The Italian Supreme Court rules on the effects of the opposition to a European Order for Payment

In case of opposition to a European Order for Payment, Article 17 (1) of Regulation (EC) No 1896/2006 (latest consolidated version) states: "the proceedings shall continue before the competent courts of the Member State of origin unless the claimant has explicitly requested that the proceedings be terminated in that event. The proceedings shall continue in accordance with the rules of: (a) the European Small Claims Procedure laid down in Regulation (EC) No 861/2007, if applicable; or (b) any appropriate national civil procedure".

Moreover: 1) the transfer to civil proceedings is governed by the law of the State where the order has been issued, 2) this law must not prejudice the claimant's position in the subsequent proceedings, and 3) the claimant is to be informed both of the opposition and of any transfer to civil proceedings.

Recital 24 of Regulation (EC) No 1896/2006 makes it clear that the opposition leads "to an automatic transfer of the case to ordinary civil proceedings", adding that "the concept of ordinary civil proceedings should not necessarily be interpreted within the meaning of national law".

The effects of the opposition in the CJEU's case-law

The CJEU in turn has consistently stressed, on the one hand, that Article 17 produces only said effects and, on the other hand, that the transfer to ordinary civil proceedings is automatic (13 June 2013, Case C-144/12, *Goldbet*, para. 31; see also 4 September 2014, Joined Cases C-119/13 and C-120/13, *eco cosmetics*, para. 38).

In *Flight Refund* (10 March 2016, Case C-94/14), the Court sketched a slightly different scenario when holding that "the proceedings automatically *continue* […] in the Member State of origin of the order […]", but further confirming that the continuation occurs "in accordance with the rules of ordinary civil procedure […]" (para. 52; emphasis added).

No national provisions for the transfer: how to fill the gap according to the Italian Supreme Court

What seems definite from the foregoing is that, if the claimant were not to request the termination of the proceedings, the opposition triggers the transfer to ordinary national civil procedure (or to the European Small Claims Procedure) under the law of the Member State of origin.

But, what if the *lex fori* does not provide rules as to the transfer?

An answer comes from the Italian Supreme Court (*Corte di Cassazione*) in a recent judgment (31 January 2019 no 2840). Although the *Corte di Cassazione* has reasoned under the initial version of the Regulation (EC) No 1896/2006, it infers from this latter certain principles which may be also applied to the latest version.

The Italian Court holds, in fact, that the continuation of the proceedings is not a matter left to national law, but it is directly governed by the Regulation through the reference to the national provisions that apply to ordinary civil proceedings.

The Member State has to apply the ordinary, normal form of national proceedings which apply to the disputed claim as if the claimant resorted directly to them.

In case the national legal order lacks rules to govern the transfer and determine the specific ordinary civil proceeding triggered by the opposition, the *Corte di Cassazione* puts forward the following solution.

First, the judge who issued the order is entitled not only to inform the claimant of the opposition, but also to give him a term to bring the action under the ordinary procedural rules. Second, the claimant may choose, among the ordinary civil proceedings, those that better suit the claim for which he resorted to the European procedure.

The Regulation does not allow the judge to lead the transfer, especially by determining the national rules governing the ordinary proceeding.

On the contrary, a national rule in case the claimant does not comply with the term to bring the action exists whereby the proceeding is extinguished (Article 307 (3), Italian Code of Civil Procedure).

A new “choice” for the claimant

The Italian Supreme Court finds in the Regulation the ground for providing the claimant with a sort of "choice of proceedings".

Recalling the emphasis that both the Regulation and the CJEU put on the automatism in the "continuation/transfer" to the ordinary civil proceeding, what automatically comes out from the judgment of the *Corte di Cassazione* seems such "choice of proceedings" rather than the very "continuation/transfer".

Moreover, on closer inspection, since the would-be ordinary proceeding is extinguished if the claimant makes the term to bring the action expire, the real "choice" lies between the continuation or the termination of the whole proceeding.

Perhaps the "choice" is not well founded in the Regulation, but…

The Italian Supreme Court's effort to counterweigh the lack of national provisions is certainly worthwhile. As is it that to forge the transfer regime in compliance with the Regulation.

However, just reasoning with the Regulation in mind, one may wonder whether the aforementioned "choice" is actually well founded.

According to the Italian Supreme Court, the Regulation entitles the claimant to "explicitly" choose what national proceeding is to be applied. Furthermore, even though the claimant has not explicitly requested under the Regulation to terminate the proceedings following the debtor's opposition, he is again requested, this time under Italian law, to possibly reveal such willingness by making the term expire without bringing the action.

Where is in the Regulation the room for such "choices"? Actually, where is the room for "choices" other than that to explicitly oppose to the transfer?

These doubts increase under the latest version of the Regulation.

Pursuant to Article 7 (4), the claimant may indicate to the court "which, if any, of the procedures listed in points (a) and (b) of Article 17(1) he requests to be applied to his claim in the subsequent civil proceedings", unless he indicates to the court that "he opposes a transfer to civil proceedings […] in the event of opposition by the defendant".

Article 17, which gives the claimant the alternative between the European Small Claims Procedure and any appropriate national civil procedure, adds that where the claimant has not indicated one of these procedures (or he has requested the application of the European Small Claims Procedure to a claim that does not fall within the scope of Regulation (EC) No 861/2007), "the proceedings shall be transferred to the *appropriate* national civil procedure" (para. 2; emphasis added).

Consequently, the Appendix 2 to the Application for a European Order for Payment (form A) puts in the claimant's hand the option to request: 1) the discontinuance of the proceedings, or 2) the continuation in accordance with the rule of the European Small Claim Procedure, if applicable, or 3) the continuation in accordance with any appropriate national civil procedure.

Once again, where is the room for "choices" other than that to explicitly oppose to the transfer, or to request that the proceedings be continued under the European Small Claim Procedure or under the appropriate national civil procedure? Moreover, may the judgment as to the "appropriateness" of the national civil procedure be left to the claimant? May it be left to him even when the request to apply the European Small Claim Procedure is ungrounded because the claim falls outside the scope of Regulation (EC) No 861/2007? Who decides about the lack of "appropriateness"? Accordingly, what happens in case the claimant brings an action for civil proceedings that are not "appropriate" or suitable for the claim he sought to satisfy through the European Order for Payment procedure?

…the "choice" logically is the best way not to prejudice the claimant

All things considered, a room in the Regulation (EC) No 1896/2006 seems to unfold more for further judge's burdens than for further claimant's "choices" when it comes to governing the transfer under Article 17 in absence of specific national provisions.

However, it's worth recalling that Article 17 (3) provides that "where the claimant has pursued his claim through the European order for payment procedure, nothing under national law shall prejudice his position in subsequent civil proceedings".

It goes without saying that the claimant is not prejudiced, but fully protected, if he may even choose the national civil proceedings after the debtor's opposition

and benefits from a second choice between continuing or terminating the whole proceeding.

What about the defendant?

Despite being inclined to safeguard the claimant, the Regulation pays close attention also to the rights of the defendant.

Therefore, it should not be underestimated, as a concluding remark, that "[i]n the European order for payment, the defendant shall be informed that […] where a statement of opposition is lodged, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure […]" (Article 12 (4)(c)).

It is debatable whether, from the defendant's standpoint, the "accordance" with the rules of ordinary civil procedure may also include – in the silence of the Regulation and in absence of national rules governing the transfer – the "accordance" with the claimant's choice of the national procedure that the defendant may eventually undergo.

The doubts increase if one considers that, unlike the claimant, who would benefit from a series of choices, the defendant has only two means (except for the remedies) to impinge on the procedural destiny of the disputed claim (to pay the amount or to oppose the order), which both result in the European procedure's closing.

Ultimately, the idea that the claimant may choose the national civil proceeding and profits from a second choice between continuing or terminating the whole proceeding seems to unbalance the position in which the Regulation has placed the claimant and the defendant after the order has been issued.