



**CROSS BORDER RECOGNITION AND ENFORCEMENT
OF JUDICIAL DECISIONS IN COMMERCIAL MATTERS**

PART II - DECISIONS ISSUED OUTSIDE THE EUROPEAN UNION

By

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I. Applicable legislation and General Principles

The matter is governed by by Article 64ff of Law 218/95 according to which a foreign decision is recognized in Italy without any proceeding¹ when:

- a) The foreign Court had jurisdiction to issue the judgment, according to Italian rules on jurisdiction.
- b) The original summons was been validly served upon the other party, pursuant to the rules in force in the foreign jurisdiction and there is no violation of the right of the party to defend its case.
- c) The parties have appeared in the proceeding according to the laws of the foreign jurisdiction or the failure to appear in court (contumacia), was validly declared by the court pursuant to the rules of the foreign court.
- d) The judgment is res judicata according to the foreign law.
- e) There is no Italian judgment with the effect of res judicata relating to the same matter.
- f) No proceeding between the same parties for the same matter was started before an Italian court prior to the commencement of the foreign proceeding.
- g) The foreign judgment is not contrary to public order.

A brief analysis of the above requirements follows.

¹ In practice, in case of decisions awarding damages, a proceeding is always required, unless the debtor pays spontaneously. In fact, Article 67 of Law 218/95 requires a proceeding when the defendants challenges the right of the creditor to enforce the decision and when the creditor wants to resort to a foreclosure procedure or to any other legal remedy for the effective implementation of the decision.



A) Jurisdiction

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

- The defendant has its residence or domicile in the jurisdiction or has appointed a representative authorized to appear in court in the jurisdiction pursuant to article 77 of the Code of Civil Procedure²;
- there is jurisdiction pursuant to of the criteria established by Title 2, Sections 2, 3 or 4, of the Brussels Convention;
- the defendant has accepted the jurisdiction of the foreign court either in writing or by appearing before the foreign court without challenging its jurisdiction³

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

The jurisdiction criteria of the Brussels Convention are quite broad and diversified and cannot be examined in detail here. The basic rules are that, for contractual obligations, the jurisdiction will be of the court where the contract must be performed.⁴ Therefore, in the event of a sale, usually the place of delivery, in case of payment of a debt the domicile of the creditor.⁵ Special rules exist, among other cases, for labour cases (place of work), consumer or insurance contracts

² Article 77 of the Code of Civil Procedure indicates that: "The general representative as well as the representative appointed for a specified transaction cannot representing court the principal when such a power has not been explicitly granted to them, in writing, except for urgent matters and interlocutory orders. Such a power is presumed as granted in favour of the general representative of a party without residence or domicile in Italy..."

³ Prior to the entering into force of Law 218/95 the jurisdiction rules were incorporated in Article 4 of the code of civil procedure, which dictated slightly different rules and that considered also the place of execution of a contract as a legitimate link to exercise jurisdiction. The rules on jurisdiction, however, have procedural nature and the rules in Article 4 of the Code of Civil Procedure are therefore irrelevant even for foreign cases commenced, or completed, when such old jurisdiction rules were still in force

⁴ See Article 5(1) of the Brussels convention .

⁵ See Article 1182 of the Italian Civil Code



(residence of consumer). Regarding awards for claims based in tort, the jurisdiction is of the court where the injury occurred.⁶

B) Service of process

This requirement encompasses various facets. First of all the commencement of the foreign procedure must be notified to the defendant. This circumstance is to be verified by the court requested of the exequatur, which will not take it for granted based on the notation that the foreign court issued the decision and, therefore, implicitly admitted that the petition was duly served.

The possible disputes regarding the notification requirement relate to the formalities of notification and to the evidence of the notification. Unlike other countries, Italy has very formalistic rules regarding notification of judicial acts. Service of process is almost always made through a court bailiff⁷ and the judicial act does not need to be served in person. The bailiff can leave the service at the defendant's home or office, or if he cannot get access to those places, he can leave the service with the doorman, etc.⁸.

If the plaintiff is from a country which is a party to the Hague Convention for the service abroad of 15 November 1965, it is also possible to resort to service of process according to the rules of the convention. To this purpose, especially for U.S plaintiffs, it is important to note that while service of process through the central authority as indicated in Article 5 of the Hague Convention is safe⁹, a service of process by mail pursuant to Article 10 of the Convention, made directly by the plaintiff's lawyer and in accordance with the rules of the country of the plaintiff, is not recommended. In fact, in such a case it may be quite difficult to obtain evidence of the service of process, and an affidavit of the plaintiff's lawyer may not suffice or, in any event, may give rise to debates and questions. Furthermore, it is recommended that the petition be translated even if the defendant speaks the foreign language and even if not required under the laws of the foreign country.

⁶ See Article 5(3) of the Brussels convention. If the place where event that caused the harm eventuated is different from the place where the harm was suffered, the courts of both places will have jurisdiction at the option of the injure party (Court of Justice 30 November 1976, no. 21/76)

⁷ Note that If the document to be served is for the appearance before a foreign court, service of process must be authorized by the Public Prosecutor office

⁸ Article 136ff of the Code of Civil Procedure indicates a long list of alternative method of process for the bailiff. The alternatives are in sequential order and method no. 2 cannot be used until method no. 1 proves ineffective.

⁹ Although the Hague Convention does not necessarily require the translation of the petition to be served abroad, it is always better to serve the petition together with a translation to avoid claims of improper service at the time of enforcement.



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

Another issue to consider is that Italian law does not necessarily require personal service of process and that judicial acts are often delivered to relatives, maids, doorkeepers, office secretary and the like.¹⁰ For this reason, it is recommended that, prior to executing service of process, the plaintiff obtains official evidence of the correct address of the defendant. This address is recorded, for individuals, in the municipal office and for companies at the local chamber of commerce. Official certification may be requested and may be filed together with the application for enforcement to demonstrate that the petition was served at the correct place.

In addition to the circumstances mentioned above, Article 64 of Law 218/95 bars the *exequatur* when the defendant, due to the peculiarities of the foreign judicial process (or of the specific case), could not effectively exercise its right to adequate defence.

This clause is often used with reference to the issue of the adequacy of the time granted by the foreign legislation to respond to the petition of the plaintiff. Certain jurisdictions have very limited deadlines for responding to an action, and those deadlines are significantly shorter than the equivalent Italian rules.¹¹ Although the respect of Italian deadlines is not required, it is suggested that the plaintiff takes into account, to the extent permitted by the foreign law, the circumstance that receiving a petition from abroad, understanding its content, selecting a lawyer abroad, etc. is a process that can easily take a few weeks. If the deadline is too short and, because of this circumstance, the defendant was not given a fair opportunity to defend, this circumstance may later bar the enforcement of the action.

¹⁰ This is even more the case when the Hague Convention is used, as the service of process is always made by mail.

¹¹ According to Article 163 of the Italian Code of Civil Procedure, the first hearing must be at least 120 days from the date of service of process if the defendant is abroad, and the defendant must file its response 20 days in advance of the hearing.



C) Participation of the parties to the proceeding

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

The key problem posed by default judgment is that, under Italian law, the plaintiff is always obliged to demonstrate, with reasonable evidence, that his case is grounded, regardless of whether the defendant appears in court. Failure to appear will not be considered as admission of the allegations made by the plaintiff. Some jurisdictions, however, accept the opposite principle and the failure to appear will automatically trigger a decision against the defendant based on the uncontested allegations of the plaintiff. It is disputed whether a decision of this type may be declared enforceable in Italy.¹²

D) Res Judicata

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

E) No Conflict with Italian decisions

The foreign decision will not be recognized in Italy if it is in conflict with a final Italian decision (*res judicata*). The rule applies irrespective of which proceeding was the first one to be initiated. It also applies if the Italian decision was issued after the foreign decision. In such a case it might be possible to request an Italian court to revoke the Italian decision and then enforce the foreign decisions.¹³

¹² For a recent case where the Italian judge granted the enforcement of a foreign Default Judgment see App. Milano 14 December 2010. The decision has raised large criticism and it is not clear whether it can be relied upon given certain peculiarities of the case.

¹³ Article 395 indicates certain cases in which a *res judicata* may be revoked. Paragraph (5) of Article 395 indicates that a final decision may be revoked if it is later found that it conflicts with a prior final decision, provided that this conflict was not made known to the judge of the second decision.



F) *Conflicting Italian proceeding*

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

Law 218/95 provides that the Italian proceedings will prevent the recognition of a foreign proceeding if the Italian proceeding is commenced before the commencement of the foreign proceedings. This rule shall apply as long as the Italian proceeding is in place; if completed with a final decision the comments under paragraph e) shall apply.

It is important to note that the Italian code of civil procedure includes various type of proceedings which are commenced with different formalities. Without going into many details, there are two main ways of initiating a proceeding: (i) filing a petition upon the defendant and then filing the case in court, and (ii) filing the case in court and then serving the petition upon the defendant. In both cases, the proceeding is deemed pending only as of the date the petition is served upon the defendant.¹⁴

G) *Public order*

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

Except for family law matters, Italian courts are very reluctant to use the concept of public order to deny enforcement of a foreign decision (both for procedural and substantive reasons), unless there is a violation of an Italian fundamental principles, as indicated in the Italian Constitution, or a violation of principles embodied in international conventions. Considering such a restrictive meaning to public order, it is almost impossible to have a collection judgment in violation of a rule of public order¹⁵. Problems arise with reference to the collection of punitive

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

¹⁴ Article 39 of the code of civil procedure makes reference to the date of service of process for ordinary proceedings, where the first activity is that of serving the petition to the defendant, however this principle is extended to the other structure by the courts: see. Cass. 29 October 1998, no. 10784, Foro it. Rep. 1998, Competenza civile, no 198.

¹⁵ One exception related to a case where the *exequatur* was refused to a decision awarding damages for breach of a contract entered into by an Italian resident in violation of Italian legislation on exchange control (see Cass. 6 April 1995, no., 4033, Foro it. Rep.1996, Delibazione no. 23). It is



damages, which are not recognized by Italian law and serious doubts of violation of Italian public order rules exist.

II. EXEQUATUR PROCEDURE

As mentioned above, foreign decision are recognized “per se” in Italy if incompliance with the requirements dictated by Article 64 of Law 218/95, however an exequatur procedure is required in the event that the recognition of the foreign decision is challenged by an interested party, or in the event either party fails to comply with the holding of the decision and recourse to judicial enforcement is therefore required.

The petition to obtain the exequatur must be served upon the defendant with summons to appear before the Court of Appeals of the place where the decision is to be enforced. In most cases, the decision relates to the payment of an amount of money, and the competent court is therefore that of residence of the debtor or that of the place where an asset to be foreclosed is located.

The applicable procedure is the same provided for ordinary litigation and plaintiff must serve the petition to the defendant to appear before the court at a given hearing.¹⁶ The minimum window between the date the petition is served and the date of the hearing is 90 days.¹⁷

Ten days after the petition is served upon the defendant, the plaintiff must file the petition in court, together with supporting documentation.¹⁸ Those documents will evidence fulfilment of the conditions indicated in Article 64 (a) through (g) of Law 218/95.

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

With reference to the other documents, the original or a notarized copy is required and the signature of the notary must be completed with an Apostille pursuant to

doubtful that exchange control laws should be considered of public order, given the restrictive interpretation usually given su such term, however the court clearly did not want to allow an easy way out from the very restrictive exchange control legislation in force at that time.

¹⁶ See Article 163 of the code of civil procedure

¹⁷ See Article 163bis and 342 of the Code of Civil Procedure

¹⁸ See Article 165 of the code of civil procedure



the Hague convention of 5 October 1961. For countries which have not ratified the Hague conventions,¹⁹ copies must be certified by the closest Italian consulate.

Once the favourable decision of the court is obtained, the foreign decision, together with the decision of the Court of Appeals, constitutes a "titolo esecutivo", i.e. a document for which a party may request the use of judicial enforcement remedies if not spontaneously performed by the debtor.²⁰

III. The judicial enforcement of the foreign decision

As soon as the exequatur is obtained, the plaintiff will be requested to pay registration tax. The registration tax is due for the sole fact that the decision is issued and must be paid regardless of whether the plaintiff is ultimately able to obtain any money from the defendant. The amount of this tax varies depending on the nature of the underlying legal relationship. The default rate is 3% of the awarded amount. If the underlying commercial transaction is of a professional nature and was therefore subject to VAT, a nominal registration tax is levied. Upon payment of the registration tax, the court will release an enforceable copy of the exequatur which, together with the foreign decision, will constitute legal title to obtain whatever is indicated in the decision and to request judicial assistance for the enforcement of the decision.

The enforcement of the foreign decision will follow exactly the same steps that must be undertaken to enforce an Italian decision. The first thing to do is to serve the defendant with a copy of the exequatur together with a copy of the foreign decision. If the defendant does not pay and the party wants to initiate an enforcement procedure, the first step is that of serving upon the defendant a formal request for payment, called *precetto*, which includes a request of payment²¹ within a term of not less than ten days and makes reference to the judicial title.²² If the debtor does not pay within the term indicated in the *precetto*, the creditor can commence the foreclosure procedure²³.

¹⁹ For example, Canada.

²⁰ See Article 67(2) of Law 218/95.

²¹ The amount to indicate on the *precetto* will include the amount awarded by the court, plus fees and expenses for the *precetto*.

²² See Article 480 of the code of civil procedure. Normally, foreign decision, exequatur and *precetto* are served all together, to save time. Note that service must be made to the party personally and not to his lawyer.

²³ The foreclosure procedure must be commenced within 90 days from the date of service of the *precetto*. If such a term elapses and the procedure is not commenced, a new *precetto* must be served.



There are various types of foreclosure procedures depending on whether the creditor wants to enforce the judgment on real estate, movable properties or credits towards third parties. In general, the foreclosure starts with an act called *pignoramento*²⁴ which is an order, issued by a bailiff, not to dispose of certain assets which are identified by the bailiff at the time of executing the *pignoramento*. Those assets are later sold in judicial auctions²⁵, unless the debtor pays the due amount. The process is not exactly fast and can take years for real estate.

Costs and fees incurred for obtaining the foreign judgment are recoverable in Italy to the extent that recovery was specifically awarded by the foreign judgment. Costs and fees incurred for the enforcement of the foreign action in Italy are theoretically recoverable, as Italian law provides for the losing party to pay relevant costs,²⁶ however the amount normally awarded by the court is often substantially lower than costs actually incurred.

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

²⁴ See article 491ff of the code of civil procedure. The *pignoramento* will be for the amount indicated in the *precetto*, plus estimated amount for foreclosure costs and fees.

²⁵ See Article 501 f of the code of civil procedure

²⁶ See Article 91 of the Code of Civil Procedure