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Diversity of Enforcement Titles in Cross-border Debt Collection in the EU

National Report:

ITALY

University of Maribor

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Diversity of Enforcement Titles in Cross-border Debt Collection in the EU

National Report: Italy

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1 General characteristics of enforcement titles

1.1 Types of enforcement titles

Art. 474 del Codice di procedura civile[1]
(Titolo esecutivo)

L'esecuzione forzata non può avere luogo che in virtù di un titolo esecutivo per un diritto certo, liquido ed esigibile.
Sono titoli esecutivi:
1) le sentenze, i provvedimenti e gli altri atti ai quali la legge attribuisce espressamente efficacia esecutiva;
2) le scritture private autenticate, relativamente alle obbligazioni di somme di denaro in esse contenute, le cambiali, nonché gli altri titoli di credito ai quali la legge attribuisce espressamente la sua stessa efficacia;
3) gli atti ricevuti da notaio o da altro pubblico ufficiale autorizzato dalla legge a riceverli.
L'esecuzione forzata per consegna o rilascio non può aver luogo che in virtù dei titoli esecutivi di cui ai numeri 1) e 3) del secondo comma. Il precetto deve contenere trascrizione integrale, ai sensi

[1] *Codice di procedura civile* (Regio Decreto 28 ottobre 1940, n. 1443, Gazzetta Ufficiale n. 253 of 28 October 1940, as amended), hereinafter: Code of Civil Procedure. Available at: www.altalex.com/documents/codici-altalex/2015/01/02/codice-di-procedura-civile [18.1.2020].

dell'articolo 480, secondo comma, delle scritture private autenticate di cui al numero 2) del secondo comma.

Art. 474 Code of Civil Procedure
(Enforcement title)

Enforcement can only take place by virtue of an enforceable title for a right being certain, of a fixed amount and due.

Enforcement titles are the following:

1) sentences, judicial decisions and other deeds to which the law expressly attributes executive effectiveness;
2) authenticated private deeds, regarding the obligations of sums of money contained therein, bills of exchange as well as other debt instruments to which the law expressly attributes the same effects;
3) deeds received by a notary or other public official authorised by law to receive them.
   Enforcement for delivery or release can only take place by virtue of the enforcement titles referred to in points 1 and 3 of para. 2. The notice to comply shall contain full transcription, pursuant to art. 480, para. 2, of the authenticated private deeds referred to in point 2 of para. 2.

According to art. 474 Code of Civil Procedure, there are two types of enforcement titles: judicial and extra-judicial.

Judicial titles include judgments, measures and deeds issued by a court during or at the end of court proceedings. As follows from art. 282 ff. Code of Civil Procedure, regarding provisional enforcement, even a decision rendered at the end of a first instance proceeding has enforcement effect, unless the defendant has appealed it and the second instance court has suspended the enforcement effect of the first instance decision during the appeal proceedings. Moreover, a settlement

(*conciliazione*) concluded in the course of a civil action and recorded in the minutes of the case is enforceable as a judgment (art. 185 and 322 Code of Civil Procedure).[2]

Extra-judicial titles include debt instruments, public deeds and authenticated private deeds created autonomously by the parties.[3]

1.2 Judicial decisions issued within civil procedure

In the Italian legal order there is no autonomous definition of 'civil and commercial matters.' Such matters are subject to private law provisions. The main source of private law is the Civil Code of 1942,[4] which also regulates issues pertaining to commercial law.[5]

The Italian judiciary can be described as a pyramid-shaped structure, developed along bureaucratic vertical lines. As far as civil courts are concerned, there are two courts of first instance:

- justice of the peace (*giudice di pace*), being an honorary judge adjudicating small civil and criminal claims and matters, and
- *tribunale*, being the main first instance court in civil matters and judge of appeal for appeals against decisions of justices of the peace.

Courts of appeal (*corti d'appello*) are courts of second instance for appeals against the decisions of *tribunali*. Moreover, they have very limited first instance competence, e.g. as regards recognition and enforcement of foreign decisions.

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[2] 'Procedures for enforcing a judgment – Italy'. Available at: e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-it-en.do?init=true&member=Procedures%20for%20enforcing%20a%20judgment%20-%20Italy#toc_2 [18.1.2020]; G. Oberto, 'An Outline of the Italian System of Enforcement Proceedings in Civil Matters'. Available at: www.giacomooberto.com/enforcement/reportoberto.htm#par2 [18.1.2020]; A. Batini, S. Traverso, 'Enforcement of Judgments and Arbitral Awards in Italy: Overview'. Available at: uk.practicallaw.thomsonreuters.com/1-619-4633?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 [5.2.2020]. See further M.A. Lupoi, 2018, pp. 231 ff.

[3] 'Procedures for enforcing a judgment – Italy', supra n. 2.

[4] *Codice civile* (Regio Decreto 16 marzo 1942, n. 262, Gazzetta Ufficiale n. 79 of 4 April 1942, as amended**),** hereinafter: Civil Code**.** Available at: www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile [18.1.2020].

[5] T. Galletto, 2010, pp. 52–53.

The court of last (third) instance for appeals against the decisions of the courts of appeal is the Supreme Court (*Corte di cassazione*). Its main function is to ensure the strict observance and uniform interpretation of the law.[6]

In general, competences in the area of enforcement lie with ordinary courts (*tribunali ordinari*).[7]

According to art. 15-*bis* Code of Civil Procedure, the justice of the peace is competent for the forced expropriation of movable property. Courts are competent for the forced expropriation of immovable property and claims. If movable property is subject to forced expropriation together with immovable property in which it is located, courts also have jurisdiction over expropriation. Courts are competent for the delivery and release of things as well as for the forced enforcement of obligations of performance and non-performance.

Pursuant to art. 131 para. 1 Code of Civil Procedure, judicial decisions (*provvedimenti*) can take the form of:

1) a sentence (*sentenza*),
2) an order (*ordinanza*) or
3) a decree (*decreto*).

Art. 131 del Codice di procedura civile
(Forma dei provvedimenti in generale)

La legge prescrive in quali casi il giudice pronuncia sentenza, ordinanza o decreto. In mancanza di tali prescrizioni, i provvedimenti sono dati in qualsiasi forma idonea al raggiungimento del loro scopo.

Dei provvedimenti collegiali è compilato sommario processo verbale, il quale deve contenere la menzione della unanimità della decisione o del dissenso, succintamente motivato, che qualcuno dei componenti del collegio, da indicarsi nominativamente, abbia eventualmente espresso su ciascuna delle questioni decise. Il verbale, redatto dal meno anziano dei componenti togati del collegio e

[6] M.A. Lupoi, 2018, supra n. 2, pp. 61 ff.; 'Judicial systems in Member States – Italy'. Available at: e-justice.europa.eu/content_judicial_systems_in_member_states-16-it-en.do?init=true&member=1 [7.2.2020].
[7] 'Procedures for enforcing a judgment – Italy', supra n. 2.

sottoscritto da tutti i componenti del collegio stesso, è conservato a cura del presidente in plico sigillato presso la cancelleria dell'ufficio.

Art. 131 Code of Civil Procedure
(Forms of judicial decisions in general)

The law prescribes in which cases the judge pronounces a sentence, an order or a decree.

In the absence of such provisions, judicial decisions are issued in any form suitable for achieving their purpose.

In case of collegial judicial decisions, minutes are drawn up, and they shall contain mention of the unanimity of the decision or of dissent, succinctly motivated, that any of the members of the panel of judges, to be indicated by name, has possibly expressed on each of the issues decided. The minutes, drawn up by the youngest of the members of the panel of judges and signed by all the members of the panel, are kept by the president in a sealed envelope at the office registry.

The particular types of judicial decisions will be briefly discussed below.

1) Sentence

Art. 132 del Codice di procedura civile
(Contenuto della sentenza)

La sentenza è pronunciata in nome del popolo italiano e reca l'intestazione: Repubblica Italiana.
Essa deve contenere:
1) l'indicazione del giudice che l'ha pronunciata;
2) l'indicazione delle parti e dei loro difensori;
3) le conclusioni del pubblico ministero e quelle delle parti;
4) la concisa esposizione delle ragioni di fatto e di diritto della decisione;
5) il dispositivo, la data della deliberazione e la sottoscrizione del giudice.
La sentenza emessa dal giudice collegiale è sottoscritta soltanto dal presidente e dal giudice estensore. Se il presidente non può sottoscrivere per morte o per altro impedimento, la sentenza viene sottoscritta dal componente più anziano del collegio, purché prima della sottoscrizione sia menzionato

l'impedimento; se l'estensore non può sottoscrivere la sentenza per morte o altro impedimento è sufficiente la sottoscrizione del solo presidente, purché prima della sottoscrizione sia menzionato l'impedimento.

Art. 132 Code of Civil Procedure
(Content of the sentence)

The sentence is pronounced in the name of the Italian people and bears the header: Italian Republic.

It shall contain:

1) the indication of the judge who pronounced it;
2) the indication of the parties and their counsels;
3) the conclusions of the public prosecutor and those of the parties;
4) a concise explanation of the factual and legal reasons for the decision;
5) the operative part, the date of the decision and the signature of the judge.

The sentence issued by a panel of judges is signed only by the president of the panel and by the judge who drafted the sentence. If the president cannot sign the sentence because of death or other impediment, the sentence is signed by the oldest member of the panel of judges, provided that the impediment is mentioned above the signature; if the drafter cannot sign the sentence because of death or other impediment, the affixation of the president's signature shall be sufficient, provided that the impediment is mentioned above the signature.

The sentence is defined as a jurisdictional provision containing a decision, pronounced by the judge in a trial. Normally it is the concluding or final act of a judgment. Its form is established by law: it is passed 'in the name of the Italian people', with the title 'Italian Republic', it contains a disposition (the pronouncement in short of the judge's decision) and its grounds (the statement of reasons for the decision in the judgment) (art. 132 para. 1 Code of Civil Procedure). The sentence

is the most formal and complex. It is used for a final judgment in ordinary proceedings as well as for many important orders.[8]

2) Order

Art. 134 del Codice di procedura civile
(Forma, contenuto e comunicazione dell'ordinanza)

L'ordinanza è succintamente motivata. Se è pronunciata in udienza, è inserita nel processo verbale; se è pronunciata fuori dell'udienza, è scritta in calce al processo verbale oppure in foglio separato, munito della data e della sottoscrizione del giudice o, quando questo è collegiale, del presidente.
Il cancelliere comunica alle parti l'ordinanza pronunciata fuori dell'udienza, salvo che la legge ne prescriva la notificazione.

Art. 134 Code of Civil Procedure
(Form, content and communication of the order)

The order is succinctly reasoned. If it is issued at a hearing, it is included in the minutes; if it is issued outside a hearing, it is written at the bottom of the minutes or on a separate sheet, with the date and signature of the judge or of the president of the panel of judges, when rendered by a panel.
The court clerk communicates the order issued outside a hearing to the parties, unless the law requires notification.[9]

3) Decree

Art. 135 del Codice di procedura civile
(Forma e contenuto del decreto)
Il decreto è pronunciato d'ufficio o su istanza anche verbale della parte.
Se è pronunciato su ricorso, è scritto in calce al medesimo.
Quando l'istanza è proposta verbalmente, se ne redige processo verbale e il decreto è inserito nello stesso.

[8] M. Cappelletti and J.M. Perillo, 1965, p. 176; S. Grossi and M.C. Pagni, 2010, pp. 168–170; E. Fameli and F. Socci, 'Guide to Italian Legal Research and Resources on the Web'. Available at: www.nyulawglobal.org/globalex/Italy.html [18.1.2020]. ; M.A. Lupoi, 2018, supra n. 2, paragraphs 228 ff.
[9] See further S. Grossi, M.C. Pagni, supra n. 8, pp. 171–172.

Il decreto non è motivato, salvo che la motivazione sia prescritta espressamente dalla legge; è datato ed è sottoscritto dal giudice o, quando questo è collegiale, dal presidente.

Art. 135 Code of Civil Procedure
(Form and content of the decree)

The decree is issued *ex officio* or on a motion by a party, which may also be made orally.

If it is issued upon a motion, this is noted at the bottom of the decree.

When the motion is made orally, minutes are drawn up and the decree is inserted in the same minutes.

The decree is not motivated, unless the motivation is expressly prescribed by law; it is dated and signed by the judge or, when it is rendered by a panel of judges, by the president.

The decree is a type of final order used in many special proceedings, particularly those conducted *ex parte*.[10] In practice, the most important measure of this type is the injunction order (*decreto d'ingiunzione*, *decreto ingiuntivo*), which is issued e.g. when there is documentary evidence of a claim, according to art. 633 Code of Civil Procedure.[11]

1.3 Conformity with the euro-autonomous definitions of 'judgment' and 'authentic instrument'

When considering the types of decisions and instruments under Italian law, their conformity with the euro-autonomous definitions of 'judgment' and 'authentic instruments' elaborated by the Court of Justice of the European Union (hereinafter: Court of Justice, CJEU) for the purpose of the Regulation (EU) No. 1215/2012 (hereinafter: Brussels I Recast Regulation, B IA) must be addressed.

[10] M. Cappelletti and J.M. Perillo, supra n. 8, p. 176.
[11] A. Giussani, 2018, p. 15. See also S. Grossi, M.C. Pagni, 2010, supra n. 8, p. 172.

The criteria set out in the definition of 'judgment' in art. 2 B IA are met in case of judicial decisions mentioned in section 1.2 above. Under Italian law, a judgment is a decision issued by a judge exercising his/her decisional powers granted by the law. In order to be considered a decision, a judgment must comply with the requirements set out in art. 132 Code of Civil Procedure. Most first instance judgments (including monetary judgments or judgments ordering or prohibiting the performance of acts) are enforceable, even if appealed, unless the court of appeal has suspended enforcement. Declaratory judgments are enforceable only when they have final and conclusive effect (*res judicata*). The following orders are provisionally enforceable even if they are technically not 'decisions':

- *ex parte* orders for the payment of sums of money or for the transfer of movable assets (art. 642 and 648 Code of Civil Procedure), provided they are declared temporarily enforceable either by the judge or after 40 days from its service failing the debtor's opposition;
- notices to vacate or notices of eviction related to overdue payment under a lease contract (art. 657 ff. Code of Civil Procedure);
- notices of repossession upon the expiry of a rental contract or in the case of late payment of rent, when such notices are confirmed by a court order;
- orders issued in the course of proceedings for the payment of sums (art. 186-*bis*, *ter* and *quater* Code of Civil Procedure);
- conciliation reports settling employment disputes; and
- orders issued to employers to pay sums of money to unlawfully dismissed employees.[12]

It should also be emphasised that provisional measures, although included in the definition, are not qualified as proper enforcement titles under Italian law and their enforcement is subject to special rules, in accordance with art. 699-*duodecies* Code of Civil Procedure.

[12] 'Enforcement of Judgments 2019: Italy'. Available at: practiceguides.chambers.com/practice-guides/enforcement-of-judgments-2019/Italy [23.1.2020].

Art. 669-duodecies del Codice di Procedura Civile (Attuazione)

Salvo quanto disposto dagli articoli 677 e seguenti in ordine ai sequestri, l'attuazione delle misure cautelari aventi ad oggetto somme di denaro avviene nelle forme degli articoli 491 e seguenti in quanto compatibili, mentre l'attuazione delle misure cautelari aventi ad oggetto obblighi di consegna, rilascio, fare o non fare avviene sotto il controllo del giudice che ha emanato il provvedimento cautelare il quale ne determina anche le modalità di attuazione e, ove sorgano difficoltà o contestazioni, dà con ordinanza i provvedimenti opportuni, sentite le parti. Ogni altra questione va proposta nel giudizio di merito.

Art. 669-duodecies Code of Civil Procedure (Implementation)

Except for the provisions of art. 677 ff. with regard to seizures, the implementation of injunctive relief concerning sums of money takes place in the forms of art. 491 ff. insofar as compatible, while the implementation of injunctive relief concerning obligations of delivery, release, performance or non-performance takes place under the control of the judge who issued the injunctive relief, who also determines the methods of implementation and, where difficulties or disputes arise, provides, by way of order, appropriate measures after hearing the parties. Any other issue shall be raised in the proceeding on the merits.

What is more, only judicial enforcement titles allow direct enforcement of specific performance obligations other than delivery of movable assets or release of immovable ones.[13]

When it comes to the definition of 'authentic instrument', reference should be made to art. 2699 Civil Code, which provides the definition of a public deed (*atto pubblico*).

[13] A. Giussani, 2018, supra n. 11, p. 16.

Art. 2699 del Codice civile
Atto pubblico

L'atto pubblico è il documento redatto, con le richieste formalità, da un notaio o da altro pubblico ufficiale autorizzato ad attribuirgli pubblica fede nel luogo dove l'atto è formato.

Art. 2699 Civil Code
Public deed

The public deed is a document drawn up, with the required formalities, by a notary or other public official authorised to attribute public faith to it in the place where the deed is made.

In the Italian legal system, authentic instruments are created mainly by notaries. Italian law makes extensive use of such authentic instruments across a range of legal transactions, particularly ones involving the entry or adjustment of an entry in a public register. For some transactions the use of an authentic instrument is required for its validity (e.g. donations, matrimonial agreements, the constitution and modification of companies with limited liability and certain agreements with municipalities); for other transactions (e.g. real estate transactions, business transactions, partnership transactions, mortgages) it is not essential to use an authentic instrument but, if the transaction must be registered in a public register, a failure to do so will prevent the transaction being entered in the public register.

In this context, authenticated signatures should also be mentioned. Authentication of signatures can take place by a notary or another public official and involves the official certifying that a signature of a person whose identity has been verified by the official has been written in the official's presence (see art. 2703 Civil Code).[14]

With regard to questions for a preliminary ruling regarding the notion of 'judgment' referred by national courts of the Member States to the CJEU (art. 263 TFEU), it should be indicated that in case C-394/07, a reference for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of

[14] P. Beaumont, J. Fitchen and J. Holliday, 2016, p. 139.

Judgments in Civil and Commercial Matters was made by the Italian Court of Appeal of Milan (*Corte d'appello di Milano*). The Court of Justice ruled on the notion of judgment for the purposes of the provisions on recognition and enforcement in the Brussels Convention and on the scope of the ground for refusal of recognition and enforcement based on an infringement of the public policy of the state in which enforcement is sought.[15]
See: ECJ 2 April 2009, Case C-394/07, Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company, ECLI:EU:C:2009:219.

1.4 Default judgments

If the defendant fails to make an appearance, the instructing judge shall examine the validity of the service of citation, and if the service is valid, the judge declares the defendant to be in default (*contumacia*) (art. 291 Code of Civil Procedure). An erroneous declaration of default constitutes a reversible error. If the claimant fails to make an appearance, the action is discontinued unless the defendant moves that it be pursued despite the claimant's default (art. 290 Code of Civil Procedure).

In general, the declaration of default is not the equivalent of the party's admission of the allegations of fact made by their opponent because normal rules on the burden of proof remain applicable. If a party fails to carry that burden, judgment will be rendered against it. This rule provides an effective check on spurious claims. Nevertheless, a party declared in default is at a considerable disadvantage since the court, in determining whether its opponent has discharged the burden of proof, may normally consider only evidence presented by the opponent and the limited evidence the court may obtain on its own motion.[16]

[15] Court of Justice of the European Union: Annual Report 2009. Available at: aei.pitt.edu/42289/1/2009_Court.pdf [25.1.2020], p. 50.
[16] M. Cappelletti and J.M. Perillo, 1965, supra n. 8, pp. 298–299; 'Enforcement of Judgments 2019: Italy', supra n. 12.

2 General aspects regarding the structure of judgments

2.1 Elements of a judgment

As indicated in section 1.2, judicial decisions encompass sentences, orders and decrees.

The elements of the structure of a sentence are the following:

1) the indication of the judge who pronounced it;
2) the indication of the parties and their counsels;
3) the conclusions of the public prosecutor and those of the parties;
4) a concise explanation of the factual and legal reasons for the decision;
5) the operative part, the date of the decision and the signature of the judge.

The order is succinctly reasoned. If it is pronounced at a hearing, it is included in the minutes; if it is pronounced outside a hearing, it is written at the bottom of the minutes or on a separate sheet, with the date and signature of the judge or of the president of the panel of judges, when rendered by a panel.

The decree is not motivated, unless the motivation is expressly prescribed by law; it is dated and signed by the judge or, when it is rendered by a panel of judges, by the president.

The structure of sentences, orders and decrees is laid down in art. 132, 134 and 135 Code of Civil Procedure, respectively (already cited in section 1.2).

Italian judgments can be considered adequately standardised. The elements of a judgment are written in separate rows, usually in capital letters. This applies, for instance, to the heading, including the title (designation of the judgment), the indication of the court and the parties as well as the expressions preceding specific parts of the judgment, such as 'concise presentation of the factual and legal basis' (*CONCISA ESPOSIZIONE DELLE RAGIONI DI FATTO E DI DIRITTO*), '[the judge] considers:' (*[il giudice] OSSERVA:*), 'facts of the case' (*FATTI DI CAUSA*), 'reasons for the decision' (*RAGIONI / MOTIVI DELLA DECISIONE*), 'justification' (*MOTIVAZIONE*) and finally 'for these reasons', abbreviated to: P.Q.M. (*PER QUESTI MOTIVI*), which precedes the operative part (conclusion).[17]

As already mentioned in section 1.1, in line with the general principle, a first instance sentence is provisionally enforceable between the parties to the proceedings (art. 282 Code of Civil Procedure). If an appeal is brought against a first instance judgment, enforceability can only be suspended on application by the appellant. To obtain a suspension, serious reasons, both on the grounds of the application and on the risk in case of enforcement, must be established.[18] According to art. 283 Code of Civil Procedure, the appeal judge, upon a motion filed by a party together with the main appeal or with an incidental appeal, when there are serious and well-grounded reasons, also with reference to the possibility that one of the parties may become insolvent, stays in whole or in part, the enforceability or the enforcement of the challenged judgment, with or without a bond.[19]

[17] For details, see a model sentence of the first instance, available at: www.consiglionazionaleforense.it/documents/20182/462917/ALLEGATO+5+-+Modello+di+sentenza+di+primo+grado.pdf/a4f65d90-af23-4a82-87ce-cb0e296bc0dc?version=1.0 [5.2.2020]. See also www.ricercagiuridica.com/sentenze/ [5.2.2020];, 'Member State case law – Italy'. Available at: e-justice.europa.eu/content_member_state_case_law-13-it-en.do?member=1 [8.2.2020].
[18] G. Oberto, supra n. 2; A. Batini and S. Traverso, supra n. 2.
[19] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 259.

The second instance sentence shall be divided into four fundamental parts: the heading, the course of the proceedings (summary of the sentence under appeal, grounds of appeal), the reasons for the decision and the operative part.[20]

According to art. 36 Code of Civil Procedure, the judge competent for the main case shall also decide on the counterclaims (*domande riconvenzionali*) which depend on the title brought in court by the claimant or on the one that already belongs to the case as a means of exception, provided that they do not exceed the judge's competence as to the subject matter or the value; otherwise, the provisions of the two previous articles (relating to incidental ascertainments and set-off objection, respectively) shall be applied.

After having been notified with the claimant's complaint, the defendant may bring a counterclaim only in his/her first defence (*comparsa di risposta*), i.e. the response, at least 20 days before the hearing of appearance set in the summons, or at least 10 days before in case of abbreviation of terms pursuant to para. 2 of art. 163-*bis* (art. 166 Code of Civil Procedure).[21]

2.2 Enforceability certificate

Judgments and other instruments that are enforceable as judgments require the addition of an enforceability certificate – *formula esecutiva* that orders their enforcement (art. 475 para. 1 Code of Civil Procedure). The *formula esecutiva* is inscribed on the instrument by the court registrar or other custodian of the instrument. It commands the enforcement officer and all other competent officials to enforce the instrument, the public prosecutor's office to aid such officials, and the police to render assistance upon request (art. 475 para. 3 Code of Civil Procedure).

[20] For details, see a model sentence of the second instance, available at: www.consiglionazionaleforense.it/documents/20182/462917/ALLEGATO+1+-+Modello+sintetico+di+sentenza+base+ex+art.+352%2C+c.+1+c.p.c..pdf/d5342592-6cee-4ab7-b315-265d8b16f0d7 [5.2.2020]..

[21] S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 105–106; M. Di Marzio, 2013, pp. 210 ff.

According to art. 479 Code of Civil Procedure, save where the law provides otherwise, enforcement must be preceded by serving the enforcement title and a notice to comply on the debtor. The notice to comply (order of payment – *precetto*) is a formal notice (a warning) by the creditor to the debtor to the effect that, if the latter does not fulfill his/her obligation within a given period (not less than ten days), enforcement proceedings will be initiated. The form of *precetto* is regulated in art. 480 Code of Civil Procedure. A notice to comply lapses if enforcement proceedings are not commenced within ninety days after its service, but if the debtor takes steps to contest the validity of the notice to comply, the running of the ninety day period is suspended to permit determination of the contest (art. 481 Code of Civil Procedure).[22]

2.3 Indication of the parties, the amount in dispute and the underlying legal relationship

The parties are identified in the heading of a judgment by indicating their names, surnames and fiscal codes.[23]

As follows from art. 10 Code of Civil Procedure, the value of the action, which is relevant to determine the proper venue for the action, shall be calculated on the basis of the claim, pursuant to the following provisions. To this end, claims filed in the same proceeding against the same party shall be summed up, and the interest due, the expenses and the damages accrued before filing the claims shall be summed up to the principal.

The following may be subject to expropriation: movable property, immovable property, the debtor's claims and movable property that the debtor keeps on the premises of third parties, shares in companies. Obligations to deliver movable property and to release immovable property as well as fungible positive and negative obligations may also be enforced.

[22] G. Oberto, supra n. 2; A. Giussani, 2018, supra n. 11, pp. 16 ff.; 'Procedures for enforcing a judgment – Italy', supra n. 2; S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 348–349.
[23] See a model sentence of the first instance, supra n. 17.

According to art. 514 Code of Civil Procedure, in addition to assets declared unattachable by special legal provisions, the following assets cannot be attached (*cose mobili assolutamente impignorabili*):

- sacred objects and items used in religious practice;
- wedding rings, clothes, household linen, beds, dining tables and chairs, wardrobes, chests of drawers, refrigerators, stoves and ovens, whether gas or electric, washing machines, household and kitchen utensils and a piece of furniture to hold them, sufficient to meet the needs of the debtor and his/her household; however, this does not include furniture of significant value (except beds), including valuable antiques and items of confirmed artistic worth;
- food and fuel necessary to sustain the debtor and the other persons mentioned in the previous paragraph for one month;
- weapons and other items that the debtor must keep in order to provide a public service;
- awarded decorations, letters, records and family papers in general as well as manuscripts, except where they form part of a collection;
- domestic and companion animals kept by the debtor or in other places belonging to him/her, without production, food or commercial purposes;
- animals used for therapeutic or assistance purposes of the debtor, his/her spouse, partner or children.

The law also declares unattachable *i.a.*: state-owned property, non-disposable assets owned by the state or another public body, property covered by matrimonial property regimes, the property of ecclesiastical institutions and religious buildings.
The law has recently changed so that the court of the debtor's place of permanent or temporary residence, domicile or head office may, at the creditor's request, authorise the property for attachment to be pursued using electronic methods (art. 492-*bis* Code of Civil Procedure); forms of payment in instalments have also been introduced in the case of enforcement of movable goods, as part of conversion of attached property measures (*conversione del pignoramento*).[24]

[24] 'Procedures for enforcing a judgment – Italy', supra n. 2; S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 365–366.

As follows from the Civil Code provisions regarding annuities, when an annuity is constituted free of charge, it can be arranged so that it is not subject to foreclosure or seizure within the limits of the creditor's food need (art. 1881 Civil Code).

2.4 Provisional and protective measures

Before initiating a dispute, it is possible to apply for interim provisional relief (*tutela cautelare ante causam*), e.g. in order to preserve a certain factual situation or to freeze the debtor's assets until the final judgment, or, in some cases, to anticipate the effects of the decision on the merits. There are various types of interim measures: 'protective' measures are designed to preserve the state of affairs during the proceedings or to protect assets, whereas 'anticipatory' measures are those which anticipate, before the outcome of the proceedings, the effects of the final judgment.

The general rules governing interim proceedings are set out in art. 669-*bis ff.* Code of Civil Procedure. The claimant must commence an action on the merits within the timeframe set by the judge, which shall not exceed 60 days after the adoption of the interim measure. Otherwise, the interim measure becomes ineffective. Interim measures remain in effect until delivery of the judgment in the main proceedings, which will replace them. Protective measures, for which the initiation of the main proceedings is required, also lose their effect if the main proceedings are not initiated, or continued within the time limits laid down by the law or by the court, or where a security required by the court has not been lodged. Anticipatory measures, including atypical ones, even where they cannot become part of the final ruling, continue in effect even where the main proceedings are not initiated or are initiated but subsequently discontinued.[25]

Under the Italian legal system, the taking of evidence is governed by the principle that the scope of the proceedings is determined by the parties (*principio dispositivo*), as laid down in art. 115 para. 1 Code of Civil Procedure: the court must base its judgment on the evidence submitted by the parties, 'apart from those cases specified by law'. However, certain exceptions to this rule are set out in the following provisions of the Code of Civil Procedure.

[25] M.A. Lupoi, 2018, supra n. 2, pp. 121 ff.; A. Giussani, 2018, supra n. 11, pp. 19 ff.; 'Interim and precautionary measures – Italy'. Available at: e-justice.europa.eu/content_interim_and_precautionary_measures-78-it-maximizeMS_EJN-en.do?member=1[8.2.2020].

Generally, the judge decides on the offers of evidence made by the parties and schedules the hearing according to art. 184 Code of Civil Procedure for the admission of an item of evidence requested by the parties which the judge deems admissible and relevant. If the judge decides by order issued outside a hearing, the order shall be issued within 30 days. In case the judge *ex officio* orders the admission of evidence by an order pursuant to art. 183 para. 7 Code of Civil Procedure, each party, within a final time limit assigned by the judge in the same order, may request the admission of the evidence which the party deems necessary in relation to the evidence admitted *ex officio* by the judge. Moreover, parties may file a reply pleading within a further final time limit assigned by the judge, which reserves his/her decision pursuant to art. 183 para. 7 Code of Civil Procedure.[26]

As follows from art. 183 para. 5 Code of Civil Procedure, at a hearing scheduled for trial, or at a hearing which may be scheduled pursuant to para. 3 (if the judge should proceed according to art. 185, which regards settlement attempts), the claimant may file claims and the objections which derive from the counterclaim or the objections filed by the defendant. The claimant may also request the judge to authorise him/her to summon a third party to join the proceeding according to art. 106 and 269 para. 3 Code of Civil Procedure, if the need to summon the party arose out of the defendant's defence. The parties may elaborate and modify their respective claims, objections and conclusions as already filed.

If so requested by the parties, the judge may grant them the following final time limits:

- a 30-day time limit for filing pleadings to elaborate or modify the claims, objections and conclusions as already filed by the parties;
- a further 30-day time limit to reply to the new claims and objections, or to the claims and objections arising from the same claims and objections as well as to indicate the evidence and documents;

[26] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 204; 'Taking of evidence – Italy'. Available at: e-justice.europa.eu/content_taking_of_evidence-76-it-en.do?member=1#toc_2_1 [12.2.2020]. ; E. Silvestri, 'Evidence in Civil Law – Italy', Available at: pf.um.si/site/assets/files/3223/evidence_in_civil_law_-_italy.pdf [12.2.2020].

– a further 20-day time limit to merely indicate the evidence of rebuttal.[27]

2.5 Judgments containing 'decisions' on issues other than the merits of the case

According to art. 306 Code of Civil Procedure, the parties may voluntarily abandon the proceedings (*rinuncia agli atti*). For such a withdrawal to be effective, the agreement of all parties who would have an interest in the prosecution of the case is required. Unilateral withdrawal is not usually allowed, unless the counterpart is in default. The intention to abandon the proceedings and the other party's acceptance shall be manifested directly by the party at a hearing or in a written document served on the counterpart(s). Unless otherwise agreed upon, the abandoning party must pay the counterpart's legal costs. Withdrawal entails the discontinuance of the proceedings, which is declared by the judge by way of an order. A sentence is issued, in turn, if disputes arise regarding the validity of the withdrawal or the acceptance.[28]

As regards an involuntary joinder of parties (*chiamata di un terzo in causa*), a third party is summoned at the initiative of one of the parties or at the initiative of the court; he/she is summoned by a citation drawn up in the usual form. A third party may be cited by one of the parties at any time up to the first hearing. The instructing judge may order the citation of a third party at any time up to the end of the first evidentiary stage (*chiamata di un terzo per ordine del giudice*). In the latter circumstance, the instructing judge orders the parties to cite the third party. If neither of them complies within the term set by the judge, he/she shall order the case to be removed from the docket by way of a non-actionable order (art. 269 and 270 Code of Civil Procedure).

[27] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 203–204; M. Mazei, 'Mutatio ed emendatio libelli: il nuovo orientamento giurisprudenziale sulla modificazione della domanda giudiziale dopo la nota pronuncia della Cassazione a Sezioni Unite'. Available at: www.diritto.it/mutatio-ed-emendatio-libelli-orientamento-giurisprudenziale-sulla-modificazione-della-domanda-giudiziale-la-nota-pronuncia-della-cassazione-sezioni-unite/ [12.2.2020].

[28] M.A. Lupoi, 2018, supra n. 2, pp. 171 ff.; A. Saletti and T. Salvioni, 2015, 'Estinzione del processo'. Avaliable at: www.treccani.it/enciclopedia/estinzione-del-processo-dir-proc-civ_(Diritto-on-line)/ [10.2.2020].

A third party may intervene voluntarily by filing a document, with a copy for each of the parties, having the same form as the defendant's reply. Alternatively, he/she may present such a document during an oral hearing (*costituzione del terzo interveniente*). A voluntary joinder may occur at any time up to the end of the evidentiary stage of the proceedings (art. 267 and 268 Code of Civil Procedure).[29]

If the same claims are advanced in two actions before the same court, or if two related actions are pending before the same court, they may be consolidated in accordance with art. 273 and 274 Code of Civil Procedure (joinder of actions – *riunione di procedimenti*). The joinder can be ordered upon the request of a party or on the court's own initiative.[30]

[29] M. Cappelletti and J.M. Perillo, 1965, supra n. 8, pp. 169–170.
[30] *Ibid.*, supra n. 8, p. 171.

3 Special aspects regarding the operative part

3.1 Basic content of the operative part

The operative part of a sentence shall contain the final decision of the judge as to the case brought before the court.[31] It may be more or less complex, depending on the claims and defences adjudicated upon.[32]

The operative part may contain an expression 'sentence provisionally enforceable by law' (*sentenza provvisoriamente esecutiva per legge*).

Traditionally, civil actions that may be brought by the claimant are divided into three general categories, according to the kind of remedy the court is asked to provide:

1) declaratory actions – actions of mere ascertainment (*azioni di mero accertamento*) can be brought when the existence or the limits of substantive right are in dispute between the parties; the judgment (which may also consist of a negative declaration) establishes whether such right exists or

[31] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 170.
[32] M.A. Lupoi, 2018, supra n. 2, paragraph 230.

not as well as its content and limits, and it does not need any further enforcement;

2) when a right has been infringed upon, an action can be brought to order the infringing party to restore the situation *quo ante*, if possible, and otherwise to pay in kind to compensate for the damages suffered by the claimant (*azione di condanna*); decisions rendered in such actions may need to be enforced against the losing party, if he/she does not voluntarily comply with the order of the court;
3) a court decision may be required in order to create, modify or extinguish a legal relationship between the parties (*azione costitutiva*) or a personal status; such decisions produce their substantive effects only when they have become *res judicata* and the situation has therefore been definitely established or removed; no enforcement is required, since the legal relationship is directly created, modified or extinguished by the court's decision.[33]

The declaratory action is called of 'mere' ascertainment because the request for ascertainment is contained in all the actions filed in court, also in those of condemnatory and constitutive character.[34]

3.1.1 Specification of the debtor's obligation

The rules regarding generic condemnation are laid down in art. 278 Code of Civil Procedure. According to this provision, when the existence of a right has been already assessed, but the amount of the performance due is still disputed, the panel of judges, upon a motion filed by the party, may limit itself to issuing a generic condemnation, condemning the party to perform, deciding, by order, that the proceeding continue for the definition of the amount due. In this event, the panel of judges, by the same judgment and upon motion by the party, may also condemn the debtor to pay an interim award, to the extent that it deems the specific amount object of the interim award as proven.[35]

[33] M.A. Lupoi, 2018, supra n. 2, paragraph 175.
[34] D. Rombolà, 2018. 'Azione di mero accertamento: presupposti e limiti'. Available at: giuricivile.it/azione-di-mero-accertamento/ [23.3.2020].
[35] See further S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 253–254.

3.1.2 Prohibitory injunction

According to art. 614-*bis* Code of Civil Procedure, relating to indirect coercion, by the condemnation decision, except where this is manifestly unjust, upon motion by the party, the judge establishes the amount of money due by the obliged party for any breach or subsequent non-observance, or for any delay in the enforcement of the decision. The condemnation decision is a title for payment of the sums due for any breach or non-observance. The provisions of the present paragraph shall not apply to public and private employment controversies and to other collaboration relations consisting in the rendering of continuative and coordinated services under art. 409.

The judge determines the amount of the sum under the first paragraph, taking into account the value of the dispute, the nature of the service, the liquidated or predictable damage, and any other relevant circumstance.[36]

3.1.3 Interlocutory judgment

An interlocutory decision (*sentenza non definitiva*) is a judgment which only decides on part(s) of a more complex dispute, leaving the rest to a subsequent decision. Such a decision never concludes the proceedings in which it is rendered. Therefore, special appeal provisions apply.

Interlocutory decisions are usually rendered in two sets of cases. On the one hand, the trial judge can always consider the case ready for judgment on some procedural and/or substantive preliminary issue. If the decision on the preliminary issues determines the whole dispute before the court seized (e.g. the contract on which payment was requested is held to be null and void; the action is dismissed for lack of jurisdiction or competence), the judgment is final. If, in turn, the preliminary issue is decided in a way which is not incompatible with the prosecution of the proceedings, the interlocutory decision is handed out and proceedings are brought back before the instructing judge.37

[36] See *Ibid.,*supra n. 8, p. 400.
[37] M.A. Lupoi, 2018, supra n. 2, paragraph 229.

The notion of an interlocutory decision is derived from art. 279 Code of Civil Procedure which regards the form of decisions issued by the panel of judges.

The panel of judges issues an order when it decides only issues concerning the evidentiary phase, without defining the case, and when it decides only issues of venue. In this event, if it does not decide the case by the same order, it gives direction for the further evidentiary phase of the case.

The panel of judges issues a judgment when:

1) it decides the case by deciding issues of jurisdiction;
2) it decides the case by deciding preliminary issues concerning the proceeding or the merits of the case;
3) it decides the case, deciding on the whole merits of the case;
4) deciding some of the issues under points 1, 2 and 3, it does not decide the case and gives separate decisions for the admission of additional evidence;
5) using the power under art. 103 para. 2 and 104 para. 2 Code of Civil Procedure, it decides only some of the actions joined until then and, by separate decisions, orders the separation of the other actions and the admission of additional evidence concerning the latter or the remand to the lower judge of those actions falling within the his/her venue.

The decisions concerning the admission of additional evidence, provided for in points 4 and 5, are given by separate orders.

Orders issued by a panel of judges should contain a reasoning, and, whatever the reasoning, they can never prejudice the final decision of the case except where the applicable provisions of law provide otherwise. These orders can be modified and revoked by the same panel of judges that issued them and cannot be challenged as judgments. Orders issued by a panel of judges are always immediately enforceable; however, when the judgments under point 4 of para. 2 are immediately challenged, the instructing judge, upon unanimous request by the parties, when he/she deems that the decisions contained in the order issued by the panel of judges are dependent on those contained in the challenged judgment, may decide by unchallengeable order that the execution or the continuation of the evidentiary phase be stayed until the appeal proceeding is defined.

The order is filed with the registrar, together with the judgment.[38]

3.1.4 Alternative obligations

As follows from the Civil Code, the debtor of an alternative obligation is released by rendering one of the two performances, but cannot compel the creditor to receive a part of one and a part of the other. The choice lies with the debtor if it has not been assigned to the creditor or a third party. The choice becomes irrevocable with the rendering of one of the two performances, or with the declaration of choice, communicated to the other party, or to both if the choice is made by a third party. If the choice is to be made by several persons, the judge can set a deadline for them. If the choice is not made within the deadline, it shall be made by the judge. When the debtor, ordered alternately to render two performances, does not render either of them within the term assigned to him/her by the judge, the choice lies with the creditor. If the right of choice is up to the creditor and he/she does not exercise it within the time limit established or in the one fixed by the debtor, the choice passes to the latter. If the choice is left to a third party and the third party does not make it within the time limit assigned to him/her, it shall be made by the judge. An alternative obligation is considered simple if one of the two performances could not be the object of an obligation or if it became impossible due to reasons not attributable to any of the parties (art. 1285–1288 Civil Code).
This issue shall be referred to in the reasoning of a sentence.

3.1.5 Whole or partial dismissal of a claim

If a claim is wholly or partially dismissed (on substantive grounds), the operative part can take the following wording:

'The Court (...), definitively ruling ....., hereby orders: dismisses the application proposed by (...)'.

[*Il Tribunale (...), definitivamante pronunciando ....., così provvede: respinge la domanda proposta da (...)*].

[38] S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 254–256; D. Turroni, 'Sentenze non definitive e parziali'. Avaliable at: ilprocessocivile.it/bussola/sentenze-non-definitive-e-parziali [31.3.2020].

3.1.6 Whole or partial rejection of a claim

If a claim is wholly or partially rejected (on formal/procedural grounds), the operative part can take the following wording:
'The Court (...) rejects the application pursuant to art. .... formulated by the claimant (...)'

[*Il Tribunale (...) rigetta la domanda ex art. .... formulata dall'attore*].

3.1.7 Set-off

The amount of claims subject to set-off may be specified in a sentence.[39]

As follows from art. 35 Code of Civil Procedure, when a set-off objection is raised, and it has as its object a disputed claim exceeding the limits of the judge's venue with reference to the value of the action, the judge, if the main claim is based on a non-disputed title, or on a title which can be easily assessed, may decide on the same claim only and remand the parties to the judge competent to decide on the set-off objection (i.e. a superior judge) for the decision of the same objection, subjecting the enforcement of the judgment to the offering of a bond, where necessary (see art. 1119 Code of Civil Procedure); otherwise, the judge proceeds pursuant to the previous article (regarding incidental ascertainments).[40]

3.2 Relation between the operative part and the reasoning of the judgment

The operative part does not contain elements from or references to the reasoning of the judgment. However, it should be pointed out that the operative part shall not be read separately from the reasoning of the judgment; rather, they should be read jointly, and any omission in the holding might be filled in by looking at the reasoning (see Cass. 26 April 1984 no. 2632), provided that the limits of the judgment are not

[39] See e.g. the sentence of the Court of Monza, Section III, in the case 403/03, of 1 January 2003, available at: www.ricercagiuridica.com/sentenze/sentenza.php?num=1670 [22.3.2020].
[40] S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 104–105.

exceeded (see Cass. 30 August 2004 no. 17392). Otherwise, the judgment is null (see Cass. 13 May 2000 no. 4754).[41]

3.3 The wording of the operative part of a judgment ordering the debtor to perform

The operative part of a sentence can take the following wording:

'The Court (…) DECLARES THE DEFENDANT TO BE LIABLE AND ORDERS HIM TO PAY the claimant the sum of …… euro, with statutory interest from the date of submitting the application until actual payment (…)' [*Il Tribunale (…) DICHIARA TENUTA E CONDANNA la parte convenuta al pagamento, nei confronti di parte attrice, della somma di euro ……, con gli interessi legali dalla domanda sino al saldo effettivo*].[42]

3.4 Reciprocal performances

According to art. 1460 Civil Code, in contracts with reciprocal performances, each of the contracting parties may withhold the performance if the other party does not fulfill or does not offer to fulfill the reciprocal performance at the same time, unless different terms for the fulfillment have been established by the parties or result from the nature of the contract. However, the rendering of the performance cannot be refused if, having regard to the circumstances, the refusal is contrary to good faith. In such cases, the *exceptio non rite adimpleti contractus* applies [*l'eccezione di inadempimento ex art. 1460 c.c.*]. If this objection is raised by the party, it is referred to in the reasoning of the sentence (within the framework of 'The course of the proceedings' part).

3.5 Interest rates in a judgment ordering payment

The amount of interest as well as interest payment dates are not indicated precisely in the sentence because it is the enforcement authority that shall determine and

[41] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 170; M.A. Lupoi, 2018, supra n. 2, paragraph 164.
[42] See e.g. the sentence of the Court of Turin, Section III, in the case 18430/16, of 18 January 2017, available at: news.avvocatoandreani.it/doc/tribunale-torino-sez-iii-sentenza-del-2017-103575.html[15.2.2020].

calculate them on the basis of the documents (e.g. invoices) provided by the claimant and referred to in the reasoning of the sentence.

3.6 Joined claims

In the case of joined claims, the operative part can take the following wording:

'The Court (...), definitively ruling on civil case no. ....., hereby orders:

- declares the termination of the right of the preliminary contract signed on ..... by the parties with due date of ..... for default of,
- acknowledges to ..... to return the sum of ..... euro to the claimant ....., together with statutory interest from the date.....,
- rejects the application pursuant to art. .... formulated by the actor,
- orders the claimant in reimbursement in favor of ..... of the total amount of ..... euro ....., together with interest from the date ..... as compensation for damages suffered for illegitimate occupation of the property situated in ..... (...)'

[*Il Tribunale (...), definitivamante pronunciando sulla causa civile ....., così provvede:*

- *dichiara la risoluzione di diritto del contratto preliminare sottoscritto in data ..... dalle parti con decorenza del ..... per inadempimento del ...,*
- *riconosce al ..... a restituire all'attore la somma di euro ....., oltre interessi legali dal .....,*
- *rigetta la domanda ex art. .... formulata dall'attore.*
- *condanna l'attore alla refusione in favore di ..... della somma complessiva di euro ....., oltre interessi a decorrere dal .....a titolo di risarcimento dei danni subiti per illegittima occupazione dell'immobile sito in .....*
  (...)][43]

3.7 Attachments

As already indicated in section 3.2, the operative part and the reasoning shall be considered jointly. It means that details regarding the parties' statements and the court's assessment can be found in the respective parts of the reasoning, i.e. 'The course of the proceedings' and 'Reasons for the decision'. For the purpose of the

[43] See S. Asaro, F. Colletti and D. Recco, 2011, pp. 141–142.

enforcement of a judgment, it is therefore necessary that the exact amount of payment (including VAT if due as well as costs of proceedings in accordance with the rules laid down by law) be implied therefrom by the enforcement authority.

Relevant documents provided by the claimant are referred to in the reasoning as well: '...having regard to the documents attached to the application, ...' [...*visti i documenti allegati alla domanda,* ...].

As regards the insolvency proceedings, according to art. 14 Insolvency Law,[44] the entrepreneur who applies for insolvency proceedings shall file the mandatory accounting and tax records relating to the three previous years or the entire existence of the company, if this had a shorter duration, at the court registry. He/She shall also file a detailed and estimated status of his/her activities, the list of creditors and the indication of their respective claims, the indication of gross revenues for each of the last three financial years, the list of those who have real and personal rights over things in his/her possession and an indication of the things themselves and the title from which the right arises. The aim of the above provision is to ensure that the court can ascertain the state of insolvency by examining the documentation that the entrepreneur is obliged to provide.

Pursuant to art. 16 point 3 Insolvency Law, in the sentence declaring insolvency (*sentenza dichairativa di fallimento*), the court shall oblige the insolvency debtor to deposit the balance sheets, accounting and tax records as well as the list of creditors at the court registry within the time limit of three days, if the requirement laid down in art. 14 has not been fulfilled yet.[45]

3.8 Discretion of the court

According to art. 112 Code of Civil Procedure, the judge shall decide upon all the claims and within the limits; he/she shall not *ex officio* decide upon objections which may be raised only by the parties.

[44] *Legge fallimentare* (Regio Decreto 16 marzo 1942, n. 267).

[45] E. Bertacchini, L. Gualandi and G. Pacchi, 2011, pp. 74, 298, 733; 'Vademecum curatore fallimentare'. Available at: www.assocuratoribo.it/wp-content/uploads/2019/06/Vademecum-Curatore_3.8.pdf [15.4.2020]..

When determining the content of the claims and objections raised by the parties, the judge should interpret them pursuant to their form and substance, also considering the goals pursued by the parties through those claims and objections. However, the judge cannot grant the parties relief different from that sought by them; nor can the judge issue a judgment based on facts different from those offered in the parties' pleadings.[46]

[46] S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 158–159.

4 Special aspects regarding the reasoning

4.1 Structure and content of the reasoning of a judgment

The reasoning shall indicate a brief summary of factual and legal grounds of the decision. According to the sentence of the Supreme Court of 3 April 1999, n. 3282, if the reasoning fails to contain any description of the facts of the case, but it is still possible to identify those facts from the context of the sentence, the sentence is still valid. The reasoning is an important part of the sentence and is expressly identified as an element of due process under art. 111 of the Constitution. In order to meet the requirement of due process and issue a valid sentence, however, the judge rendering the decision is not required to address all the arguments used by the parties when making the decision.[47]

By virtue of art. 118 of the Implementing Provisions of the Code of Civil Procedure, which was amended in 2009, the reasoning has become 'lighter'. As a consequence, the judge can resolve the legal points of a dispute simply by referring to existing precedents. Of course, this does not mean that a *stare decisis* system has been created. The abovementioned provision enables the judge to quickly deal with 'serial' cases.

[47] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 170. See also F. De Angelis, 2008, pp. 5–6.

Moreover, judges are expressly prohibited from quoting academic writing in their legal reasoning. Therefore, in practice, judges generically refer to the 'best doctrine', without mentioning any specific writer or book. However, this prohibition is considered quite anachronistic.[48]

4.1.1 The parties' statements

The summary of the parties' statements is formulated as follows:

'1. By summons served on ....., the claimant has requested ....., on the ground that ....., and made the following requests .....
2. The defendant has appeared with his / her defence and response of ..... and has alleged that .....
3. The defendant has also brought a counterclaim in which has requested ..... on the ground that ..... and has made the following requests .....'

[1. *Con atto di citazione notificato in data ....., la parte attrice ha chiesto ..... allegando che ..... e formulando le seguenti istanze istruttorie .....*
2. *Si è costituita la parte convenuta con memoria di costituzione e risposta del ..... e ha eccepito .....*
3. *La parte convenuta ha, inoltre, proposto domanda riconvenzionale con la quale ha chiesto ....., allegando che ..... e formulando le seguenti istanze istruttorie .....*]

4.1.2 Distinction between the parties' statements and the court's assessment

Normally, the parties' statements and the court's assessment (findings and interpretation) are clearly separated as parts of the justification. The description of the parties' statements may be preceded by a heading: 'The course of the proceedings' [*Svolgimento del processo*], while the court's assessment may be preceded by a heading: 'Reasons for the decision' [*Motivi della decisione*].

[48] M.A. Lupoi, 2018, supra n. 2, paragraph 230.

4.2 Procedural prerequisites

As a rule, procedural prerequisites and applications are referred to in the reasoning if they prove relevant for resolving the dispute. Thus, all the issues that have been considered by the court must be addressed in the reasoning.

The above rule is not explicitly laid down in the provisions of law, but it is derived from art. 132 Code of Civil Procedure (regarding the content of a sentence, already cited in section 1.2) as well as art. 118 Implementing Provisions of the Code of Civil Procedure[49] (regarding the reasoning of a sentence). According to the latter provision, the reasoning of a sentence referred to in art. 132 para. 2 point 4 Code of Civil Procedure consists of a concise presentation of the relevant facts of the case and the legal reasons for the decision, also with reference to compliant precedents. The issues considered and decided by the panel of judges shall be presented concisely and in order, and the applicable legal provisions and principles of law shall be indicated as well. In the case provided for in art. 114 Code of Civil Procedure (regarding a judgment issued *ex aequo et bono* upon the party's motion), equity considerations on which the decision is based shall be presented. In any case, any citation of legal authors must be omitted. The choice of the drafter of the sentence provided for in art. 276 para. 5 Code of Civil Procedure is made by the president among the members of the panel who have expressed a vote concurring with the decision.

[49] *Disposizioni per l'attuazione del Codice di procedura civile e disposizioni transitorie* (Regio Decreto 18 dicembre 1941, n. 1368, Gazzetta Ufficiale n. 302 of 24 Dicember 1941, Suppl. Ordinario n. 302). Available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1941-08-25;1368 [27.4.2020].

5 Effects of judgments – the objective dimension of *res judicata*

5.1 Formal and substantive *res judicata*

Under Italian law, formal (procedural) *res judicata* and substantive *res judicata* are distinguished, the latter being a legal and logical consequence of the former. Formal *res judicata* forbids every court from deciding again a dispute or an issue previously decided upon by another court (*ne bis in idem*). The implications of substantive *res judicata* are that the court's ascertainment of the legal relationship is binding for the parties and the same issue cannot be adjudicated upon *ex novo* in further proceedings.[50]

Every judgment, irrespective of its procedural or substantive content, is subject to becoming procedural *res judicata*. Not all judgments, however, can acquire substantive binding effect. In particular, procedural decisions usually do not have any effect at all outside of the proceedings in which they were rendered. An exception regards the Supreme Court's rulings on competence, which are binding for any future dispute between the same parties if the original proceedings are discontinued. Only judgments on the merits (*sentenze di merito*) can spread their effects outside of the

[50] M.A. Lupoi, 2018, supra n. 2, paragraphs 233, 236.

proceedings in which they were rendered, onto the substantive relationships between the parties.[51]

5.2 The moment at which a judgment become *res judicata*

When there are no more means of challenge that a party can use, either because the time limit to file them has expired or because the party has already exhausted them, then a sentence is considered to be formal *res judicata* (*cosa giudicata formale*), meaning that it is final and can no longer be challenged. According to art. 324 Code of Civil Procedure, a sentence that is no longer subject to a jurisdiction regulation, an appeal, an appeal in cassation, or revocation for the reasons set out in art. 395 para. 4 and 5, shall be considered as final.

The law establishes two different deadlines for bringing an ordinary appeal. The so-called short time limit runs for 30 days from the moment the decision is notified by one party to the other. The time limit is longer for a petition to the Supreme Court (60 days). As regards the jurisdiction regulation (*regolamento di competenza*), it may be brought within 30 days of the date the court clerk communicates to the parties that the sentence has been published. After the above deadlines have expired, only extraordinary appeals can be raised.[52]

As regards appeals proceedings, ordinary and extraordinary remedies are distinguished, depending on their relation with procedural *res judicata*.

Ordinary remedies, i.e. appeal (*appello*), petition to the Supreme Court (*ricorso per Cassazione*), motion for assessment of venue (*regolamento di competenza*) and motion for ordinary revocation (*revocazione ordinaria*) – can only be brought within a fixed time limit (see section 5.2), before the judgment becomes *res judicata*. Conversely, a judgment can never become *res judicata* until the time limits to raise ordinary appeals have expired.

[51] *Ibid.*, supra n. 2, paragraphs 233, 234.
[52] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 280; M.A. Lupoi, 2018, supra n. 2, paragraph 233.

Extraordinary remedies, i.e. motion for extraordinary revocation (*revocazione straordinaria*) and third party challenge (*opposizione di terzo*) – may be brought against judgments which have already become *res judicata*.[53]

5.3 *Res judicata* and the distinction between the operative part and the reasoning of the judgment

According to a view adopted in case law, *res judicata* can extend to issues and questions which were not actually in dispute between the parties but which are logically and juridically implied in the judgment, going as far as admitting implicit *res judicata* on those issues which are the logical and juridical antecedent of the matters actually adjudicated upon. The doctrine, however, relying on art. 34 Code of Civil Procedure, which allows the judge to decide *incidenter tantum* issues which are specifically in dispute between the parties, tends to opt for a stricter notion of *res judicata* that never goes beyond the scope of the matters and issues actually disputed between the parties.

Res judicata effects do not extend to the so-called *obiter dicta*, i.e. to those statements a court makes on related issues to those which fall to be adjudicated, but which do not change the results of the dispute at hand.[54]

5.4 Prior rulings on preliminary questions of law

In the Italian legal system, judgments issued by courts are not a source of law and therefore they do not bind judges in decisions in similar subsequent cases (art. 101 para. 2 and art. 107 para. 3 Constitution). Judges are bound by the law, not by the previous decisions of higher courts. Precedents are only persuasive, because, as art. 2909 Civil Code provides, judgments are only binding on (and therefore constitute law among) the parties, their successors or assignees. Therefore, Italian decisions have a subjective ambit of efficacy, being applicable only to their recipients and to nobody else, even if a similar dispute arises. They will obviously be strongly persuasive, but a new case will be decided only by referring to the law, and nothing prevents judges from reaching a different solution.

[53] M.A. Lupoi, 2018, supra n. 2, paragraph 244.
[54] *Ibid.*, supra n. 2, paragraph 236.

However, despite the lack of formally binding judgments in Italy, there is a general expectation that precedents be followed. The importance of judicial precedents, especially those of the Supreme Court, has been reconsidered most frequently in civil law. The precedents of the Supreme Court are of special importance because this court not only performs an appellate function, but also has been assigned a 'nomophylactic' role to ensure 'the correct observance and uniform interpretation of the law, as well as the unity of national objective rights'.[55]

5.5 Claim preclusion

The principle of claim preclusion does not apply to the Italian legal system. For instance, if the claimant forgot to file a claim for damages in a proceeding, he/she could then file another suit against B, claiming damages, even when the judgment stating B's failure to perform would have become final and binding upon the parties. The right to file the second action is only subject to the ordinary time limit to file an action (ten years – according to art. 2946 Civil Code).[56]

5.6 Determination of facts in earlier judgments

As a rule, courts are bound by the determination of facts in earlier judgments. In line with well-established case law and legal doctrine, the same issue of law which has been already settled (*un punto di diritto accertato e risolto*) in an earlier final judgment (*giudicato esterno*) is precluded from being re-examined in another proceeding between the same parties. This approach is aimed at avoiding divergences in the case law.[57]
An example could be a sentence regarding a car accident in which one's fault has been ascertained. Such judgment can be invoked at every stage of the proceedings.

[55] L. Baccaglini, G. di Paolo and F. Cortese, 2017. Available at: cgc.law.stanford.edu/commentaries/19-baccaglini-di-paolo-cortese/ [22.3.2020]. ; 'The role of the Precedent in the English and Italian Judicial System', available at: studiolegalepaolini.com/language/it/the-role-of-the-precedent-in-the-english-and-italian-judicial-system/[22.3.2020].
[56] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 76.
[57] See e.g. R. Giovagnoli, 2011, p. 402.

5.7 *Res judicata* in the case of a negative declaratory action

Unless a counterclaim is brought, the dismissal of a negative declaratory action itself does not mean that the creditor obtains an enforcement title. In such case the court is not in any event obliged to issue a converse judgment.

5.8 Hypothetical cross-border cases

If, in Member State Y, a seller (S) as claimant is suing the buyer (B) as defendant for payment of the purchase price, B will not be able to sue S in Member State Z for liability on a warranty at the same time due to *lis pendens* rules under B IA.

1) Is it possible for B to sue S in Member State Z after the case in Member State Y has been decided with *res judicata* effect?

Once the case in Member State Y has been decided with *res judicata* effect, the *lis pendens* rules under B IA do not prevent the action of B as there is not any *lis alibi pendens* (see for general remarks Cass., sez. III civ., n. 20841/2018, point 1.7). Another issue to discuss is whether the action of B could be barred due to the preclusive effect of the final decision given in the Member State Y. Under Italian law, a final decision prevents only actions among the same parties on the same subject matter. As the claim for payment of the purchase price is different from the claim for liability on a warranty, in principle, B could sue S in Italy in the given situation. However, this scenario may vary depending on the *res judicata* effect under the law of the issuing Member State (see point 2 below).

2) If it is possible for B to sue S in Member State Z, will the court in State Z be bound by the reasoning in the judgment from the court in Member State Y?

Under Italian law (see art. 2909 Civil Code and art. 324 Code of Civil Procedure), the *res judicata* effect covers the ruling and all the issues: *(i)* which can be put forward either in the course of action; or alternatively, *(ii)* which, although not specifically inferred, constitute logical, essential and necessary antecedents of the ruling. Under

this scope, the *res judicata* effect may entail even the court's reasoning.[58] Out of the above mentioned, the *res judicata* effect does not cover anything but the operative part of the judgment (for more details see section 5.3). However, for the Italian Supreme Court the *res judicata* effect of judgments that fall under the scope of B IA is not regulated by Italian law. In a decision of 2014 (Cass. civ., Sez. II, n. 10853/2014), the Supreme Court relied on the case law of the CJEU and noted that the *res judicata* effect of a judgment under EU law also extends to the elements of the reasoning that form the necessary basis of the ruling and are inseparable from it. However, the CJEU case law does not allow to conclude that the effects of *res judicata* are clearly established under EU Law. Therefore, the Supreme Court ruled that art. 32 and 33 of the Regulation (EC) No. 44/2001 entail an implicit reference to the law of the Member State in which the judgment is issued. In conclusion, the Member State addressed (hereinafter: MSA) must apply the law of the Member State of origin (hereinafter: MSO) to determine the *res judicata* effect of the judgment.

In the light of the foregoing in point 2, it can be assumed that the Italian court should consider the elements of the reasoning of the decision issued in the Member State Y even if they fall out of the scope of *res judicata* under Italian law (for a recent confirmation see Tribunale di Milano, Sez. Spec. Impresa, 25.01.2018, n.824).

3) How the limitation period problem should be handled in the scenario described above? The *lis pendens* case law of the CJEU prevents the filing of a warranty liability claim in State Z as long as a payment claim is pending in State Y. How can the buyer prevent the limitation period from running in State Z without making the warranty case pending?

Under Italian law, the warranty for defects is subject to the limitation period of one year (art. 1495 para. 3 Civil Code). The limitation period amounts to two years in case of claims falling under the scope of the UN Convention on Contracts for the International Sale of Goods (Cass., sez. II civ., n. 1605/2021). The question is whether this period can be interrupted only by a judicial application (art. 1492 and 1495 para. 3, and 1513 Civil Code) or even by out-of-court acts (art. 2943 para. 4 Civil Code), according to the general provisions on limitation period. The issue was settled by the Sezioni Unite of the Supreme Court in 2019 (judgment no. 18672/2019).

[58] See C. Mandrioli, 2011, p. 112.

The Court ruled that the buyer may avail himself of the general rules on limitation period. The *rationale* of the judgment lies in the willingness to facilitate the way for out-of-court settlement of disputes, which would be barred by the contrary interpretation. Therefore, if the claim of B is prevented by *lis pendens* rules, B could nonetheless interrupt the limitation period through an out-of-court act (e.g. letter of formal notice). Hence, from the day of the interruption, a whole new limitation period shall begin to run.

6 Provisionally enforceable judgment

Generally on the relation of *res judicata* to enforceability (i.e. whether a judgment can be enforced before it becomes *res judicata*), see sections 1.1 and 2.1.

6.1 Provisionally enforceable judgment

The enforcement carried out on the basis of a provisionally enforceable title is made by the creditor at his/her own risk.

Carrying out the enforcement of a provisionally enforceable title (based on a non-definitive sentence) exposes the creditor to the risk deriving from the modification of the sentence that has not (yet) become final as well as the risk of the possible cancellation of the title (since it is always a *sub judice* title). The legislator does not provide a general rule to resolve these situations, but provides some fragmentary legislation:

- art. 653 Code of Civil Procedure states that revocation of the injunction order (*decreto ingiuntivo*) following opposition does not terminate the

enforcement if the sentence confirms in whole or in part of the amount indicated in the injunction order;

– art. 389 Code of Civil Procedure regulates requests for restoration or reparations following the cassation judgment.

In fact, once the provisionally enforceable title has ceased to exist, the creditor may be subject to opposition to the enforcement (Cass. 9 August 2019 no. 21240). Indeed, the enforceable title is not only necessary to start the executive action, but it must also persist for the whole duration of the proceeding (Cass. 6 August 2002, 11769). The supervening termination of the enforcement title – which can also be recognised *ex officio* (Cass. 16 April 2013 no. 9161; Cass. 19 May 2011, 11021; Cass. 28 July 2011 no. 16541; Cass. 29 November 2004, no. 22430) – implies the acceptance of the opposition to the enforcement.[59]

Generally, it is not necessary for the creditor to provide security for the costs of the enforcement proceedings in case the application is denied.

The amendment (partial change or reverse) of the judgment recognising the creditor's claim gives rise to the obligation of *restitutio in integrum*. As the proceeding intended to enforce a provisionally enforceable judgment is taken by the creditor at his/her own risk, the creditor must pay all the expenses and the legal fees and interests (see e.g. Cass., civ., n. 11491/2006). The legal interests are due from the day of the payment, stemming from an obligation to make restitution. On the contrary, a claim of damage can only be performed under art. 96 para. 2 Code of Civil Procedure (vexatious litigation). In these cases, the right to compensation for damage suffered depends on the satisfaction of several conditions, relating to the fact of damage and the proof that the civil action has been prosecuted with lack of due diligence. Consider for example the situation in which the debtor (D) had lost a property as a result of the enforcement proceeding (e.g. judicial auction) brought by the creditor (C) and based on a provisionally enforceable judgment. In the given scenario, D has the right to obtain the restitution of the price stemming from the forced sale procedure initiated under the (then reversed) judgment. However, to obtain the compensation for the damage he suffered from the mandatory sale of his/her assets, D should introduce a separate claim under art. 96 para. 2 Code of

[59] A.M. Soldi, 2019, pp. 83 ff.

Civil Procedure, provided that specific conditions are met (see in this regard Cass., Sez. III, civ., n. 27564/2017). The claim for damage shall not be pursued in a separate proceeding, unless so required by the particular features of the proceedings (see e.g. Cass., sez. III, n.24538/2009).

The same applies to the situation in which the debtor voluntarily paid (performed) the claim as well as – in principle – to the situation in which the judgment was a default judgment, by a first instance court or a court of appeals. However, if the judgment was given in the context of a so-called seizure *inaudita altera parte* (e.g. injunction under art. 633 ff. Code of Civil Procedure), it could be easier to pursue a claim for vexatious litigation, namely the lack of due diligence in prosecuting the enforcement proceedings, as the claimant should be aware of the provisional nature and the revocability of the judgment enforced (see e.g. Cass. n. 25143/2008, Cass. n. 21992/2007, Cass. n. 8829/2007, Cass. n. 16559/2005).

Art. 96 para. 2 Code of Civil Procedure states that compensation for damage suffered for vexatious litigation is liquidated by the judge. However, the provision does not clarify the criteria that the latter should apply in order to liquidate damage. In this regard, case law maintains that liability under art. 96 Code of Civil Procedure constitutes a *sui generis* type of liability, which stems from extra-contractual liability (art. 2043 Civil Code), but it is independent and alternative to it (Cass. 16 November 2016, no. 23367).

As to the scope of compensation, it has been highlighted that vexatious litigation can cause whatever type of damage. Indeed, it might be material or non-material, it might cover both direct and indirect loss suffered and might include either compensation for actual damage or compensation for the loss of opportunity[60].

[60] R. Rossi, c.p.c. commentato, art. 96, responsabilità aggravata, available at: https://studiolegale.leggiditalia.it/#id=C1CI0000001860,__m=document [22.11.2021]. .

6.2 Foreign enforcement titles involving property rights or concepts of property law unknown to the Italian legal system

As follows from art. 55 Act on the Reform of the Italian System of Private International Law, the publicity of acts regarding the constitution, transfer and extinction of property rights is regulated by the law of the State where the property is located at the moment of the act. The above provision attributes competence to the *lex rei sitae* for the publicity of property rights on the assets, and at the same time establishes the competence of the registry situated in the *locus rei.*

The principle of typicality of acts subject to legal publicity must be coordinated with the need to publicise also acts coming from other legal systems, or which concern events or legal relations governed by foreign laws. This process is carried out on a case-by-case basis with the 'adaptation' technique of foreign substantive rules with those relating to publicity, and this is because of the wide scope of rules governing publicity, such as, e.g., art. 2645 Civil Code. An example can be the transcription of a property transfer contract governed by German law, limited to only an abstract act of transfer without an obligational contract, which constitutes the basis of the transfer on the causal level. Another example is that of the publicity of trust, governed by art. 12 Hague Convention of 1 June 1985, to be integrated as regards the conditions, contents and methods with art. 2645-*ter* Italian Civil Code whose provisions must, however, be 'adapted' in light of the specific contents of the applicable foreign law relating to the duration, form of the act, purpose of the bond, etc.[61]

[61] R. Scuccimarra, 'Diritti reali nel diritto internazionale privato'. Available at: notaioscuccimarra.it/pubblicazioni/1571-2/ [31.3.2020].; Z. Crespi Reghizzi, 'Diritti reali [dir. int. priv.]'. Available at: www.treccani.it/enciclopedia/diritti-reali-dir-int-priv_(Diritto-on-line)/ [31.3.2020].

7 Effects of Judgments – personal boundaries of *res judicata*

The issue of how co-litigants and third persons (individuals who are not direct parties of the proceedings) are affected by the judgment relates to substantive *res judicata*, which is distinguished from the formal *res judicata* mentioned in section 5.1. Substantive *res judicata* concerns the binding effects of the court's assessment of the rights on which the parties' claim was based. To have substantive *res judicata* effects, a sentence must previously become procedural *res judicata*.

As follows from art. 2909 Civil Code, a sentence is binding upon the parties to the proceedings where the sentence was rendered, their heirs and the successors in title, i.e. persons who acquired from the parties the rights being the object of the proceedings (*le parti, i loro eredi o aventi causa*). This means that the court's ascertainment of the right in dispute has binding effects on the parties and their proxies only. However, also some third persons can suffer from the indirect or extended effects of *res judicata*, e.g. when a person's right depends upon the existence of a right or a legal relationship between other parties. To prevent the negative effects of *res judicata* upon their own rights, these third persons have the possibility to voluntarily join the proceedings while they are still pending (*intervento adesivo dipendente*), in order to support the position of the party on which their rights depend.

Subject to certain conditions, third parties can also bring extraordinary appeals against the decision.

The *res judicata* effects may be also extended to certain individuals who were not parties to the dispute (e.g. procedural replacement – art. 111 Code of Civil Procedure).[62]

[62] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 280.

8 Effects of Judgments – temporal dimensions

8.1 Changes to statute or case law

Generally, changes to statute or case law do neither affect the validity of a judgment nor present grounds for challenge. According to the rule laid down in art. 11 para. 1 Provisions of Law in General (so-called *preleggi*),[63] the law provides only for the future: it has no retroactive effect.

8.2 Judgments ordering payment in instalments

Legal relationships that are not of a one-off nature and are subject to modifications, such as in case of maintenance, can be amended by way of a judgment.

8.3 Set-off objection

As a rule, the set-off objection has to be raised by the party no later than in his/her first defence (see art. 167 Code of Civil Procedure).[64]

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[63] *Disposizioni sulla legge in generale* (Regio Decreto 16 marzo 1942, n. 262, as amended). Available at: www.cameradigiustizia.com/UserFile/R.D_16.03.1942_n.262.doc.pdf [27.4.2020].
[64] S. Grossi and M.C. Pagni, 2010, supra n. 8, p. 105.

When, in the opposition proceedings, a counterclaim is raised by the debtor and is contested by the creditor, if the value of the counterclaim does not exceed that of the claim enforced, the accumulation of cases (the one regarding the opposition and the one regarding the assessment of the counterclaim) is not subject to the suspension of the terms of the working period, whereas if the counterclaim is excessive, this suspension applies (Cass. n. 5396/2009, referred to by the Cass. civ., n. 29802/2019).

9 *Lis pendens* and related actions in another Member State and irreconcilability as a ground for refusal of recognition and enforcement

9.1 Cause of action under the Brussels I Recast Regulation and *lis pendens* under Italian law

The Brussels I Recast Regulation uses the concept of a 'cause of action' for the purposes of determining *lis pendens*.

9.1.1 Determination of lis pendens

According to art. 39 para. 1 Code of Civil Procedure, if actions involving the same parties and having the same object are pending before different judges, the judge before whom the action was filed later, at any time and instance of the proceeding, also *ex officio*, issues an order stating the *lis pendens* (*litispendenza*) and orders the striking of the case from the General Register of Proceedings. *Litispendenza* means 'action

pending before a judge', but this word is used also to indicate the situation where the same actions – among the same parties and having the same object – are pending before different judges.[65]

9.1.2 Identity of claims

Lis pendens is considered to occur when:

1) the actions pending before different judges have the same parties, the same *petitum* (i.e. the remedy object of the parties' claim) and the same *causa petendi* (i.e. the same right claimed and the same grounds for the claim), and
2) the actions are pending before different judges in the same instance of proceedings (i.e. all the same actions are pending in the evidentiary phase or before that phase).

In Italian legal literature and case law, however, different positions exist as regards the 'identity' issue, which is a reflection of different notions of *res judicata* followed, respectively, by the doctrine and the courts. In general, courts tend to apply a wider notion of *res judicata*, which, e.g., extends preliminary issues to those actually decided in the dispute.

9.1.3 Relation of a negative declaratory action to contradictory actions

The action of mere ascertainment is the action through which the verification of one's own right (positive ascertainment) or the ascertainment of the non-existence of another's right (negative ascertainment) is requested.[66] See further section 3.1. According to the interpretation presented by the Supreme Court**, a** person who files an action of ascertainment, even if negative, must demonstrate the interest, which must be current and concrete, to obtain a useful result, legally relevant and not achievable except with the intervention of the judge, by removing a state of objective uncertainty about the existence of the legal relationship raised in the case (see e.g. the judgments of the Supreme Court: of 30 July 2015, n. 16162; of 23 May 2003, n. 8200).

[65] S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 108–109; M.A. Lupoi, 2018, supra n. 2, paragraph 165.
[66] D. Rombolà, 2018, supra n. 34.

9.1.4 The notion of *lis pendens* elaborated by the Court of Justice of the European Union

As is known, notwithstanding the fact that the definition of *lis pendens* enshrined in art. 29 B IA resembles the formulas provided by the Italian Code of Civil Procedure (proceedings involving the same cause of action and between the same parties are brought before different judges), the CJEU interpreted it as a self-standing concept of EU law. In particular, the latter notion is broader than the Italian one: it also encompasses those situations defined as *continenza qualitativa* by Italian case law and literature. An example of *continenza qualitativa* may be the following: after one of the parties has filed an action for the enforcement of an obligation stipulated in a contract, another action is subsequently brought against him by the other party before a different court for the rescission or discharge of the same contract. Italian case law applies art. 39 para. 2 Code of Civil Procedure (*continenza di cause*) to these situations (see Cass. Sez. Un. no. 20596/2007; Cass. no. 19460/2017). Pursuant to this provision, proceedings shall generally be reinstated before the judge where the action was filed first, so as to avoid conflicting judgments.

The EU definition of *lis pendens* has been delivered by the CJEU in the *Gubisch* case (C-144/86) and later confirmed in *Tatry* (C-406/92). In the first judgment, the Luxembourg Court stated that *lis pendens* covers a case "where a party brings an action before a court in a Contracting State (i.e. Germany) for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another Contracting State (i.e. Italy)" (para. 13). The Court reached this conclusion by affirming that these two actions have the same subject-matter (*petitum*) because, although not identical, they are nonetheless based on the same core issue, namely on the question whether the contract at stake is binding. The same reasoning has been applied by the CJEU in the subsequent similar *Tatry* case, the only difference being that the action filed first "seeks a declaration that the plaintiff is not liable for damage as claimed by the defendants, while the second, commenced subsequently by those defendants, seeks on the contrary to have the plaintiff in the first action held liable for causing loss and ordered to pay damages" (para. 42). The *rationale* behind the Court's reasoning was to facilitate the recognition of MSO judgments in MSA to the maximum extent possible, thus avoiding the risk of conflicting judgments, which had prevented their

recognition. In other words, these CJEU judgments are aimed at promoting the free movement of judgments in the EU.

As far as Italian case law is concerned, it should be noted that Italian judges have adapted to the EU notion of *lis pendens* whenever the application of EU Regulations is at stake (see e.g. Cass. civ. Sez. Unite Ord., 19/05/2009, n. 11532, in which the Supreme Court explicitly refers to *Tatry* judgment).

However, literature has highlighted the flaws stemming from the adoption of the EU notion of *lis pendens*, especially in cases such as *Tatry*, where the first action to be filed seeks a non-liability declaration. Indeed, was this declaration contained in the first judgment and was the latter recognized in the MSA, the second action would suffer from a partial denial of justice due to the *res judicata* effect of the foreign judgment.[67]

9.2 Related actions

Actions are related when they have the same parties (subjective relation) and they have the same object (*petitum*), or they are based on the same grounds (*causa petendi*) (objective relation). There are various types of related actions: they can be ancillary to the main action (*cause accessorie*, see art. 31 Code of Civil Procedure), actions seeking the enforcement of a guarantee (*cause di garanzia*, see art. 32 Code of Civil Procedure), actions dealing with substantive preliminary issues (*cause pregiudiziali di merito*, see art. 34 Code of Civil Procedure). They may also be related for other reasons: this is the case, for example, of counterclaims (*cause riconvenzionali*, see art. 36 Code of Civil Procedure).

Indeed, according to art. 40 Code of Civil Procedure, if related actions (see art. 31 ff. Code of Civil Procedure) are filed before different judges, and these actions, since they are related, may both be decided in a single proceeding, the judge issues an order assigning to the parties a final time limit (see art. 152 para. 2 Code of Civil Procedure) by which they shall reinstate the action before the other judge. In case of ancillary actions (art. 31 Code of Civil Procedure), proceedings shall be reinstated

[67] See C. Consolo, 2015, p. 371.

before the judge deciding on the main action; in other cases, proceedings shall be reinstated before the judge where the action was filed first.

As far as reinstatement of proceedings is concerned, case law has clarified that this is a discretionary power of the proceeding judge: thus, his decisions regarding the reinstatement of actions cannot be appealed (see Cass. no. 5424/1981; Cass. no. 1083/2004).

Moreover, case law derived from art. 31, 40 and 104 Code of Civil Procedure the possibility for creditors to file separated actions for the enforcement of claims stemming from the same underlying contract in cases where an objective interest exists in filing actions separately. In the latter cases, actions will not be decided in a single proceeding (so-called *frazionamento del credito nei rapporti di durata*: see Cass. Sez. Un. no. 4090/2017).

The existence of related actions cannot be raised by the parties nor by the judge, *ex officio*, after the first trial hearing (see art. Code of Civil Procedure), and the judge shall not order the reinstatement of actions where the status of the main action or of the action which was filed first is such that it is not possible to handle and decide jointly the related actions exhaustively.

Case law confirmed that the reinstatement of actions is not possible in cases when it would be too burdensome for the main action and when it would cause an excessive delay on the ongoing proceeding (see Cass. No. 2649/2004). Also, the reinstatement of proceedings cannot be ordered when related actions are subjected to the jurisdiction of administrative courts and civil courts, respectively. In these situations, judges are obliged to stay the proceedings *ex* art. 295 Code of Civil Procedure (see Cass. Sez. Un. no. 7621/2003). Case law clarified also that the reinstatement of actions cannot be ordered for actions pending at different stages of the proceeding (Cass. no. 15659/2000).

Lastly, as far as time limits are concerned, case law stated that when the existence of related actions is raised by the parties, this must be done explicitly by means of exception. The existence of related actions cannot be inferred from the request issued by the parties to the instructing judge to stay the proceedings *ex* art. 295 Code of Civil Procedure (see Cass. no. 14224/2017; Cass. no. 686/1984).

Moreover, in cases of related actions dealing with substantive preliminary issues, art. 295 Code of Civil Procedure confers the judge the power to stay the proceedings until the case concerning substantive preliminary issues will be decided.

However, the difference between ancillary related actions and other categories of related actions is not relevant if one of the related actions has to be dealt with through special proceedings (*riti speciali*).

In the latter case, regardless of the type of connection, related actions shall be handled and decided pursuant to the rules applicable to the action on the basis of which the venue is determined or, subordinately, pursuant to the rules applicable to the action of the highest value.

Nevertheless, there are some exceptions, such as in the case of special proceedings provided by articles 409 ff. and 442 ff. Code of Civil Procedure. Indeed, if an action is related to another one which has to be decided through these special proceedings, the latter shall apply to the whole proceedings.

Lastly, related actions are also relevant in the relationship between the *tribunale* and the justice of the peace (*giudice di pace*). In particular, if related actions are filed before a justice of the peace and before a *tribunale*, the justice of the peace can state, also *ex officio*, that the actions are related in favour of the *tribunale*.

As has been said, there might be situations in which the consolidation of proceedings is not possible (see art. 40 para. 2 Code of Civil Procedure) either because the time limit has expired or because the action which was filed first is such that it is not possible to handle and decide jointly the related actions exhaustively. In these cases, the so-called *sospensione del processo* (stay of proceedings) applies (see art. 295–298 Code of Civil Procedure). By virtue of art. 295, the court must issue a decision to stay proceedings whenever another case regarding a substantive preliminary issue is pending before the same or another court (so-called *sospensione necessaria*). On the other hand, art. 296 Code of Civil Procedure envisages that the instructing judge, at the request of all parties, where justified reasons exist, may order, for one time only, that the trial remains suspended for a period not exceeding three months, setting the hearing for the continuation of the trial (so-called *sospensione su istanza delle parti*).

9.3 Cross-border cases involving related actions

For the purposes of B IA, actions are deemed to be related "where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (art. 30 para. 3 B IA). Hence, proceedings on the merit and interlocutory proceedings (*procedimento cautelare*) cannot be considered as related actions, and nor can be the case for two different interlocutory proceedings.[68]

As far as Italian case law is concerned, there are only a few cases dealing exclusively with related actions in the meaning of art. 30 B IA, which is often invoked alongside *lis pendens ex* art. 29 B IA. In particular, art. 30 B IA has been applied *in concreto* by the Court of Padua (*Tribunale di Padova*) in a judgment issued on 15 October 2014.

In the case at hand, an action, filed in Poland, for payment of the purchase price on the basis of a certain contract was deemed related to another action, filed in Italy, seeking liability on a warranty on the basis of the same contract. Actions were regarded as related because they were based on the same core issue. Indeed, in both cases judges had to assess whether the parties had correctly performed the obligations laid down in the contract.

On the contrary, the Italian Supreme Court excluded the existence of related action in case Cass., Sez. Unite ord. 8 April 2011 n. 8034. Indeed, the risk of irreconcilable judgments was excluded because actions were based on different facts, the first action being filed against an investment fund for non-contractual liability while the second being filed by an investment fund against another one for contractual liability. The application of art. 30 B IA was excluded by the Supreme Court also in case Cass. civ. Sez. Unite Ord., 12/04/2012, n. 5765.

[68] See B. Barel and S. Armellini, 2020, p. 352.

9.3.1 Irreconcilability

Italian courts have not provided a general definition of irreconcilability for the purpose of related actions. As has been said, there are only a few cases where proceedings have been consolidated to avoid the risk of irreconcilability. An example is case Cass. civ. Sez. Unite, 28/10/1993, n. 10704, in which an action for payment of the purchase price on the basis of a certain contract filed against a British undertaking was deemed related to another action brought against the same defendant seeking compensation for non-contractual liability stemming from unfair competition.

9.3.2 Discretion of national courts to stay proceedings

In case Cass. civ. Sez. Unite, 26/11/1990, n. 11363, the Supreme Court interpreted art. 22 of 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (corresponding to art. 30 B IA). In this regard, it stated that the stay of proceedings as well as the decline of jurisdiction by any court other than the court first seized do not entail any obligation upon the given court. These are only discretionary powers allowed to the courts by the Convention. Thus, the decision not to stay proceedings and not to decline jurisdiction cannot be appealed.

Moreover, the Court of Florence (*Tribunale di Firenze*) in case 07/05/1987 *Agostini c. GEB Schuh-grosseinkaufsbund* (Rivista Diritto Internazionale Privato e Processuale, 1988, 313) clarified that the possibility provided by art. 22 of 1968 Brussels Convention to any court other than the court first seized to stay its proceedings does not depend upon the request of the parties. Rather, it falls under art. 295 Code of Civil Procedure, which envisages the so-called *sospensione necessaria*. The latter provision aims at coordinating the activities of different courts when related actions are pending at the same time. Indeed, according to art. 295 a court must stay proceedings in order to wait for another court to decide a substantive preliminary issue, when such decision will have *res judicata* effects also on the other dispute.

10 Court settlements

10.1 Prerequisites for the conclusion of a court settlement

By virtue of art. 185 Code of Civil Procedure, upon a request filed jointly by the parties, the instructing judge schedules a hearing for the parties' appearance in order to freely examine them and to attempt to effect their conciliation. The instructing judge is also empowered to schedule the aforementioned hearing pursuant to art. 117. When the parties' personal appearance is ordered, the parties have the right to be represented by a counsel provided with a general or special power of attorney, who shall be informed about the facts of the case. The power of attorney shall be issued in the form of a public deed or an authenticated private deed and shall vest the counsel with the power to conciliate the parties or to settle the dispute. If the power of attorney is conferred in an authenticated private deed, this can also be authenticated by the party's counsel. The counsel's lack of knowledge of the facts of the case, without any justified reason, shall be assessed by the judge in accordance with the second paragraph of art. 116. The conciliation attempt can be renewed at any time of the evidentiary phase of the proceeding. Once the parties have settled the dispute, minutes of the conciliation shall be drawn up. The minutes constitute an enforcement title.[69]

[69] S. Grossi and M.C. Pagni, 2010, supra n. 8, pp. 206–207.

Additionally, as follows from art. 185-*bis* Code of Civil Procedure, the judge, at the first hearing, or until the instruction is complete, presents the parties, where possible, having regard to the nature of the judgment, the value of the dispute and the existence of questions of easy and prompt solution of law, with a settlement or conciliatory proposal. The conciliation proposal cannot constitute grounds for recusal or abstention of the judge.

The parties are free to evaluate and accept such a proposal. If they do, the dispute is settled. Otherwise, the case proceeds to judgment but the judge shall take into consideration the fact that the parties have unreasonably rejected his proposal when it comes to assigning the costs of the proceedings. Basically, either the losing party will be punished for abuse of process under art. 96 Code of Civil Procedure or the winner might be awarded less than it would normally have been. Art. 185-*bis* Code of Civil Procedure has been extensively applied, especially in larger courts, where the judge often formulates settlement proposals after evidence has been gathered, so that such proposals are effectively an anticipation of the final judgment.[70]

The conciliation attempt is done also by the justice of the peace (*giudice di pace*) at the first hearing (art. 320 Code of Civil Procedure) and by the judge of appeal at the first appeal hearing (art. 350 para. 3 Code of Civil Procedure).

10.1.1 Necessary elements of a court settlement

The minutes of the conciliation shall contain the indication of the case, the declarations of the parties and the signatures.

[70] M.A. Lupoi, 2018, supra n. 2, paragraph 215.

Example:

MINUTES OF CONCILIATION

In the case no. ..... between ..... and ..... concerning ..... these minutes of conciliation report have been drawn up:
1 – Mr. ..... offers to Mr. ..... the sum of ..... euro.
2 – Mr. ..... accepts this proposal and declares that he has nothing else to claim for any reason, title and action.
3 – The legal costs and fees are compensated between the parties and the counsels, who sign these minutes and renounce professional solidarity.
The judge is authorised to remove the case from the docket.
Read, approved and signed

Place and date .....

The parties .....
The counsels .....
The single judge .....

[VERBALE DI CONCILIAZIONE

Nella causa n. ..... tra ..... e …... ad oggetto …... è redatto il presente verbale di conciliazione:
1 – Il sig. …... offre al. sig. ..... la somma di euro ……
2 – Il sig. …... accetta tale proposta e dichiara di non avere null'altro a pretendere per nessuna ragione, titolo e azione.
3 – Le spese legali e competenze sono compensate tra le parti ed i difensori, che sottoscrivano la presente, rinunziano al vincolo di solidarietà professionale.
Il g.u. è autorizzato a cancellare la causa dal ruolo.
Letto approvato e sottoscritto

Luogo e data .....

Le parti .....
I difensori .....
Il giudice unico dott. .....][71]

[71] B. Nigro and L. Nigro, 2013, pp. 291–292.

10.1.2 Legal relationships that can be settled in a court settlement

All legal relationships except for those concerning inalienable rights can be subject to a court settlement.

Legal relationships that are not of a one-off nature and are subject to modifications, such as in case of maintenance, child custody or rights of access, can be amended either by way of a judgment or by way of a settlement, depending on the parties' intention. In contrast, this does not apply, e.g. to a judgment awarding damages.

10.2 Enforceability of court settlements

In general, a court settlement is always enforceable. In terms of time limit, the only limitation is due to the statute of limitations attached to the specific rights laid down in the court settlement. In the Italian legal order, a ten-years statute of limitations applies to rights provided both by judgments and court settlements.
Needless to say, a court settlement is no longer enforceable once the obligations enshrined in it have been fulfilled.

10.3 Errors in court settlements

Conciliation *ex* art. 185 and 185-*bis* Code of Civil Procedure has both procedural and substantial effects.[72]

With regard to the former, conciliation leads to the end of the proceeding. Indeed, the action is usually declared deprived of purpose by the instructing judge by means of an order, despite the Code of Civil Procedure does not require a formal judicial decision to close the proceeding.

Besides that, the settlement enshrined in the special minutes constitutes an enforcement title. In fact, art. 88 of the provisions implementing the Code of Civil Procedure prescribes that the content of the settlement shall be contained in special minutes, signed by the parties, the instructing judge and the court clerk. In the

[72] See C. Mandrioli, 2017, p. 81.

absence of a special minutes, case law maintains the validity of the conciliation although contained in the minutes issued at hearing (Cass. 18 April 2003 no. 6288).

Contrary to the signature by the court clerk, the signature by the judge is an essential requisite for the validity of the settlement.

As far as the parties' signatures are concerned, while some authors consider the conciliation valid even without signatures of the parties, provided that the special minutes are signed by the judge, others regard it as null and void.[73]

In case of invalidity of the settlement, case law has affirmed the revocability of the order by which the instructing judge declares the end of the proceeding once the conciliation has occurred, with subsequent continuation of the proceedings (Cass. 4 December 1986 no. 7193; Cass. 9 July 1984 no. 3985).

Furthermore, parties can resort to the remedy provided by art. 615 Code of Civil Procedure in order to challenge the validity of the enforcement title enshrined in the special minutes.

Anyway, it is worth mentioning that were the minutes containing the settlement null and void, this would not preclude the conciliation from producing substantive effects – similar to those produced by an extra-judicial legal transaction among private parties – provided that the necessary conditions are met.[74]

As far as substantial effects are concerned, court settlements are considered as legal transactions, because conciliation stems from the agreement of the parties.[75] Thus, the interpretation of the conciliation's content is subject to the provisions which regulate the interpretation of contracts (art. 1362 ff. Civil Code) (Cass. no. 4564/2014; Cass. no. 14911/2007) and, in particular, to those concerning legal transactions (art. 1965 ff. Civil Code) (Cass. no 13613/2004).

[73] F. Lancellotti, 1961, pp. 397 ff., 413.
[74] L. Laudisa, 1990, pp. 413 ff., 451.
[75] L. Laudisa, 1990, supra n. 74, p. 450.

It follows from the foregoing that court settlements might be challenged through the remedies available against contracts and especially against legal transactions.[76] Thus, as an example, a court settlement might be nullified for vitiating factors such as misrepresentation, mistake, duress or incapacity (*dolo, errore, violenza, incapacità*).

In conclusion, in the light of the effects produced by conciliation on both procedural and substantive grounds, there is no unanimity as regards the classification of conciliation minutes under category no. 1), 2) or 3) of art. 474 Code of Civil Procedure, which enumerates the different categories of enforcement titles and clarifies their effects.

[76] F. Lancellotti, 1961, supra n. 73, p. 413, n. 82.

11 Enforceable notarial acts

11.1 Competences of the notary in civil and commercial matters

Notaries act as professionals who exercise a public function: their role is to authenticate acts signed in their presence.[77] The profession of notary is governed by the Act no. 89 of 16 February 1913 on the rules governing the notarial profession and notarial archives (the Notarial Law).[78]

The notary is a public officer to whom the State entrusts the power to confer public trust, i.e. the status of legal proof, to the deeds he/she draws up. Therefore, everyone, including the courts, must accept as true what a notary has attested, unless the crime of forgery is established. A public deed is a proof:

- of the origin of the document produced by the public official,
- of the parties' statements made in the document,
- of other facts that the official states to have occurred in his presence or have been carried out by the notary.

[77] 'Legal Professions – Italy', available at: e-justice.europa.eu/content_legal_professions-29-it-en.do?init=true&member=1 [9.3.2020].
[78] *Legge 16 febbraio 1913, n. 89 sull'ordinamento del notariato e degli archivi notarili* (Gazzetta Ufficiale n. 55, of 7 March 1913, Serie Generale). Available at: https://www.notariato.it/sites/default/files/legge-notarile_agg2016.pdf [9.3.2020]..

For this reason, the notary must personally determine the will of those persons who engage him/her and the goal to be achieved, in order to prepare the deed, according to the law, in the most suitable and economical manner. To this end, provision of the notary's advice prior to the signing of the deed is essential.

In performing his/her function, the notary must, by law, be independent and impartial: he/she must protect the interests of all parties equally, regardless of who has appointed him/her. He/She must, therefore, decline to act whenever there is a conflict of interest (for example, when his/her own relatives are parties to a transaction). He/She performs a function of prior control of legality: he/she has a duty to abide by the law and must not accept transactions prohibited by law. Thanks to the checks carried out by notaries, in Italy there are essentially no disputes regarding real estate transactions (only 0.003% give rise to disputes). In addition, due to the abolition in 2000 of the 'homologation' review by the courts and the subsequent assumption by the notary of the responsibility for the establishment of new companies, a corporation, which until 2000 needed about 150 days from its creation to its effective operation, can now be operating on the day of the deed, or at most in a few days.

Finally, the notary collects on behalf of the State taxes associated with all transactions (registration, mortgage and land taxes, etc.).[79]

11.2 Notarial act as an enforcement title

As indicated in section 1.1, art. 474 para. 3 Code of Civil Procedure recognises the enforcement effectiveness of a public deed not only as regards the obligations of sums of money contained therein, but also in case of delivery or release. Alongside the public deed, enforcement effectiveness is attributed also to authenticated private deeds; however, it is limited to obligations concerning sums of money. In accordance with art. 475 Code of Civil Procedure, notarial acts shall contain a *formula esecutiva* (see section 2.2).[80]

[79] See 'The notary: Function'. Avaliable at: https://www.notariato.it/en/function [9.3.2020] .
[80] A.M. Marzocco, 2013. 'L'atto notarile come strumento per la tutela esecutiva dei diritti' Avaliable at:elibrary.fondazionenotariato.it/articolo.asp?art=43/4316&mn=3 [10.3.2020].

11.2.1 Debtor's consent and direct enforceability of a notarial act

In the Italian legal order, notarial acts are enforcement titles for a right being certain, of a fixed amount and due (see art. 474 Code of Civil Procedure). Given that consent of both parties is necessary to conclude a bilateral legal transaction that creates rights being certain, of a fixed amount and due in favour of one of the parties, notarial acts are enforcement titles in the meaning of art. 474 Code of Civil Procedure regardless of the specific debtor's consent to direct enforceability. In other words, no specific clause is necessary to express the debtor's consent to direct enforceability. In order for notarial acts to be directly enforceable, they only have to be added an enforceability certificate (*formula esecutiva*) as provided by art. 475 Code of Civil Procedure.

In the Italian legal system, the debtor's consent is required in the course of the legal transaction. There is no need of a further debtor's consent in order to initiate enforcement proceedings.

11.3 The structure of a notarial act

According to art. 51 Notarial Law, a notarial act must be entitled 'The Italian Republic'.

The act must contain the following:

1. the indication in words of the year, month and day together with the local council area and place in which the notarial act is made;

2. the name, surname and an indication of the residence of the notary and the notarial district on whose roll he/she is registered;

3. the name, surname, paternity, the date and place of birth, the domicile, residence and conditions of the parties, witnesses and any persons standing trust for the parties.

If the parties or any of them participate in the act by means of a representative, the above requirements must be observed with respect both to such parties and to their representative. The original or copy of the power of attorney must be annexed to the act unless the original or copy is already included in the drafting notary's acts;

4. a declaration stating the certainty of the personal identity of the parties or a declaration of the enquiries made to establish such identity by the persons standing trust for them;

5. an indication, at least the first time this is done, in words and in full, of the dates, amounts and the quantity of the things forming the subject matter of the act;

6. a precise description of the things forming the subject matter of the act, in such a way as to avoid the possibility of mistaking them for others. When the act is concerned with immoveable property this must be described so far as possible, with an indication of its nature, the local council area where it is situated, the cadastral numbers, the census maps where these exist and its borders in order to provide a certain identification of the immoveable property concerned;

7. an indication of the acts and the documents annexed as part of the act;

8. confirmation that the act, together with the documents and acts annexed to it, has been read aloud to the parties and in the presence of the witnesses (if there are any) by the notary or read aloud by persons he/she believes to be trustworthy in his presence.

The notary may not require others to read the act written by him save as provided for under the Civil Code with respect to wills.

The reading of the annexed documents or acts may be omitted by express wish of the parties so long as they know how to read and write.

Such wish must be mentioned in the act;

9. confirmation that the act has been written by the notary or by persons he/she considers to be trustworthy, with an indication of the sheets making up theact and the written pages;

10. signing of the notarial act with name and surname of the parties, persons standing trust, interpreters, witnesses and the notary.

Any persons standing trust for the parties may leave after the prescribed declaration under point 4. In such circumstances, they must sign immediately after such declaration and the notary must note this.

If any of the parties or persons standing trust cannot or does not know how to read, he/she must declare the reason for such impediment and the notary must record such declaration;

11. for wills, an indication of the time when the signing was effected. Such indication may be made in other acts if the parties so request or if the notary considers it appropriate so to do;

12. where acts are written over more than one sheet, the signing of each sheet (at least with the surname) by the parties, the interpreter, the witnesses and the notary save with respect to the sheet containing the final signatures.

Initials must also be written on each sheet of the documents and titles incorporated in the act save where the documents concerned are authenticated, public or registered documents.

If there are more than six parties who can and are able to sign participating in the act, instead of all their signatures in the margin of the sheets, only some of them need to sign in the margin of each sheet, delegated by the parties representing different interests.

The notary's signature on the intermediate sheets is not necessary if the act has been written out by him in whole by hand.[81]

11.4 Obligations contained in a notarial act that can become directly enforceable

As already indicated above, by virtue of art. 474 Code of Civil Procedure, only notarial acts for a right being certain, of a fixed amount and due are always considered enforcement titles.

The enforcement of conditional claims contained in a notarial act is conditional upon the fact that the events envisaged by the conditional claims occur. In order for conditional claims to be enforced, it is not necessary that the creditor proves that the events contained in conditional claims had occurred, unless the debtor opposes the enforcement procedure by means of art. 615 Code of Civil Procedure.

11.5 Recognition and enforcement of foreign notarial acts under private international law

The recognition and enforcement of foreign non-EU judgments, court settlements as well as authentic instruments is governed by the Act no. 218 of 31 May 1995 on the Reform of the Italian System of Private International Law82 (art. 64 ff.).

The above law affirms the general automatic recognition of foreign judgments and other acts, without the need for recourse to any procedure, repealing the *exequatur* requirement, albeit with some limits. The main differences between recognition of EU judgments and the general rules are the following: non-EU judgments are recognized only after *res iudicata* in the State of origin; grounds for denial of recognition are wider (e.g. lack of international jurisdiction of the court of origin according to Italian principles on the topic; *lis pendens* in Italy).

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[81] See further E. Calò, 2001, p. 169; G. Casu, 'Formalità dell'atto notarile'. Available at: www.altalex.com/documents/news/2013/11/22/formalita-dell-atto-notarile [24.3.2020].

[82] *Legge 31 maggio 1995, n. 218. Riforma del sistema italiano di diritto internazionale privato* (Gazzetta Ufficiale n. 128 of 3 June 1995, Suppl. Ordinario n. 68, as amended), hereinafter: Act on the Reform of the Italian System of Private International Law. Available at: www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1995-06-03&atto.codiceRedazionale=095G0256&elenco30giorni=false [9.3.2020].

Enforcement of a foreign judgment, by contrast, means using it as an enforceable title and *exequatur* is still necessary to that end.[83]

11.6 Opposition to the claim contained in a notarial act

According to art. 615 Code of Civil Procedure, when the right of the applicant to proceed to the execution proceedings is challenged, and the enforcement proceeding has not yet been commenced, the opposition to the *precetto* may be filed by a summons to appear before the judge with venue over the case with reference to the subject, value, or territory of the case, pursuant to art. 27. For serious reasons, upon the party's request, the judge stays the enforceability of the title empowering to levy enforcement. When the enforcement has been commenced, the opposition under the previous paragraph and the challenge concerning the possibility to attach the assets shall be filed by motion to the judge of the same enforcement proceeding. This latter judge, by decree, schedules a hearing for the parties' appearance before him and the final time limit for serving the motion and the decree. In enforcement by way of expropriation, opposition is inadmissible if it is made after the sale or assignment has been made in accordance with art. 530, 552, 569, unless it is based on newly discovered events or the opponent proves that he could not file it promptly for reasons not attributable to him.

A third party alleging to be the owner of the attached assets or to have a right *in rem* on the same assets may file an opposition by motion before the judge of the enforcement proceeding before the sale or assignment of the assets is ordered by the judge (art. 619 para. 1 Code of Civil Procedure).

[83] A. Giussani, 2018, supra n. 11, pp. 25 ff.; A. Giardina, 1996, pp. 760–782; D.G. Daleffe, 'Riconoscimento ed esecuzione di atti stranieri'. Available at: www.altalex.com/documents/news/2016/12/01/riconoscimento-ed-esecuzione-di-atti-stranieri [10.3.2020].

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DIVERSITY OF ENFORCEMENT TITLES IN CROSS-BORDER DEBT COLLECTION IN THE EU: NATIONAL REPORT: ITALY

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Abstract The "National Report: Italy" systematically and comprehensively addresses the main features of enforcement titles in civil and commercial matters in the Italian legal system, focusing in particular on the analysis of their structure and content. The report outlines legal rules, the case law of the courts as well as the legal practice governing the structure and content of the operative part and the reasoning of the judgment. It also discusses the effects of judgments with reference to res judicata and enforceability. Moreover, the enforceability of court settlements and notarial acts is described. The report was created as part of a study conducted under the auspices of the EU project EU-En4s ("Diversity of Enforcement Titles in Cross-border Debt Collection in the EU") under the coordination of the Faculty of Law of the University of Maribor.

Keywords: enforcement title, judgment, court settlement, authentic instrument, *res judicata*

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