International Association of Judges
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Civil Law and Procedure

Replies of the Italian Delegation to the Questionnaire for the 2011 meeting (Istanbul – Turkey, 5-8 September 2011)

CROSS-BORDER ISSUES IN THE FACE OF INCREASING GLOBALIZATION – AS REFLECTED IN A SERIES INDIVIDUAL FACT SCENARIOS

A. Recognition and Enforcement of a Foreign Judgment

(A). General Questions:

1) What laws exist in your country regarding the recognition and enforcement of a foreign judgment?

The recognition and enforcement of foreign judgments in Italy is governed by Article 64 et seq. of the Private International Law Act (Law No. 218 of 31 May 1995), which replaced some provisions of the Italian Code of Civil Procedure and of the Italian Civil Code.

As far as recognition is concerned, pursuant to the Act, any judgment issued by a foreign court is automatically recognized in Italy without the need of a court order (which was required under the old law), unless the recognition or enforcement of the foreign judgment is denied or resisted by the person against whom it is asserted. In order for a foreign judgment to be (automatically) recognized, however, it must satisfy the following requirements:

- The judge who issued the judgment must have had jurisdiction over the matter in accordance with the relevant Italian principles;
- The original summons or claim must have been served upon the defendant in compliance with the prescriptions of the state in which the process took place, and the fundamental right to a defence must not have been violated;
- The parties must have appeared in the action in accordance with the local procedural law, or a default must have been properly declared in accordance with such law;
- The foreign judgment must be final and binding according to the law of the jurisdiction in which it was issued;
- The foreign judgment must not conflict with any final judgment issued by an Italian court;
- No proceedings may be pending before any Italian court in relation to the same subject matter and between the same parties which were instituted prior to the commencement of the foreign proceedings; and
- The rulings contained in the foreign judgment may not conflict with Italian public policy.

As I have just explained, no formal recognition is required. However, pursuant Article 67 of said Italian act of 1995, in case of not compliance with or of challenging of the automatic recognition of foreign judgement, or when it appears to be necessary to enforce the judgement (see below, on this aspect), anyone who has an interest in it can lodge a request with court of appeal of the place in which the judgment has to be enforced, asking the court to ascertain the existence of the requirements for the recognition of the judgement. The judge can also incidentally recognize a

foreign judgement with an effect which is limited to this second judgement. Just to give an example of this case, in a recent judgement before the first instance court of Belluno, the court, which had been asked by an Ukrainian woman to issue a legal separation judgement against her husband (Ukrainian citizen), rejected her plea, because it incidentally recognized the divorce judgement previously rendered by a Ukrainian court, so deciding that, being the couple already divorced, they could no longer get a judgement of legal separation (as, following the recognition of the foreign judgement, that couple could not be considered as married).

Coming to enforcement, we have just seen that a special procedure for recognition is requested by above mentioned Article 67 in order to have a foreign judgement enforced. Therefore we can say that, while recognition is, generally speaking, automatic (save challenge by concerned party), enforcement presupposes as a formal requirement a previous formal recognition by an Italian appellate court. After such recognition has occurred, the foreign judgement can be enforced following the same procedure provided for by Italian law for the execution of Italian judgements.

The issue of recognition and enforcement of foreign judgements forms also object of a number of international conventions to which Italy is part, as well as of an increasing array of regulations issued by the European Union.

Among such European Regulations let me mention the following ones:

- Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
- Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments (called also "Brussels I" Regulation). It entered into force on 1st March 2002 and simplifies the procedure for having a foreign judgment declared enforceable, replacing the Brussels Convention of 1968. The Regulation was extended to Denmark following the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (called also "Brussels II" regulation).
- Regulation (EC) No 805/2004 of 21 April 2004 creating a European enforcement order for uncontested claims.
- Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

Also some cross-border new procedures have been created, in order to directly obtain an enforcement title, which is automatically recognised and enforceable in any EU State (save Denmark):

- Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure.
- Regulation (EC) No 861/2007 of 11 July 2007, establishing a European Small Claims Procedure.

A tendency within the EU legal order is to progressively abandon the distinction between recognition and enforcement. Aim is to have a system in which European judgements can "circulate" among EU countries without any need of formal recognition or *exequatur*. The recent "Stockholm Programme" (2010-2014) approved by the EU clearly sets that goal, providing for that "As regards civil matters, the European Council considers that the process of abolishing all

intermediate measures (the *exequatur*), should be continued during the period covered by the Stockholm Programme. At the same time the abolition of *exequatur* will also be accompanied by a series of safeguards, which may be measures in respect of procedural law as well as of conflict-of-law rules." As far as such safeguards are concerned, the same document says that appropriate measures will especially regard "judgments taken by default, which may be measures in respect of procedural law as well as of conflict of law rules (e.g. the right to be heard, the servicing of documents, time required for providing opinions, etc). The main policy objective in the area of civil procedural law is that borders between countries in the European Union should not constitute an obstacle either to the settlement of civil law matters or to initiating court proceedings, or to the enforcement of decisions in civil matters. With the Tampere conclusions and the Hague programme, major steps have been taken to reach this goal. However, the European Council notes that the effectiveness of Union instruments in this field still needs to be improved."

Coming to international conventions to which Italy is part, I would like to mention following ones:

- New Lugano Convention. Signed on 30 October 2007 by the European Union, this new instrument on jurisdiction and enforcement of judgments in civil and commercial matters replaces the 1988 Lugano Convention, which until then had governed the rules on jurisdiction between EFTA Member States (EFTA covers the European Union plus Switzerland, Iceland, Norway and Lichtenstein - however, this latter Member State did not ratify the Brussels Convention). The original Lugano Convention, signed on 16 September 1988, was negotiated on the basis of the Brussels Convention as interpreted by the European Court of Justice over the past 40 years. The construal of the Lugano Convention, however, did not fall within the ambit of the ECJ's jurisdiction, as of course it falls short of the requirements set out under article 293 of the EC Treaty for a convention to be deemed as a piece of legislation produced by the EU. As a result, to avoid divergent views on the application and interpretation of the two Conventions, three additional protocols were adopted. These additional protocols compel the courts of each Contracting State to "pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting State" in relation to the provisions of either Convention. Protocol No. 2 sets up an information exchange system specifically aimed at achieving uniform interpretation. This information system involves transmitting relevant judgments delivered pursuant to these two Conventions to a central body (a Register of the ECJ). The 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters entered into force between the Member States of the European Union (including Denmark) and Norway on 1 January 2010.
- Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants (Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children has been signed in 2003 by Italy, but it has not been ratified yet).
- Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.
- Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.
- Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.
- European (Council of Europe) Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, Luxembourg, 20 May 1980.

2) What is the difference in the operative result in your country between the recognition of a foreign judgment and the enforcement of a foreign judgment?

The legal term "Recognition" designates the attribution within a certain legal order of effects which are other than the enforceability. This means that a judgement which has been recognised can automatically get all effects which imply a modification in the legal relations among parties and with other subjects. "Enforcement," on the contrary, is the legal proceeding tending to force parties to comply with the judgement. In other words, while recognition automatically affects the level of legal relations, enforcement implies and presupposes the cooperation (spontaneous or forced) by other people. Just to give an example, saying that a foreign judgement of divorce is recognized means that those persons can marry again, as they are considered to be singles, without any need for the divorce judgement to be revised or submitted to an *exequatur* procedure. Having a former husband pay alimonies according to the divorce judgement is, on the contrary, a matter for execution.

3) What conditions are required in the court of your country in order to declare a foreign judgment as enforceable?

As already mentioned (see above, under question A. 1.), pursuant to Article 67 of the 1995 Act, a foreign judgement has to be formally recognized by a decision of the court of appeal, in order to become enforceable and to be enforced in Italy. This may happen under following conditions:

- The judge who issued the judgment must have had jurisdiction over the matter in accordance with the relevant Italian principles;
- The original summons or claim must have been served upon the defendant in compliance with the prescriptions of the state in which the process took place, and the fundamental right to a defence must not have been violated;
- The parties must have appeared in the action in accordance with the local procedural law, or a default must have been properly declared in accordance with such law;
- The foreign judgment must be final and binding according to the law of the jurisdiction in which it was issued;
- The foreign judgment must not conflict with any final judgment issued by an Italian court;
- No proceedings may be pending before any Italian court in relation to the same subject matter and between the same parties which were instituted prior to the commencement of the foreign proceedings; and
- The rulings contained in the foreign judgment may not conflict with Italian public policy.

4) In order to enforce a foreign judgment, does your country require reciprocity with the country which gave the judgment?

No, it doesn't. Before the reform of 1995 came into force, Article 16 of preliminary provisions of the Italian Civil Code stipulated that foreigners could enjoy same civil rights as citizens only under condition of reciprocity. This rule has been quashed by aforementioned law.

5) Under what circumstances does the court in your country not enforce a foreign judgment?

I have already explained (see above, under point 3), what are the requirements for the enforceability of a foreign judgement. Therefore the Italian courts of appeal will not declare enforceable those judgments which do not comply with above mentioned requirements.

Let me point out in particular, in this framework that Italian law provides that foreign judgments shall not conflict with Italian internal international public policy (*ordine pubblico interno internazionale*), often described in a more simple way as "Italian international public policy." Italian case law on the definition and scope of Italian international public policy is very limited and has tended not to involve commercial cases. In those cases in which Italian courts have ruled on the issue, the practice has been to adopt a very narrow construction of public policy. It is therefore possible for an Italian judge to order the recognition of a foreign judgment which, had the judgment originated in Italy itself, would not have been issued on the basis that it violated public policy. Just to give an example, which also shows the difference between "Italian international" and "Italian internal" public policy, in 1984 the Italian Supreme Court of Cassation declared as not in violation of Italian international public policy the American rule which recognized validity and enforceability of prenuptial agreements in contemplation of divorce, in a case concerning an American couple. The same Court said that that very kind of agreement would cause an infringement of the Italian internal public policy (i.e. Italian mandatory rules, from which the parties may not depart, but which do not represent fundamental and indefeasible values of Italian society).

6) Can your country impose temporary orders issued by a foreign court, such as alimony?

According to Article 10 of Law 218/95 temporary orders can be issued by an Italian judge when the temporary order has to be enforced in Italy or when there is Italian jurisdiction on the merits of the case. So, for instance, in case of a prejudice caused by a foreigner against an Italian citizen, the Italian judge will have jurisdiction provided that assets of debtor to be frozen are located in Italy, or if the place where the harmful event occurred or may occur is located in Italy (because in this latter case the Italian judge has jurisdiction over the merit, according to our conflict law rules). As far as recognition of foreign temporary orders is concerned, it has to be underlined that Article 64 of the Italian international private law reform of 1995 only concerns "judgments." According to the Italian definition of "judgment" a temporary order is not contemplated under that provision; reason is that interim and precautionary measures undergo simplified and accelerated procedures, they tend to be provisional and they have are instrumental to the case (this means that, unlike judgements, such decisions cannot become permanent and final). As a consequence, a foreign temporary order (such as e.g. an American "asset-freezing injunction") cannot be recognized or enforced in Italy. Foreign creditors who want to protect their credits and or assets in Italy will have to lodge a petition with an Italian judge.

Special rules are provided for within the European Regulation system.

Pursuant to Article 31 of "Brussels I" regulation, "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter." According to Article 47 of same Regulation, "1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required. 2. The declaration of enforceability shall carry with it the power to proceed to any protective measures. 3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought."

Pursuant to Article 20 of the "Brussels II *bis*" Regulation "1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has

jurisdiction as to the substance of the matter. 2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate."

According to Article 14 of Regulation No. 4/2009, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligation, "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter."

Coming to the special case of a temporary order for alimony, I think this kind of decision, even if it is a provisional one, can be considered as a "decision," pursuant to Article 2 of said regulation No 4/2009. According to this provision, "1. For the purposes of this Regulation: 1. the term 'decision' shall mean a decision in matters relating to maintenance obligations given by a court of a Member State, whatever the decision may be called, including a decree, order, judgment or writ of execution, as well as a decision by an officer of the court determining the costs or expenses. For the purposes of Chapters VII and VIII, the term 'decision' shall also mean a decision in matters relating to maintenance obligations given in a third State."

This means concretely that, in alimony cases, the decision will be automatically enforceable, according to Articles 17 et seq. of Regulation No. 4/2009, which provide for abolition of *exequatur* for decisions over maintenance obligations in Member States bound by the 2007 Hague Protocol, without any special procedure being required and without any possibility of opposing its recognition and also without any need for a declaration of enforceability.

7) What are the conditions necessary for recognition of a foreign judgment in your country? Can your court recognize a foreign judgment incidentally?

As to the first part of the question, see above my answers to questions A. 1. and A. 3.

As far as the second part of the question is concerned, I have already pointed out, answering question A. 1., that the Italian judge can also incidentally recognize a foreign judgement with an effect which is limited to this second judgement. This is literally provided for by Article 67, Para. 3, of said Law No. 218 of 1995. I have already referred the case of a recent judgement before the first instance court of Belluno, where the judge, who had been asked by an Ukrainian woman to issue a legal separation judgement against her husband (Ukrainian citizen), rejected her request, because the court incidentally recognized the divorce judgement previously rendered by a Ukrainian court, so deciding that, being the couple already divorced, they could no longer get a judgement of legal separation (as, following the recognition of the foreign judgement, that couple could not be considered as married).

8) Is it possible to enforce a foreign arbitration award in your country?

Pursuant to Article 839 of the Italian Code of Civil Procedure "1. Anyone wishing to enforce a foreign arbitral award in Italy shall file a motion with the President of the Court of Appeal where the other party resides; if such other party does not reside in Italy, the motion shall be filed with the President of the Court of Appeal of Rome. 2. The applicant shall also file the original award (or an authenticated copy) as well as the arbitration clause (or an authenticated copy). 3. In case the aforesaid documents are not drafted in Italian, the claimant shall also file an official translation. 4. The President of the Court of Appeal shall declare the award's validity and effectiveness unless he finds that: [a] The dispute could not be devolved to arbitration according to

Italian law; or [b] The award has been made by decisions which are contrary to the Italian public order."

(B). Cases

1) Humpty and Dumpty are a business partners in Wonderland. Humpty violated the partnership agreement signed between them. The partnership agreement stated that the partnership will be the representative in your country, of an investment company from Wonderland, and will market its services in your country. Humpty argued that Dumpty established a competing investment company in your country. Wonderland Court ruled that the Dumpty violated his duty of good faith and fair dealing and ruled against him to pay Humpty damages of 5.5 million dollars. A sum of one and a half million dollars as punitive damages and the rest as compensatory damages for harm caused.
Humpty asks the court in your country to enforce the Wonderland court ruling, Dumpty opposed, his main claim being that part of the damages is punitive and therefore is not enforceable.

What is the law in your country?

Pursuant to the case law of the Italian Supreme Court of Cassation (see judgment No. 1183 of 19 January 2007) punitive damages award is not in compliance with Italian internal international public policy. In a product liability case, a federal district court in Alabama entered a one million dollars judgment against an Italian manufacturer accused of producing a defective item that allegedly contributed to the death of the plaintiff's son. The court did not specify the apportionment of contributory and punitive damages against the Italian corporation. The Italian court of first instance (the Venice Court of Appeals) refused to recognize and enforce the Alabama judgment, concluding that the award was punitive in nature and, therefore, contrary to Italian international public policy. An appeal ensued, but the Supreme Court of Cassation found no fault in the lower court's ruling and upheld it on the ground that the Italian system of civil liability is strictly compensatory, not punitive.

I personally do not agree with such conclusion.

Although it is true that, in the U.S., punitive damages do not have a compensatory nature since their main goal is to punish and prevent future wrongdoing, it is also true that the trend to rationalize and restrict the award of punitive damages in the legal systems that admit this category, as illustrated by U.S. practice, may contribute to reducing the gap with other legal systems. In this regard, it is important to note that punitive damages are remedies under private law. Additionally, in civil law countries, examples can be found of institutions in which certain civil liability rules have additional functions, such as discouraging certain activities in the future, as illustrated by provisions on the extent of civil liability resulting from environmental damage. Moreover, given that in many jurisdictions compensatory damages may cover nonmonetary damage and that the costs related to litigation are commonly awarded to the successful claimant, it may happen that the amount of punitive damages awarded by a U.S. court may not always go grossly beyond the amount a court in a country whose liability system is compensatory would grant the plaintiff in the same dispute.

Let me also add that a recent reform in our Civil Procedure Code has foreseen that a party who has started a frivolous litigation before a court can be sentenced by the judge to pay a sum to the counterpart. This sentence can be awarded even without any formal petition for it by the counterpart and the above mentioned sum can be allocated by the judge in equity, even in the case no evidence of pecuniary loss has been given by the party who won the case. This means that the principle of punitive damages is going to be progressively accepted even in an outdated and backward legal system like the Italian (procedural) one.

In this scenario it seems hard to conclude that a foreign judgement awarding punitive damages is in conflict with Italian international public policy. Italian international public policy is referred to principles that typically relate to the fundamental ethical, economic, social and legal values of the members of society (see e.g. Italian Supreme Court of Cassation, judgment No. 13928 of 13 December 1999): therefore, the principle according to which judges can only allocate

compensatory and not punitive damages, which is currently under question even on the "internal" front, does not represent, in my view, fundamental and indefeasible values of Italian society.

2) A British businessman got into debt in the amount of 100-200 million pounds sterling and a bankruptcy order was issued against him by the High Court of Justice in London, with the appointment of estate trustees. Following this ruling, the trustee submitted to the court in your country a request to enforce the order and to appoint an official receiver for the realization of the debtor's assets located in your country.

a. Will the court in your country enforce the court order obtained in England?
b. The question was asked to address the fact that the English ruling does not include a personal operative remedy; in this case can your court enforce the ruling or rather give recognition?
c. Can it be a direct recognition? If not, can it be an incidental recognition?
d. What are the different effects of the three variations: enforcement, direct recognition and incidental recognition?

a. Pursuant to Article 16 of Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings." According to Article 17 of the same Regulation, "1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State. 2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effect vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent."
b. Pursuant to Article 18 of the same Regulation, "The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7. 2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors. 3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes."
c. Pursuant to Article 25, "1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention. The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with

them, even if they were handed down by another court. The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings. 2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable. 3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy."

d. See above, the answers to questions a. and b. Let me also add that, pursuant to Article 38 of aforementioned Regulation, "Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings." Furthermore, as stated in *Considerandum* No. 16, "The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States."

3) Sarah and Judy have been lifetime partners for 7 years and are citizens of your country. Their permanent residence is the State of Neverland. Sarah bore a son after she had been impregnated with a donor sperm. The son was adopted by Judy with Sarah's consent. The adoption order was issued in Neverland and Judy was registered in the birth certificate as an additional parent. Sarah and Judy would like to return to your country for the purpose of studying there for two years. They have notified the registration official that Judy has adopted the child, relying on the birth certificate and the ruling of the State of Neverland which issued the decree of adoption. The Registration official refused to accept the registry on the grounds that the existence of two biological parents of the same gender is not possible and he is not obliged to accept the registration at its face value. Sara and Judy apply to the court in your country to recognize the adoption.

a. What will be your ruling?
b. Does it depend on the question of the law in your country allowing an adoption by a couple of the same sex?
c. If so, what will be the ruling if it is not allowed?

a. Let me first explain that in Italy, as a general rule, single persons may not adopt minors (whereas adult persons can be adopted by singles). Exceptions are provided for in special cases: if, during the probationary period, one spouse dies, the adoption by the surviving spouse may still be authorized if it is found to be in the best interest of the child. Likewise, the adoption by one spouse may be authorized if the couple separated during the probationary period, but only if such authorization is motivated solely by the best interests of the child. Finally, a person may adopt the children of his or her spouse, but this is regarded as an "adoption in a special case." Actually, in a separate title, the Italian law on adoption (Law No. 184 of 1983) waives some of the requirements for adoption in special circumstances, including: - if biological relatives who have, after the death of the biological parents, developed a strong relationship to the child they wish to adopt; - if spouses wish to adopt biological or previously adopted children of the other spouse; - if the adoptee is disabled and has lost his or her biological father and mother; or - if pre-adoptive placement

proves to be impossible. In these cases, unmarried couples may also adopt. If the adoptee is disabled or spouses adopt children of their respective husbands or wives, the law requires a minimum age difference of only 18 years.

Of course the above mentioned cases are exceptional. The general prohibition on minors' adoption by single persons under Italian law has been the topic of considerable debate in Italy—even more so because the European Convention on the Adoption of Children authorizes its member states to provide for adoption by single persons, though it does not require them to allow it. As a consequence, gay or lesbian couples have no possibility to adopt: they may not marry under Italian law and neither may they adopt as a single person (which is possible in other European Countries).

Pursuant to a recent decision by the Italian Supreme Court of Cassation (judgment No. 3572 of 14 February 2011), Italian first instance juvenile courts (which are competent on the matter) cannot recognize a foreign full adoption order in favour of a single parent, as no Italian law bestows to single parents the right to full adoption. This is a consequence of the fact that in this case, pursuant to Article 41, Para. 2, of the law No. 218/1995, special provisions of law No. 476/1998 should become relevant. The latter is the Italian statute of ratification of Hague 1993 convention, (Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption), according to which also Italian provisions of the law on adoption have been amended. So, according to Article 35 of Italian law of 1984 on adoption, as amended, following the ratification of the 1993 Hague convention, Italian court cannot recognize a foreign adoption order which is "contrary to fundamental principles regarding family and juvenile law."

It has to be added that the same Supreme Court ruling stated that the first instance court could however recognize "minor" effects to that order, converting it into a special adoption, the so called "adoption in special cases," (see above) as provided for by Article 44. d) of the law No. 184/1983 on adoption. This kind of adoption produces less relevant effects than the full adoption (e.g. all legal ties to the family of origin are not legally cut off, as it happens with the full adoption).

b. In my view the above mentioned solution does not (and should not) have any link to the fact that the child was part of a gay family. Moreover, I would add that such element should be absolutely irrelevant and that any discriminatory decision taken on that ground would be in violation of the European Convention for the Protection of Human Rights. Let me cite in this framework the decision taken by the European Court sitting in Strasbourg in the case of *E.B. v. France*, 22 January 2008, where the Grand Chamber found a violation of Article 14 (right to non-discrimination) in conjunction with Article 8 (rights to private and family life). These are the relevant facts for that decision. In 1998 a French administrative authority rejected the applicant's request for authorisation to adopt a child. During the procedure the applicant had mentioned her homosexuality and her stable relationship with another woman. The administrative courts dismissed the applicant's appeals "having regard to her lifestyle," among other reasons. Ruling on this situation, the Court in Strasbourg noted that the French "administrative courts went to some lengths to rule that although regard had been had to the applicant's sexual orientation, it had not been the basis for the decision in question and had not been considered from a hostile position of principle (…). However, in the (EHR) Court's opinion, the fact that the applicant's homosexuality featured to such an extent in the reasoning of the domestic authorities is significant." It observes that "the manner in which certain opinions were expressed was indeed revealing in that the applicant's homosexuality was a determining factor." The European Court concluded that whilst efforts were taken by the French judicial authorities to justify taking into account the applicants "lifestyle," the "inescapable conclusion" was that the applicant's sexual orientation "was at the centre of the deliberations and that it was a decisive factor leading to the decision to refuse her authorisation to adopt." In rejecting the suggestion that the discrimination was a

consequence of the pursuit of a legitimate aim, the European Court reiterated that where sexual orientation is involved "there is a need for particularly convincing and weighty reasons to justify a difference in treatment."

c. As explained (see above, answer a.), according to the recent above mentioned decision of the Italian Supreme Court, the Italian ruling would be the recognition of the adoption order under the less relevant and less effective form of "adoption in special cases." This solution could be seen (in my personal view) as in violation of European principles, as well as of the principle of equal treatment of all people before the law: a principle which is also stated by the Italian Constitution (Article 3).

B. Cross border issues in the conduct of trials:

Factual Scenario #1

Company "Head Co." is the parent company of an international group of companies. It carries on business in its country of incorporation, country A. It also carries on business in country B through a subsidiary ("Subsidiary") which is incorporated in country B.

"Director" is a director of Head Co. and Subsidiary. He is also a resident of country B.

Head Co. and Subsidiary claim that Director has breached statutory, fiduciary and contractual duties that he owed to each of them, arising out of his position as director of both Head Co. and Subsidiary. The companies allege that he misappropriated funds of Head Co. and Subsidiary. They rely on substantially the same acts and events to support their respective claims.

Head Co. and Subsidiary have commenced two sets of proceedings against Director: one in country A and the other in country B, both actions seeking relief against Director arising out of substantially the same facts.

Assume you are a Court in country A. Director has applied to your Court for an order to stay the proceedings against him in your country.

Questions:

1) What test would your Court apply or what factors would your Court take into account when determining Director's application?

2) Would you be guided by the laws of your country alone, or some kind of international agreement? For instance, is your country a signatory to a convention on jurisdiction?

3) If your country is a signatory to such a convention how would this influence the decision making process?

4) Would it make any difference if there was a choice of jurisdiction provision in the contractual arrangements between the companies and Director providing that the parties submitted to the exclusive jurisdiction of country B?

5) Would your Court take into account considerations of international comity? In other words, grant a stay to give recognition to the jurisdiction of country B to determine the dispute?

6) Would it make any difference if country B was not a signatory to the convention?

7) If your country is a signatory to such a convention, what is your Court's experience of the convention in resolving issues of jurisdiction and does the convention assist to reduce disputes on jurisdiction?

Additional facts:

Assume that Head Co. argues that your Court should not stay the proceedings in country A because the laws of country B do not recognise all of the claims that have been made under the laws of country A.

8) Would this be a relevant consideration to take into account in determining whether to stay the proceedings?

9) How would your Court determine whether the relevant claim formed any part of the laws of country B?

Additional facts:

Assume that Director's employment contract with Head Co. and Subsidiary contained a choice of law clause, nominating the law of country B as the applicable law in the event of a dispute.

10) How would the choice of law clause influence your decision in the above scenario?

11) In what circumstances would your Court decline to stay proceedings, despite the clause?

12) Is your country a signatory to a convention for the recognition of exclusive choice of court agreements? If so, how does this influence the decision-making process? Is it your Court's experience that such a convention reduces disputes about the law to be applied?

13) Does your Court recognise any limit of jurisdiction based on principles of international comity – that is, that a court should decline jurisdiction in recognition of the foreign court's jurisdiction?

Additional facts:

Assume that both courts are the appropriate forum for the dispute. Assume also that Director makes an urgent application for a stay of both proceedings in both country A and country B. You are the Court in country A and would find it helpful to speak with the judge in country B to ascertain what stage the proceeding has reached in country B and its likely hearing date. You consider that this may be helpful in deciding whether to stay the proceedings.

14) Is there any structured way in your system that enables judges of different courts to communicate? If so, what is the structure and how effective is it?

Additional facts:

Assume your Court does not grant a stay and the matter proceeds in country A, applying the laws of country B.

15) How would your Court receive evidence in relation to foreign law? For example in most common law countries, the content of foreign law is a question of fact which is proven by expert evidence.

16) Is your country a signatory to any convention for determining foreign law? For instance, the New South Wales Supreme

Court in Australia and the Singapore Supreme Court have entered into a Memorandum of Understanding (MOU) to work closely on issues of foreign law. Under the MOU, when an issue of foreign law arises in a case before either of the courts, they will be able to direct parties to take steps to have any contested issue of foreign law determined by the court of the governing law.

17) If your country has similar arrangements with foreign courts, what is your Court's experience? Has it reduced the complexities and difficulties in ascertaining the content of the foreign law?

Additional facts:

Assume that Director applies to have evidence taken in country B?

18) What factors would your Court take into account when determining the Director's application?

19) Would you be guided by the laws of your country alone, or some kind of international agreement? For instance, is your country a signatory to a convention for the collection of evidence? If so, how successful is the co-operation in taking evidence in a foreign state and how efficiently and expeditiously can evidence be taken?

Additional question:

If your country is a signatory to conventions in civil proceedings, is it your Court's experience that civil procedure for commercial cases as between signatory countries have become more harmonised?

1) & 2)

Relevant legal texts in this case are provisions of Italian statutes, as well as of European Regulations and of international or bilateral conventions.

The main legal source governing Italian jurisdiction in civil and commercial matters is the already mentioned Law No. 218 of 31 May 1995 on the Reform of the Italian System of Private International Law. With reference to jurisdiction, Article 3.1 of the 1995 Act contains a general rule on jurisdiction which states that "Italian courts shall have jurisdiction if the defendant is domiciled or resides in Italy or has a representative in this country who is enabled to appear in court pursuant to Article 77 of the Code of Civil Procedure, as well as in other cases provided for by law." In addition to this general provision, Article 3.2 provides for that "Italian courts shall further have jurisdiction according to the criteria set out in Sections 2, 3 and 4 of Title II of the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters with Protocol, signed in Brussels on 27 September 1968, enforced by Law No. 804 of 21 June 1971, with amendments in force for Italy, including when the defendant is not domiciled in the territory of a contracting State, with respect to any of the matters falling within the scope of application of the Convention. With regard to other matters, jurisdiction shall be also determined according to the criteria laid down for territorial jurisdiction." Therefore, Italian courts shall have jurisdiction if the defendant, whatever his nationality, is domiciled or resident in Italy or has a representative pursuant to Article 77 of the Code of Civil Procedure, i.e., a representative empowered to act in court for the defendant (Article 3.1, first part, 1995 Act). Case law also emphasised this rule underlining that the 1995 Act allows Italian courts to have jurisdiction when the defendant is domiciled or resident in Italy, irrespective of his nationality (see the decisions of the Italian Supreme Court of Cassation, No. 4807 of 7 March 2005, *Riv. dir. int. priv. proc*., 2006, p. 161; No. 2060, of 11 February 2003, *ibidem*, 2006, p. 547; Constitutional Court, decision No. 428 of 18 October 2000, *ibidem*, 2001, p. 645). Italian courts shall have jurisdiction according to the criteria set out in Sections 2, 3 and 4 of Title II of the Brussels Convention even when the defendant is not domiciled in an EU State, with respect to all the matters falling within the scope of application of the Brussels Convention (Article 3.2, first part, 1995 Act).

Let me add in this framework that the reference made by Article 3 of the Italian 1995 Act to 1968 Brussels convention should be read now as a reference made to the already mentioned "Brussels I" Regulation, which has replaced the 1968 Brussels convention. Therefore also relevant in the above mentioned matter is Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

As for international conventions relevant in Italy, Article 2 of the above mentioned 1995 Act specifies that "the provisions of this law shall not affect the application of any international conventions to which Italy is a party." In fact, Italy is part to several conventions in this field. Most of them only concern only recognition and enforcement of foreign judgments and, consequently, do not have any relevance at jurisdictional level. Nevertheless, there are some bilateral and multilateral

agreements still in force which apply to matters that fall within the scope of the Brussels I Regulation.

Among multilateral conventions we can cite following ones:

- Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air;
- Brussels Convention of 10 May 1952 for the unification of certain rules relating to civil jurisdiction in matters of collision of sea-going ships;
- Brussels Convention of 10 May 1952 for the unification of certain rules relating to the arrest of sea-going ships;
- Rome Convention of 7 October 1952 on damage caused by foreign aircraft to third parties on the surface;
- Geneva Convention of 19 May 1956 on contracts for the international carriage of goods by road;
- Paris Convention of 29 July 1960 on third party liability in the field of nuclear energy, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982;
- Brussels Convention of 31 January 1963, Supplementary to the Paris Convention of 29 July 1960 on third party liability in the field of nuclear energy;
- Brussels Convention of 29 November 1969 on civil liability for oil pollution damage;
- Protocol on jurisdiction and recognition of decisions in respect of the right to the grant of a European Patent of 5 October 1973;
- Geneva Convention of 6 April 1974 on a Code of Conduct for liner conferences;
- Hamburg Convention of 31 March 1978 on the Carriage of goods by sea;
- Convention concerning International Carriage by rail of 9 May 1980 (COTIF);
- Montreal Convention of 28 May 1999 for the unification of certain rules for international carriage by air.

Among bilateral conventions we can cite following ones:

- Convention between Switzerland and Italy of 3 January 1933 on the recognition and enforcement of judgments in civil and commercial matters;
- Convention between Kuwait and Italy on the recognition and the enforcement of judgments on civil matters, done in Kuwait on 11 December 2002.

Moreover, please note that some bilateral conventions concerning the judicial assistance in civil, commercial and criminal matters govern recognition and enforcement of judgments. Among others, the following conventions may be mentioned:

- the Convention between Italy and Argentina on judicial assistance and the recognition and the enforcement of judgments in civil matters, signed in Rome on 9 December 1987;
- the Convention between Italy and Lebanon on the reciprocal judicial assistance in civil, commercial and criminal matters, as well as the recognition and the enforcement of judgments and arbitral awards and the extradition, signed in Beirut on 10 July 1970;
- the Convention between Italy and Tunisia on the reciprocal judicial assistance in civil, commercial and criminal matters, as well as the recognition and the enforcement of judgments and arbitral awards and the extradition, signed in Rome on 15 November 1967;
- the Convention between Italy and the Republic of San Marino of friendship and good neighbourhood, signed in Rome on 31 March 1939 as amended by the Agreement of 28 February 1946.

3)

According to Article 20 of the above mentioned Brussels I Regulation, “1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled. 2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.” The petition to which the

question refers could be seen (lacking in the question any more precise clue) as a sort of "counter-claim."

4)

Pursuant to Article 21 of the above mentioned "Brussels I" Regulation, "The provisions of this Section may be departed from only by an agreement on jurisdiction: 1. which is entered into after the dispute has arisen; or 2. which allows the employee to bring proceedings in courts other than those indicated in this Section."

5)

Pursuant to Article 27 of Regulation No. 44/2001 "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. 2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court."

6)

Rules of Regulation No. 44/2001 have now a universal character, that means that, thanks to the renvoi to it by our rules of private international law, they should be applied also to cases involving states which are not EU member states.

7)

So far, as far as I know, no such cases have been instituted before my Court.

8) & 9)

I repeat that staying of the proceedings can only be an effect of rules about jurisdiction: in this case, if my Court was seized as second, I should stay the proceedings.

10) – 13)

See above, the answer to question 4).

14)

See the website of the European Judicial Network in civil and commercial matters:
http://ec.europa.eu/civiljustice/index_en.htm

15)

Pursuant to Article 14 of 1995 Act, proof of foreign law must be found *ex officio* by the judge. He/She can also obtain help from the parties. Foreign law has to be proved as if it were a fact. Accordingly, the instruments specified in international conventions, information provided by the foreign authorities via the Ministry of Justice, and opinions of experts or specialist bodies can be used as modes of proof. In case foreign law cannot be proven, relevant law is applied by using other connecting factors provided for in the same case, where possible. Failing this, Italian law applies.

16) & 17)

Italy is part to the European Convention on Information on Foreign Law (London, 7 June 1968). This Council of Europe's treaty is aimed at the creation of a system of international mutual assistance in order to facilitate the task of judicial authorities in obtaining information on foreign law.

According to this convention, any judicial authority of a Contracting State may make a request to another Contracting State (or information under the Convention (article 3 (1)). The

request must state the nature of the case, the questions on which information concerning the law of the requested state is desired, and the facts necessary both for the proper understanding of the request and for the formulation of an exact and precise reply (article 4 (1) (2)). Copies of documents may be enclosed if they are necessary for the proper understanding of the request. The request is transmitted through designated national liaison organs, and a reply may be prepared by the liaison organ of the requested state, or by an official or private body, or a qualified lawyer acting on its behalf (article 6 (1) (2)). The purpose of the answer is to provide the court which has made the request with objective and unbiased information on the law of the state providing the answer.

However, this instrument is very seldom used in Italy, as well as in other European countries. For instance, according to international studies, figures for 1975-1986 indicate that this Convention is used more in Germany than in most other member states; a total of 281 German requests to other member states compares to a total of 93 requests made to Germany by other member states. Nevertheless, the less than twenty-five German requests per year are clearly outnumbered by hundreds of expert opinions per annum.

18) &19)

Italy is part to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Of course, as far as relations among EU countries (save Denmark) are concerned, that instrument has been replaced by Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

As to the practical working of the above mentioned instruments, let me only stress that on 5 December 2007, the European Commission adopted its report on the application of the Council Regulation (EC) 1206/2001. The report has been prepared in accordance with Article 23 of the Regulation. It concludes that the application of the Regulation has generally improved, simplified and accelerated the cooperation between the courts on the taking of evidence in civil or commercial matters. The Regulation has achieved its two main objectives, namely firstly to simplify the cooperation between Member States and secondly to accelerate the performance of the taking of evidence, to a relatively satisfactory extent. Simplification has been brought about mainly by the introduction of direct court-to-court transmission (although requests are still sometimes or even often sent to central bodies), and by the introduction of standard forms. As far as acceleration is concerned, it can be concluded that most requests for the taking of evidence are executed faster than before the entry into force of the Regulation and within 90 days as foreseen by the Regulation. Consequently, modifications of the Regulation are not required, but its functioning should be improved. In particular in the current period of adaptation which is still ongoing, there are certain aspects concerning the application of the Regulation which should be improved.

20)

If the question refers generally to any possible issue in civil proceedings, I have to underline that, just to give an example, concrete application of EU Regulations in the field of judicial cooperation in civil and commercial fields are surely going to force a higher degree of harmonization among different procedural laws of EU countries. It will be enough to have a look at the "European Judicial Atlas in Civil Matters" (available at the following website: http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm) to understand how much a system essentially based on standardisations and forms can contribute to a new system that is much simpler than the "traditional" ones (I am particularly thinking to the very bad Italian tradition of judicial acts and reasonings stretching for tens and tens of pages, basically repeating hundreds of times the same concepts and being more and more replete of irrelevant remarks). Just to give a concrete example let us think to the impact that in the next years will be brought about by the spreading of the procedure set forth by Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure. The enactment of this Regulation in given

concrete cases is done by simply using seven very simple forms (see them in English at the following web page: http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_filling_uk_en.htm).

Factual Scenario #2
The plaintiff company commenced civil proceedings in country "X" against the defendant, who was resident and living in England. The plaintiff alleged the defendant had been involved in the misappropriation of $US 21m by one of its employees, and applied to the Court for a worldwide injunction "freezing" the defendant's assets, in aid of the proceedings in country "X", together with an ancillary disclosure order relating to the defendant's assets worldwide.
Questions:
1) Would the court in your country have jurisdiction to hear this matter? If so, on what basis? For instance, in some common law countries exceptional circumstances would permit the making of an order on a particular issue, even where the court otherwise did not have jurisdiction to hear the matter. One such exceptional circumstance might be where the court hearing the substantive dispute could not make the freezing order of a person's assets, so the making of the freezing order by another court would assist the main proceedings.
2) What provisions (statutory, procedural or otherwise) exist to enable a court to make a worldwide order freezing an individual's assets? What about disclosure orders?
3) How would an order for disclosure and/or an order for the freezing of assets be enforced? Would enforceability of the order influence the decision as to whether or not to make the order in the first place? (If it was likely that the order could not be enforced, do you think the court would still make the order?)
4) Are there any provisions the defendant can rely on, to resist the disclosure order? (for instance, the privilege against self-incrimination)

1)-4) As I have already remarked, according to Article 10 of Law 218/95 temporary orders can be issued by an Italian judge when the temporary order has to be enforced in Italy or when there is Italian jurisdiction on the merits of the case. So, for instance, in case of a prejudice caused by a foreigner against an Italian citizen, the Italian judge will have jurisdiction provided that assets of debtor to be frozen are located in Italy, or if the place where the harmful event occurred or may occur is located in Italy (because in this latter case the Italian judge has jurisdiction over the merit, according to our conflict law rules).

Coming to disclosure orders, I must say first of all that the concept of discovery and pre-trial discovery, which are institutions typical of the U.S. procedure, are quite unknown in the civil procedure of the countries of civil law. Under Italian law, a party may obtain a disclosure order prior to initiating a civil proceeding only in intellectual property matters according to Article 121 of the Italian Code of Industrial Property (CIP). Article 121 of the CIP, incorporates the principles set forth by Art. 43(1) and 47 of the TRIPs agreement, which facilitate means of gathering evidence, which lies within the control of the opposing parties. Art. 121 paragraph 2 establishes that where a party has provided genuine evidence of the validity of his claims and has identified documents, data or information in the possession of the opposing party in support of that evidence, that party may request the court to order that the said evidence be produced or that the said information be acquired by interrogation of the opposing party. He may further request the court to order that said documents are necessary for identifying the individuals involved in the production and distribution of the goods or services constituting the infringement.

The above described situation changes if we consider remedies available after a party has initiated a civil proceeding. If the creditor has few means at his disposal to single out the debtor's assets subject to freezing, once he initiates the legal proceeding and the judge has granted a precautionary measure provision, he has greater instruments available. Article 210 of the Italian code of civil procedure grants to the judge the discretional power to order, upon the party's request, the disclosure of a document or of another thing, which is in the possession of the other party or of a third party, in case the judge deems it necessary for the unfolding of the legal proceeding, provided that said disclosure order does not cause damages to the party or to the third parties and does not oblige them to infringe one of the guaranteed rights and secrets protected under Italian criminal law.

Under this Article, the claimant is permitted to apply for disclosure orders pending a civil proceeding on the merits of the case. The claimant has the burden of proving its right to legal proceedings by presenting serious evidence that grounds its claim.

Enforcement of this order rests basically on the fact that a party refusing to comply with it seriously risks to lose his/her case. Actually, according to Article 116, Para. 2, of the Italian code of civil procedure, the judge, while giving the final decision, has to take into account parties' behaviour. Therefore the behaviour of the party who refused to comply with such an order, together with other relevant circumstances, could lead the party to have the case decided against him/her. No privilege against self-incrimination can be invoked by a party (but it must be added that in Italy a party has the right not to tell the truth before the judge).

Turin, 22 April 2011.

Giacomo OBERTO
Judge – Court of Turin (Italy)
Deputy Secretary General of the IAJ