

Italian Supreme Court rules on recognition and enforcement of a foreign judgment even if preceded by a worldwide freezing injunction

Written by Marco Farina, Italian lawyer, PhD in Civil Procedural Law at the University La Sapienza of Rome – Adjunct Professor of Civil Procedural Law at the University LUISS of Rome

In a judgment rendered on 16 September 2021, the Italian Supreme Court (*Corte di Cassazione*) reversed a decision from the Court of Appeal of Rome, which had denied recognition and enforcement of a monetary judgment issued by the Royal Court of Guernsey, due to a breach of the fundamental rights of defence allegedly occurred in the proceedings.

The Court of Appeal of Rome reasoned under Article 64 (b), of the Italian Act on Private International Law (Law 31 May 1995 no. 218), which provides, *inter alia*, that a foreign judgment may be not recognized and enforced if fundamental rights of defence have been breached in the foreign proceedings.

The Court of Appeal found that a relevant breach of the fundamental rights of defence had occurred because, at the outset of the proceedings, a worldwide freezing injunction (associated with a disclosure order) had been issued against the defendant. In the Court of Appeal's opinion, the injunction and its effects altered the procedural equality of the parties before the foreign court, since it was a "*highly coercive measure against the defendant who is not only severely affected in the free disposal of his assets, but is also exposed to the risk of even being deprived of his personal freedom, if he does not cooperate with his counterpart in the identification of his assets to be seized*" (English translation).

This relevant alteration of the procedural equality of the parties existed, according to the Court of Appeal, because, whilst the defendant was impacted by this order, the plaintiff was not.

In the end, the Court of Appeal held that the injunction issued against the

defendant had “*the concrete ability – in the absence of any conduct of the defendant indicating that he intended to harm the claimant’s rights – to limit, restrict, diminish the defendant’s ability to defend itself, both in imposing significant limitations on the free disposal of his assets and in constraining him to collaborate with the claimant before of preparing its own defence. All this, while nothing of the same kind affected the assets or the defensive opportunities of the claimant. The defendant, therefore, found himself in a much weaker defensive position than his counterpart*” (English translation).

The Supreme Court found several flaws in this reasoning.

Firstly, the Supreme Court held that if, in principle, it could not be denied that a relevant alteration of the procedural equality might amount to a breach of the fundamental rights of defence, the mere fact that the judgment to be recognized and enforced in Italy had been preceded by a provisional order – in the form of an injunction (associated with a disclosure order) – could not, in any case, lead to such a breach.

Regarding the functioning of a freezing injunction issued by a common law court, the Supreme Court asserted that (i) the injunction is sought to preserve the defendant’s assets until judgment can be obtained or satisfied, (ii) the injunction may be rendered when the claimant has shown a good arguable case and a risk of dissipation exists, (iii) it operates *in personam*; therefore, its effectiveness depends on the threat of punishment for contempt of court, and (iv) it is usually associated with other orders, which are aimed at rendering the freezing injunction more effective, thus constraining the affected party to identify its assets and their location (*disclosure order*) under the threat of being excluded (*debarred*) from the proceedings (*unless order*).

Having said that, the Supreme Court went on to state that, in the case at hand, the injunction was associated with a disclosure order but not with an *unless order*. So, even if the defendant were not to comply with the injunction and the disclosure order, he remained fully entitled to participate in the proceedings defending himself as no exclusion and/or debarring was pronounced against him.

In the light of the above, the Supreme Court had good reason to observe that the Court of Appeal should not have found any breach in the fundamental rights of defence (in terms of the alteration of the procedural equality of the parties) since

- as the same Italian Supreme Court held in its previous judgment (judgment no. 11021 rendered on 9 May 2013 in the well-known *Gambazzi* case, following the decision from CJEU in Case C-394/07, 2 April 2009, *Gambazzi*) - the right to a fair trial should be considered breached in the event of “*manifest and disproportionate infringement of the defendant’s right to be heard*” (English translation).

Thus, the Supreme Court noted that, if a judgment rendered against a defendant who - due to his failure to comply with a disclosure order associated with a freezing injunction - had been excluded and/or debarred from the proceedings, must be recognized and enforced in Italy (see again judgment no. 11021 of 9 May 2013 in the *Gambazzi* case), *a fortiori* a monetary judgment rendered against the defendant whose participation in the proceedings had not been prevented notwithstanding its failure to comply with the disclosure order associated with the freezing injunction, ought to be recognized and enforced in Italy.

The validity of this line of reasoning must be inferred, according to the Supreme Court, from the injunction (and the disclosure order which was associated with it) being a provisional and protective measure aimed at preserving the claimant’s right to enforce the judgment which might be rendered in its favour at the end of the proceedings on the merits. Therefore, such measures are as much an essential part of the common law procedural system as the attachment and/or preservation orders are in Italy (*sequestro conservativo*, Article 671 of Italian Code of Civil Procedure).

Hence, asserting that - as the Court of Appeal did - the mere fact that a freezing injunction has been issued and enforced against a defendant (and not against the claimant) amounts to a breach of the right to a fair trial (in terms of the alteration of the procedural equality of the parties), would insinuate that a breach of the fundamental right of defence occurs in Italy every time a claimant succeeds in obtaining a protective measure against the defendant, when the former is not addressed with the same measure.

This is not an alteration of the procedural equality of the parties. On the contrary, this is the essence of litigation between two parties in an adversarial system.

It is natural in contentious civil proceedings that the party against whom a claim is brought may be affected by measures which result in finding itself in a *different*

situation from that of the claimant. This cannot, by definition, give rise to any relevant breach of the fundamental rights of defence in terms of violation of the principle of the so-called '*equality of arms*'. For example, in the ordinary proceedings instituted by the debtor for opposing an enforceable order of payment obtained by the creditor, the debtor finds himself in *different* position from that of the creditor; a defendant, in ordinary civil proceedings, finds himself in a *different* situation from that of the claimant who has obtained – before or during the proceedings – an attachment order for the defendant's assets.

Accordingly, provided that both parties are granted equal chances to obtain and enforce a protective and/or provisional measure, is part of the ordinary functioning of a civil proceeding that a party will succeed in obtaining it and the other will not.

In the case at hand – the Supreme Court noted – both parties were granted equal and fair chances of defence as, (i) the freezing injunction and the disclosure order were given *ex parte* but the defendant was given the right to apply to the court to vary or reverse the order, and (ii) the claimant had assumed the obligation of complying, under the same threat of the "contempt of court", with any subsequent order of the Court condemning the claimant for any loss suffered by the defendant.

Moreover, the Supreme Court asserted that nothing to the contrary may be inferred from the fact that the injunction and the disclosure order operate *in personam* and that the infringement thereof triggered the consequences of a "contempt of court". The *Cassazione* did not see any violation of the fundamental rights of defence, all the more because the Italian legal system features cases in which a failure to comply with a judicial order could amount to a criminal offence.

The judgment of the Italian Supreme Court can be read here (in Italian).