

Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus

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1. Summary

The Italian Government has adopted a series of Decree-Laws [1] introducing measures to fight the emergency caused by the “new” Coronavirus.

These measures include “self-proclaimed” overriding mandatory provisions on the reimbursement of prices paid under transport, package travel and accommodation contracts by specified persons affected by the Coronavirus.

2. Arts. 28 of Decree-Law No. 9/2020 and 88 of Decree-Law No. 18/2020

In particular, on 2.4.2020, the Italian Government adopted Decree-Law No. 9, titled “Urgent measures to support families, workers and businesses, in connection with the epidemiological emergency by COVID-19” [2].

Article 28 of Decree-Law No. 9/2020 provides for “Reimbursement of Travel Tickets and Travel Packages”.

The first paragraph of Article 28 stipulates that, obligations arising from transport and package travel contracts, concluded by specified persons affected by the Coronavirus [3], are to be considered as impossible under Article 1463 of the Italian Civil Code [4].

Paragraphs 2 to 7 of Article 28 establish a specific procedure for obtaining and making the reimbursement of the price paid under the transport or package travel contract covered by the same Article.

The following paragraph 8 “proclaims”:

“The provisions of the present article constitute overriding mandatory provisions

within the meaning of Article 17 of Law of 31 May 1995, No. 218 [“Italian PIL Act”] [5, 6] and of Article 9 of Regulation (EU) No. 593/2008 of the European Parliament and of the Council, of 17 June 2008 [“Rome 1 Regulation”].

On 17.3.2020, the Italian Government has adopted a new Decree-Law (dubbed “Heal Italy”), introducing new measures to fight the emergency caused by the Coronavirus [7].

Art. 88(1) of new Decree-Law No. 18/2020 extends the provisions of Art. 28 of Decree-Law No. 9/2020 to accommodation contracts.

3. Short Comment

As a short comment to the above, I note that it is not the first time that the Italian legislator enacts “self-proclaimed” overriding mandatory provisions [8].

However, as known, it is questionable whether, EU Member States can freely enact similar provisions when they fall within the material scope of Union private international law instruments, such as the Rome 1 Regulation.

In fact, this practice appears to be particularly questionable in cases such as that at issue, where the self-proclaimed overriding mandatory provisions do not appear to be “crucial” for safeguarding public interests within the meaning of Article 9(1) of the Rome 1 Regulation, but rather appear to be exclusively purported to protect private interests (for however widespread they may be).

Notes

[1] In the Italian legal order, a Decree-Law is a provisional act having force of law, adopted in extraordinary cases of necessity and urgency by the Government. A Decree-Law must be “converted” into a Law within a period of 60 days from its publication, or otherwise it loses its effects. See, in particular, Art. 77 of the Costituzione della Repubblica Italiana, Gazzetta Ufficiale No. 298 of 27.12.1947, www.gazzettaufficiale.it/eli/id/1947/12/27/047U0001/sg.

[2] Decree-Law of 2.3.2020, No. 9, Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19, Gazzetta Ufficiale, Serie Generale No. 53 of 2.3.2020, www.gazzettaufficiale.it/eli/id/2020/03/02/20G00026/sg.

[3] See Art. 28(1)(a) to (f) of Decree-Law No. 9/2020.

[4] Article 1463 of the Italian Civil Code, headed “Total Impossibility”, can be translated as follows: “In [case of] contracts with reciprocal performances, the party that is freed due to supervening impossibility of the performance owed cannot demand counter-performance, and must return that which he has already received, in accordance with the rules on undue payment”. See, Royal Decree of 16.3.1942, No. 262, Approvazione del testo del Codice civile, Gazzetta Ufficiale, Serie Generale No. 79 of 4.4.1942, www.gazzettaufficiale.it/eli/id/1942/04/04/042U0262/sg.

[5] Law of 31.5.1995, No. 218, Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale, Serie Generale No. 128 of 3.6.1995, Supplemento Ordinario No. 68, <https://www.gazzettaufficiale.it/eli/id/1995/06/03/095G0256/sg>.

[6] Article 17 of the Italian PIL Act, is the Italian (autonomous) private international law provision governing overriding mandatory provisions. Article 17, headed “Norms of necessary application”, can be translated as follows: “Norms of necessary application. 1. Italian norms which, considering their object and their objective, must be applied notwithstanding reference to foreign law, prevail over the following provisions”.

[7] Decree-Law of 17.3.2020, No. 18, Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19, Gazzetta Ufficiale, Serie Generale No. 70 del 17.3.2020, <https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg>.

[8] See, e.g., Article 32-ter of the Italian PIL Act.

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Comment by Pietro Franzina

States occasionally declare in their legislation that a particular provision ought to be treated as an overriding mandatory provision. The author of this post submits that this practice is ‘questionable’. The post is short, and few hints are provided as to what would make this practice questionable, and in which way this should

matter. The question raised by the practice described is, in my view, whether States are permitted to make this kind of statements, and what the legal effects of such statements are. I would be interested in knowing the author's views on this. There is little doubt that domestic legislators are entirely free to label a given provision in their legislation as 'overriding' insofar as this characterisation affects the operation of domestic conflict-of-laws rules. The provision so characterised will then trump the operation of the latter rules as *lex specialis*. Truly enough, as the author of the post observes, the picture is different when it comes to conflict-of-laws provisions enacted by the EU, because Member States are not permitted to derogate from such provisions. Treating a domestic provision of substantive private law as an overriding mandatory provision amounts, in fact, to derogating from the applicable conflict-of-laws rules (or altering their effects). Article 9 of the Rome I Regulation sets forth the conditions subject to which such a derogation (or alteration) is permitted: no mandatory provision may override the conflict-of-laws rules in that Regulation, unless it fits in the definition in Article 9(1). Things being so, I guess the only real issue is whether a given provision, no matter how labelled by the enacting legislator, fits in the said definition. If it does, then it will lawfully interfere with the relevant EU provisions on conflicts of laws in the way provided for under Article 9 of the Rome I Regulation (or under the pertinent provisions in other EU texts, depending on the circumstances). I don't see how this would be questionable. Instead, if the substantive provision concerned does not fit in the Article 9(1) definition, then the non-application (or the altered application) of the applicable EU conflict-of-laws rules will simply amount to an infringement of EU law, and would bring about the consequences that such an infringement entails (the opening of an infringement procedure, the award of damages etc.). Here, too, I wouldn't speak of a 'questionable' practice: it'd be a violation of EU law. Domestic courts have authority to assess whether a given provision fits in the Article 9(1) definition. If they consider that it does not, they have the power to disregard any legislative statements to the contrary and enforce the relevant EU rules instead. Domestic courts may even ask the Court of Justice to take a stance on the matter by a request for a preliminary ruling. The rulings in *Dieter Krombach* (Case C-7/98) and *Unamar* (C-184/12) indicate that a similar course of action is indeed possible. The preceding remarks are of a general nature. It is not the purpose of this comment to discuss whether the particular measures that have been recently adopted in Italy to tackle the coronavirus crisis represent genuine overriding mandatory provisions within the meaning of Article 9(1), or not. On this point, too, however, I have strong

reservations about the author's approach and findings.

Comment by Caterina Benini (PhD Student at the Università Cattolica del Sacro Cuore di Milano)

March 27, 2020, 3:47 pm

Ennio Piovesani contends that neither Article 28 of the Italian Decree-Law 9/2020 nor Article 88 of the Decree-Law 18/2020 are genuine overriding mandatory provisions for the purposes of the Rome I Regulation. He argues that the two provisions do not appear to be crucial for safeguarding public interests, since they exclusively protect private interests. I do not share his view.

Pursuant to Article 9(1) of the Rome I Regulation, overriding mandatory provisions are provisions that are regarded by the enacting State as crucial for the protection of public interests.

The test appears to have two prongs. One is subjective in nature, in the sense that it rests on a finding by the enacting State that the provision concerned is crucial. The other is objective, and requires assessing whether the provision pursues a public interest.

As to the first prong, one must arguably content itself with determining whether the provision ranks among those that the enacting State considers to be particularly important for the community it governs. By labelling the provision as an overriding mandatory rule, the enacting State shows precisely that it considers that provision to be crucial for its interests. Where this occurs, the first prong of the test is satisfied. Otherwise stated, self-characterisation by the enacting State, while not being enough for a provision to be regarded as an overriding mandatory provision for the purposes of Article 9(1), simplifies the task of courts and interpreters which consists in assessing whether the enacting State considers the provision to be crucial.

As to the second prong, one should assess whether, irrespective of any self-characterisation, the provision objectively pursues the protection of a public interest. This prong of the test is essential to preserve the effectiveness of the normally applicable EU conflict-of-laws rules. It is at this stage of the test that the nature of the interests protected by the provision comes into play. In this connection, contrary to Ennio Piovesani, I do not consider that the above Italian

provisions are merely concerned with private interests, that is, the interests of the parties to the contracts concerned. By declaring that the spread of the epidemic makes the performance of obligations impossible within the meaning of Article 1463 of the Italian Civil Code, the legislator aimed at fostering the compliance with the governmental measures adopted to fight the coronavirus. It did so by exempting the parties from their obligations under transport and accommodation contracts, arguably on the assumption that this would reduce the risk that the concern for the unfettered performance of those obligations could undermine the strict compliance of the measures taken by the government to restrict the movement of people. Seen from this angle, the above provisions, while affecting as such the individual rights and obligations of the parties, are meant to safeguard the public health by reducing the movement of people and lowering the risk of any further spread of the virus.

Based on the foregoing, my view is that the above provisions should be labelled as overriding mandatory rules within the meaning of Article 9(1) of the Rome I Regulation.

Comment by Margherita Salvadori

March 27, 2020, 7:46 pm

I would first like to thank Mr Piovesani for having signalled the newly adopted Italian provisions and for having raised this very interesting point.

A huge number of emergency rules have been enacted by the Italian government (v., a collection of this rules: <https://www.gazzettaufficiale.it/dettaglioArea/12>).

From a non-Italian perspective, it should be underlined, as already noted, that all the rules found in the Decree-Laws will need to be “converted” into Law by the Parliament. This is an aspect of particular importance, since in that moment the Italian Parliament will have the chance to consider all the emergency rules with perhaps greater attention.

However, it is necessary to immediately consider whether these rules are compatible within the EU framework.

This is particularly important for all the provisions that have an impact on fundamental freedoms of the European Union, including freedom of services and

goods, and an impact on the intra-EU instruments. Furthermore, uniform EU law exists in the fields covered by the emergency rules and even if each Member State may be allowed to take emergency rules, the following provisions should be consistent with EU law

Some of the matters covered by the emergency rules are already governed by EU law protecting companies and families. In my view, what should be truly “overriding mandatory” is that, in the current emergency, EU Member States take shared solutions in said matters of EU law, including transport, travel package and accommodation contracts.

Comment by Ennio Piovesani

March 27, 2020, 8:36 pm

My comment was perhaps too short and I would like to: 1. provide some more information on the refund procedure introduced by the self-proclaimed overriding mandatory provisions; 2. clarify the reasons why I consider the practice of self-proclaiming questionable; 3. add some remarks as to the compatibility of the provisions at issue with Union law; 4. share my views on the possible interests underlying the same provisions.

1. As mentioned, the self-proclaimed overriding mandatory provisions introduce a procedure for the refund of prices paid under transport (namely, carriage of persons), package travel and accommodation contracts. This newly introduced procedure is more favourable to the carrier, travel organiser or innkeeper, for the reasons that follow: Arts. 28(2) and 88(1) introduce a time-limit within which the passenger/guest must notify his request of refund to the carrier/innkeeper; Arts. 28(3) and 88(1) leave to the carrier/innkeeper the choice of refunding either by returning the price paid or by issuing a credit note (referred to as “voucher”) to be used within one year; Art. 28(4) introduces the possibility for the travel organiser to refund the traveller through a voucher to be used within one year. Incidentally, “Corona-vouchers” (as dubbed by certain companies) have been implemented also in the legislation of other EU Member States to support tour operators who are suffering “strains on liquidity [...] because of missing new bookings coupled with reimbursement claims” (EU Commission, Information on the

Package Travel Directive in Connection With the Covid-19, 19.3.2020, revised version, replaces the version of 5.3.2020 - see further on the point below).

2. I question the practice of self-proclaiming for the following reasons. In the first place, as noted, self-proclaiming provisions which do not fit within the definition of Art. 9(1) may lead to an infringement of Union law . In particular, in the case of the Rome 1 Regulation, the infringement would concern the conflict rules contained in the Regulation discarded by the alleged overriding mandatory provision. The risk of infringing Union law which the national legislator takes when self-proclaiming seems to me sufficient to consider the practice questionable. That said, it is understood that Art. 9(1) also covers provisions that protect individual/private interests, as far as the main objective is to promote a collective/public interest. Therefore, in the second place, I share Mankowski's fear that self-proclaiming entails the "theoretical-dogmatic danger" that individual/private interests be "par ordre du mufti" transformed into super-individual/public interests (Bar/Mankowski, IPR, Vol. I, 2nd edn. 2003, mn. 99). Thirdly, still from a broader perspective, I might be over-pessimistic, but I also fear that self-proclaiming may trigger a race to the bottom and a proliferation of overriding mandatory provisions, which should instead remain a limited number. In my eyes these are the reasons why this practice may be referred to as questionable, or, at best as risky.
3. Apart from the compatibility with Art. 9 Rome 1 Regulation, the self-proclaimed provisions could be incompatible with other provisions of Union law, namely those contained in the Regulations on passengers' rights and in the Package Travel Directive. In particular, as concerns transport contracts, I note what follows. If I understand correctly, Art. 28(1) provides that the carrier's obligation is impossible under Art. 1463 Italian Civil Code, when the passenger cannot travel because self-isolated, quarantined, hospitalized, or otherwise confined due to the coronavirus (and the containment measures taken by the Italian authorities to fight the pandemic). Termination of contract under Art. 1463 Italian Civil Code occurs ex lege, without the need for any activity by the parties or the judge. Accordingly, the judge merely ascertains that total impossibility occurred, with a decision having ex tunc (retroactive) effects. Take for instance the case where a passenger was quarantined and later the flight company, for independent reasons, cancelled the flight. Considering that,

following Art. 28(1), the carrier's obligation became impossible under Art. 1463 before the flight's cancellation, I wonder whether the passenger will be able to rely on Regulation (EC) No. 261/2004. Therefore, I fear that the self-proclaimed overriding mandatory provisions may be incompatible with the Regulations on passengers' rights, in particular to the extent that they seem to prevent passengers from resorting to the more-favourable refund procedures provided for in the same Regulations. Moreover, as concerns package travel contracts, I note what follows. The Package Travel Directive is a full harmonization directive (see Art. 4 thereof). Following AG Wahl's opinion delivered in the cited Unamar case (see, particularly, points 40-43 thereof), I doubt as to the validity of self-proclaiming overriding mandatory provisions in matters governed by full harmonisation directives such as the Package Travel Directive. That said, by allowing refund through a voucher in cases referred to in Art. 12(2) Package Travel Directive, Art. 28(4) appears to be less favourable to the traveller. In fact, with reference to the Corona-vouchers implemented in Belgium in the field of package travel contracts, Mr. Didier Reynders (European Commissioner for Justice) has recently underlined the measure's incompatibility with Union law (*Un voucher plutôt qu'un remboursement? Didier Reynders recadre la Belgique sur les voyages organisés annulés*, <http://www.rtbf.be>, 25.3.20120). For the record, Belgium has not felt the need of self-proclaiming the provisions in question overriding mandatory (see 19 MARS 2020. - Arrêté ministériel relatif au remboursement des voyages à forfait annulés, Publié le 2020-03-20, Numac 2020040676, <http://www.ejustice.just.fgov.be/eli/arrete/2020/03/19/2020040676/moniteur>).

4. Finally, some thoughts on the public interests which the self-proclaimed overriding mandatory provisions allegedly promote. I'm not convinced that the provisions are aimed at promoting the containment measures adopted by the Italian Government. If this were the case, then I would doubt that said provisions could be considered as "crucial" for the purpose of safeguarding the relevant public interest (here: limiting the circulation of persons). In fact, that public interest appears to be sufficiently and well-protected by the containment measures alone. Incidentally, infringing the containment measures leads to a criminal (now administrative) sanction. Rather, considering that the self-

proclaimed overriding mandatory provisions allow for refund with Corona-vouchers (rather than in money), in my view, the interest underlying the provisions may be that of supporting companies belonging to the tourism sector, which — as noted above — are suffering strains on liquidity due to the coronavirus emergency. Perhaps I might have been once more too concise. In any case, given the large number of issues involved, I refer any other consideration to a separate article.