of first appearance, and the case has to be resumed before the same judge, the parties have to be summoned to appear at a hearing. If the judge already designated is no longer a member of the court or of the chamber of the court, the party files the act for reinstatement must first request the replacement by application to the president of the court or of the chamber. // (3) The statement of appearance shall be notified in accordance with article 170 of the Code." (*editor's unofficial translation*).

proceedings, so that the creditor and the defendant can make the additions made necessary by the transfer to the Italian procedure, respectively in the writ of summons and in the statement of defense (Tribunale of Rovereto, 8 June 2016 [**A.18**]; Tribunale of Taranto, 15 September 2016 [**A.19**]);

II. indication by the judge of the date of the first hearing at which the debtor is to be summoned, in compliance with the ordinary terms of appearance pursuant to Art. 163 *bis* c.p.c. (Tribunale of Piacenza, 18 September 2010 [**A.2**]; Tribunale of Milano, 28 October 2010 [**A.3**]; Tribunale of Milano, 18 July 2011 [**A.6**]; Tribunale of Mantova, 25 February 2014 [**A.12**]);

III. the judge setting the first hearing pursuant to Art. 183 c.p.c. and fixing a term for the creditor-claimant to integrate the original request and a further term for the debtor-defendant to appear before the court or to lodge the supplementary statement of defense. As part of this solution, it is sometimes expected that the registration on the register of the ordinary proceedings is carried out *ex officio* by the court's registry office following the submission of the opposition – of course, unless the claimant has not explicitly requested that the proceedings be terminated in that event (Tribunale of Varese, 12 November 2010 [**A.4**] Tribunale of Verona, 26 May 2012 [**A.7**]; Tribunale of Forlì, 18 June 2013 [**A.10**]);

IV. additionally, an isolated decision proposes the application of Arts. 645 ff. cod. proc. civ., on the opposition to national summary orders for payment (Tribunale of Arezzo, 26 February 2019 [**A.24**]).

Applicability of the rules on the opposition to a national summary order for payment also to the EPO

Recently, the *Corte di cassazione* ruled on this point, with the declared intention of "taking a position on the discipline that must have in the Italian legal system the procedural events that arise from the issuance of an EPO and the statement of opposition against it".

The Court stated that the fact that Italy does not regulate the procedure for transferring the case to ordinary proceedings (Art. 17(2) Reg.) justifies the conclusion that the case is directly governed by Art. 17(3), in the sense that the national court which issued

the EPO has the power to adopt a decision ordering the transfer. The problem, then, becomes that of identifying the limits of such power and in particular the question arises whether it is up to the judge to identify the ordinary procedural rules for the prosecution or whether it is not up to it at all and has a more limited power. The rules must be identified in view of the fact that the Regulation essentially assigns to the EPO court the task of serving notice on the creditor of the opposition and thus ordering continuation of the proceedings.

Since the regulation requires that such proceedings must continue in accordance with the rules of ordinary civil procedure and does not provide any power for the national court to identify them, and since Italy has not exercised its power to regulate the rules governing the transfer of proceedings, the Italian court which issued the EPO, once the opposition has been lodged, must merely issue an order that the proceedings be continued in accordance with the "rules of ordinary civil procedure". In other words, it is not for the Italian court to identify which of the "ordinary rules" are the ones applicable. The duty to pick the correct one then lies with the creditor who wishes to continue the proceedings.

The form of the statement of opposition to the European payment order

*Tribunale of Mantova, 25 February 2014 [**A.12**]*

The EPO Reg. provides for the use of standard forms. For example, according to the provisions of Art. 7 EPO Reg., the commencement of the European payment order procedure must necessarily take place through the use of form A. However, as clarified by the *Tribunale* of Mantova, the use of form F for the debtor intending to lodge an opposition is merely optional or, said otherwise, it is sufficient that the written opposition presents the minimum content necessary to achieve the functional purpose of expressing the intention to challenge the EPO. According to said decision, in fact, an indication to this effect can also be deduced from the wording of recital no 23 under which «the courts should take into account any other written form of opposition if it is expressed in a clear manner».

Review of the European payment order in exceptional cases (Art. 20 EPO Reg.)

*Cass. civ., 26.05.2015, n. 10799, sez. unite [**A.14**]; Cass. civ., 20.03.2017, n. 7075, sez. unite [**A.21**]*

One decision [**A.14**] clarifies that the "non-contestation" of the EPO renders the order no longer negotiable and gives it a *res judicata* stability; as a consequence, this necessarily leads to the exceptional nature of the review. This exceptionality can clearly be deduced, on one hand, from the heading of Art. 20 EPO Reg. itself (literally, review in "exceptional" cases) and is, on the other hand, validated by the content of Recital 25, which states that

review «in exceptional cases should not mean that the defendant is given a second opportunity to oppose the claim» and, in addition, that during the review procedure «the merits of the claim should not be evaluated beyond the grounds resulting from the exceptional circumstances invoked by the defendant». Consequence of this is that the exceptional cases for which the review is envisaged pursuant to Art. 20 EPO Reg. must be interpreted strictly, and the cases for review are not susceptible to analogical or extensive application.

A subsequent judgement [**A.21**] clarifies the time limit within which the review can be lodged, starting from the consideration that, according to the communication of the government rendered pursuant to Art. 29 EPO Reg., the judge responsible for the review as per Art. 20(1) EPO Reg. is the same judge that issued the order, pursuant to Art. 650 cod. proc. civ. ([114]).

[114] Art. 650 cod. proc. civ. – *Belated opposition*: "(1) The debtor may lodge an opposition even after the expiry of the time limit fixed in the order, if he proves that he did not have timely knowledge of it due to irregularity of service or accident or force majeure. // (2) In this case enforcement may be suspended in accordance with previous Article. // (3) No opposition shall be lodged after ten days from the first act of enforcement." (*editor's unofficial translation*).

V. European Small Claims Procedure Regulation (ESCPR)

Part A: Case-law ([115])

The relevant case law is displayed in chronological order by way of a summary. A critical assessment of recurring issues is provided in "Part B" of this chapter. The Reg. (EC) No 861/2007 will be cited as "ESCP Reg.".

1) Giudice di Pace of Florence, 27.11.2012

The *Giudice di Pace* of Florence, in a ESCP case brought against an Irish airline, where the defendant did not submit any answer to Form C (duly served) within the deadline provided for by Art. 5(3) ESCP Reg. and the parties did not request the taking of oral evidence, declares that an oral hearing is not necessary and gives his judgment pursuant to Art. 7(3) ESCP Reg.

2) Tribunale of Rome, 13.03.2013, no. 35042

While considering an appeal against the decision of the *Giudice di Pace* that did not impose costs on the losing party in a national small claim case (outside of the scope of the ESCP Reg.), the *Tribunale* of Rome refers to the ESCP Reg. as a criterion for the interpretation of the national rules. The Court considers that the costs should be "proportionate" (recital no. 29 of the ESCP Reg.) and therefore they should neither be a piddling sum, which would impair the right of action, nor an excessive sum, which would impact on the right of defence.

[115] Where not specified otherwise, all the judgements are available alternatively on the following databases: *De Jure*, *Leggi d'Italia*, *Pluris*.

3) Giudice di Pace of Milan, 13.02.2016 ([116])

The *Giudice di Pace* of Milan rules that, in a case where an Italian consumer claimed damages from a British airline for a delayed flight from Ibiza to Milan Malpensa, territorial competence lies with the judge of the airport of arrival (the *Giudice di Pace* of Busto Arsizio). The judge underlines that since the airline is domiciled in the United Kingdom (Art. 63(1) Reg. (EU) No 1215/2012), jurisdiction is regulated by Art. 7(1-b) Reg. (EU) No 1215/2012 and therefore the consumer can choose the judge either of the airport of departure or of the airport of arrival. As far as jurisdiction is concerned, the existence of a branch of the airline in Milan is not relevant, because the case does not involve a dispute arising out of the operations of the branch (Art. 7(5) Reg. (EU) No 1215/2012), nor it is relevant the choice of domicile in Milan that the consumer made for the purposes of the trial.

4) Tribunale of Milan, 30.05.2016

The *Tribunale* of Milan rules that the ESCP procedure is applicable to a case concerning the infringement of copyright on photographs, when the value of the claim is below the limit provided for by Art. 2(1) ESCP Reg. and the case has a cross-border nature according to Art. 3 because the claimant is domiciled in Germany and the defendant has its legal residence in Italy. Furthermore, the Court, even without explicit citation of Art. 19 ESCP Reg., underlines that the procedure is governed by national procedural rules. Therefore, notwithstanding the fact that the defendant has not filed its answer to the Court, the claimant bears the burden to prove the facts that ground its claim.

5) Giudice di Pace of Acireale, 15.05.2017

The *Giudice di Pace* of Acireale grants a claim by an Italian party against an English insurance company for the refund of the price of a flight (with a Spanish airline), due to an illness of the wife of the consumer, supposed to take part to the trip, after the purchase of the tickets.

[116] Published in *Rivista di diritto internazionale privato e processuale*, 2018, p. 166.

6) Giudice di Pace of Messina, 18.09.2017

The *Giudice di Pace* of Messina rules that the ESCP Reg. is applicable to a claim for damages for contract breach filed by an Italian party against Google Payment Ltd. for the closure of a Google Wallet account. The judge underlines that both parties are domiciled in the Member States and Italy is the Member State where the services were provided or should have been provided.

7) Giudice di Pace of Milano, 11.02.2019

The *Giudice di Pace* of Milan orders a Spanish airline to reimburse the sums paid and to pay damages for the loss of baggage, in the context of an ESCP application made by an Italian applicant without legal assistance, considering the Montreal convention to be applicable to the case.

8) Tribunale of Pisa, 25.03.2019

The *Tribunale* of Pisa decides on the appeal against a judgment of the *Giudice di pace* ordering payment of a sum of money of 250.00 Euros on the claim for compensation for the postponement of a flight taking off from Pisa. However, the claim against the flight company Ryanair was brought not by the person attending the flight but by the assignee under voluntary assignment of the right to compensation. In its defence, the flight company objected to the jurisdiction of Italian courts and, on its merits, asserted that the claim has already been satisfied with a payment to the damaged party. The appeal is granted on the procedural issue (the objection on the merits not decided and set aside) and the claimant is ordered to pay back the sum to the respondent. In particular, the district court finds that Italian courts lack jurisdiction on the basis of the fact that neither the claimant nor the respondent have their seat in Italy and that Art. 2.4 of Ryanair's *General terms and conditions of carriage* is effective and in line with Art. 25 Reg. (EU) No 1215/2012. Furthermore, the district court finds that the rules on jurisdiction over consumer contracts are not applicable according to Art. 17(3) Reg. (EU) No 1215/2012, as in the case at stake there is not a contract combining travel and accommodation.

Part B: Matters covered by jurisprudence and critical assessment

The ESCP Reg. has had a relatively restricted application in practice. Of the 8 cases available on databases, one is only mentioning the ESCP as a passage in its reasoning, but no application is made of the Regulation itself as a rule in that case. Of the other 7 cases, 5 are decided by first instance *giudice di pace* and 5 relate to flight delay or postponement compensation issues. Overall, it seems that most of the cases deal with issues relating to jurisdiction under the Reg. (EU) No 1215/2012 (thereby including consumer-related issues) and two mention the issue of the applicability of the ESCP.

VI. European Account Preservation Order Regulation (EAPOR)

Part A: Case-law

The relevant case law is displayed in chronological order by way of a summary. A critical assessment of recurring issues is provided in "Part B" of this chapter. The Reg. (EU) No 655/2014 will be cited also as "EAPO Reg.". Of the two cases, one is unpublished, and the other has been published on the *Rivista di diritto internazionale privato e processuale*.

1) Tribunale of Busto Arsizio, 29.04.2019 ([117])

The decision under consideration represents the first case published in Italy on the subject of the European account preservation order and, more precisely, it concerns the recognition and enforcement in Italy of an EAPO issued in France. As indicated in the government's communication rendered pursuant to Art. 50 EAPO Reg., if an EAPO has been issued in another Member State, the designated competent authority to enforce such EAPO in Italy is "the ordinary court of the third party's place of residence" (namely, "third party" in such case coincides with "the bank") which acts in accordance with the rules set forth in Art. 678 c.p.c. for the foreclosure of a third party's right. Along this line, the *Tribunale* of Busto Arsizio further clarifies that the "court of the third party's place of residence" can be either "the court of the place where the bank has its head office" or "the court of the place where is located the bank branch where the account was held".

2) Tribunale of Belluno, 29.09.2020 ([118])

The *Tribunale* of Belluno, with reference to a European account preservation order rendered in Spain pursuant to the EAPO Reg. and to be executed in Italy, clarifies that, where a prior request for the obtaining of account information has been made in accordance with Art. 14 (1) EAPO Reg., the court bailiff should proceed to carry out the search for information through the electronic means referred to in Art. 492 *bis* c.p.c. and Art. 155

[117] Unpublished.
[118] Published in *Rivista di diritto internazionale privato e processuale*, 2021, p. 134.

quinquies disp. att. c.p.c. and, as a result of this search, he should proceed to execute the seizure in accordance with Art. 23 EAPO Reg. The bank should then proceed with its implementation pursuant to Art. 24 EAPO Reg.

Part B: Matters covered by jurisprudence and critical assessment

It must be noted that in the case directed by the *Tribunale* of Belluno, sitting as the judge of the enforcement, the procedure to grant and enforce the EAPO was conducted in an efficient way, albeit a bit differently from the procedure envisaged by the drafters of the Regulation. In fact, in the case at stake, the Spanish Court, according to the Italian judge, had already granted an EAPO against the Italian debtor for a certain amount of time, with the additional request for information under Art. 14 EAPO Reg. When the Italian court received such measure, it instructed the bailiff to search information regarding the debtor's accounts and then directly enforce the EAPO on those accounts, for the sum specified by the Spanish courts (12,048.40 Euros).

VII. Recurring issues

An issue that is recurrent under more than one regulation is the modest application in practice that the EU Regulations covered by this Report have: this could be due to the fact that European procedural regulations are still relatively not known to practitioners or also that they constitute a rather ancillary subject in the educational system (university and professional training).

The modest application of EU regulations may also be related to another recurring issue, which is the difficulties concerning the interplay between rules laid down by EU regulations and national rules. Lacking implementing rules that extensively cover the issues of implementation, interpretation is often left to courts and practitioners, leaving a certain degree of uncertainty in the application of these Regulations.

VIII. Overall assessment

Overall, Italian courts tend to recognize and enforce foreign judgements in line with the scope of the regulations and their interpretation given by the CJEU. For example, in line with European principles, judgements are recognized and enforced even if they are contrary to some rules of Italian civil procedural law, when their recognition gives them the effects that they have in the MS of origin. Also, on a general assessment, successful challenges against incoming judgements are rarer than not. For example, considering cases concerning the Brussels I *bis* Regulation, out of 9 claims for refusal only one was successful (scrutiny was based mainly either under the rule on service of the act instituting the proceedings or the public policy clause relating to fundamental procedural guarantees). On this regard, criteria for refusal of incoming judgements seem to be interpreted in line with the jurisprudence of the CJEU.

The analysis of the jurisprudence shows, therefore, that generally European rules and their interpretation are properly taken into account by judicial decisions; recently, reasonings of decisions, in particular of the *Corte di cassazione*, explicitly quote decisions from the CJEU more often than before.

With the necessary preliminary observation that the following depends on each regulation, it can be said that most of the cases concern incoming judgements, rather than outgoing ones. It is not possible to objectively assess the reasons for this trend. However, it

could be mentioned that implementing rules often are not clear (or do not mention at all) on the competent bodies and procedures for certification of outgoing judgements: it could be possible that such unclarity, instead of producing an increase in litigation related to certifications, causes less circulation of judgements, and therefore less decisions on these matters.

In some cases, and mostly concerning the EEO and the EPO, courts had to deal with uncertainties arising out of lack of specific implementing rules relating certain aspects of the interplay between European regulations and national law. On this matter, cases show that judicial solutions tend to be unstable and sometimes unclear, leaving a considerable degree of uncertainty to practitioners. On this regard, one could certainly advocate for the adoption of implementing rules that cover more issues relating to implementation of EU regulations.

The most recent regulation, the EAPO Reg., has been applied in only two cases. Albeit this is not a significant sample, it can be noted that in one case the procedure followed to enforce the EAPO was not strictly in line with the one designed by the Regulation. However, the order has been enforced in an efficient manner: after the court of issuance sent the order *together with* a request for information under Art. 14, the Italian enforcing authority, under the directions of the competent district court, searched the bank accounts of the debtor and *directly* moved forward with the enforcement of the EAPO.