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NOTE

ON

THE ITALIAN EXPERIENCE ON ENFORCEMENT OF MONETARY OBLIGATION DUE TO JUDICIAL DECISIONS IN THE BANK ACCOUNTS

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Introduction

The execution of amounts in bank accounts in Italian legislation is part of the enforcement process in civil and commercial matters. The enforcement enables a creditor (a private individual or company or public agency) to obtain what he/she/it shall have as owed to by another person/entity as a result of a court decision (or of specific acts deemed by law to become parable to court decisions).

Enforcement is therefore a procedure, regulated by law in various ways, depending on the nature of the claim, i.e. of what is due to the person who invokes the procedure to enforce his/her/it claim on the debtor. By their nature enforcement procedures involve public bodies under the supervision of a court, which is asked by the parties concerned to ensure compliance with the rules of procedure laid down by law.

Depending on the content of the measures (court rulings or other measures that have the same value as rulings when it comes to enforcement), there are different methods of enforcement in the Italian legislation that must be implemented to enforce the creditor's claim.

I. Italian model on the execution procedure of executive titles including the execution of amounts in the bank accounts

1.1 The conditions, according to the Italian Civil Procedure Code, under which an executive title or decision may be issued/taken.

Per te proceduar me ekzekutimin eshte e nevojshme te permbushen dy kushte: a) nje kusht formal-ekzistenca e nje titulli ekzekutiv, pra e nje akti apo nje vendimi gjyqesor qe sipas ligjit mund te vihet ne ekzekutim dhe b) nje kusht thelbesor i cili ka lidhje me permbajtjen e kesaj te drejte. Kjo e drejte duhet te jete e klasifikuar sipas ligjit si nje te drejte “te sigurt, likuide dhe te kerkueshme”. Kriteri i “sigurise” eshte i kuptueshem, pasi nuk mund te kete ekzekutim kur nuk eshte e sigurt ekzistenca e te drejtes dhe permbajtjes se saj; kriteri i “likujditetit” dhe “i kerkueshmerise” nenkuptojne se fusha e zbatimit te ekzekutimit duhet te jete e percaktuar qe ne fillim, sepse nuk mund te zbatohet nje urdher (permbajtja e vendimit gjyqesor) ne rast se nuk perkthehet ne nje realizim praktik dhe te menjehershem (si p.shs. shuma e te hollave qe debitori i detyrohet kreditori; individualizimi i sendit qe do te dorezohet etj).

On the basis of a principle to which there are no exceptions, **two conditions must be satisfied before decisions become enforceable, a) a formal condition and a b) a substantive condition. The formal condition is that an enforceable decision must have been taken, i.e. an act or judicial decision that must by law is foreseen to be enforceable. The substantive condition relates to the content of the decision, which must, by law, comply with three criteria which are “to be certain, liquid and due”**. The need for certainty is obvious, as no enforcement can take place when it is uncertain whether a debt exists or what it consists of. The need for the content of the decision to be liquid and due is a initial prerequisite for enforcement, as an order

cannot be executed if there is no practical way of implementing it if the amount of money owed by the debtor to the creditor, or the nature of the item to be handed over, the conduct required, etc are not determined, Furthermore the established debt shall be due otherwise the creditor is not entitled to request its enforcement, i.e. in case another legal condition must be met.

The decision (i.e. the judicial instrument issued in accordance with the law) allowing enforcement may be of a judicial or non-judicial nature. Judicial decisions include all decisions and measures taken by a court in relation to trial proceedings that must be enforced by law. In a more detailed manner they are:

1. final judgments (to make a payment, transfer an asset or behave in a certain manner) that cannot be reviewed by a higher court or temporarily enforceable judgments (generally speaking, all judgments delivered at the first instance are enforceable unless the court of appeal has suspended enforcement);
2. orders to pay monetary obligation (sums of money) issued according to balance sheets upon the end of a financial term;
3. orders issued in the course of proceedings to pay sums that are not contested by the parties to the case;
4. interim enforcement orders, whereby the judge orders payment of monetary obligation (sums of money) or the transfer of assets on the basis of specific documentary evidence;
5. reconciliation agreements settling employment disputes;
6. injunctions to pay sums of money or transfer movable assets issued by the court on the basis of specific documents (which demonstrate the certainty of the debt in law) that become enforceable or are declared temporarily enforceable;
7. notices to quit on the expiry of a rental agreement or where payment of rent is late, if the notices are upheld by the court;
8. arbitration awards that become enforceable (i.e. decisions delivered by arbitrators, bodies that are not part of the judiciary and consist of people called upon to settle a dispute by obtaining an agreement between the parties);
9. orders issued to employers to pay sums of money to workers unlawfully dismissed.

Non-judicial decisions consist of acts/documents drafted/taken out of court which entitle persons/entities who assert their claims. These acts/documents have by virtue of the law a special enforcement power due to their nature and the rules governing their use in legal relationships, particularly with regard to the speed of procedures. So, in regard to their execution these acts are equivalent to the judicial decisions and the other enforcement court measures.

They are mainly bills of exchange and forms of credit that are expressly enforceable

under the law (promissory notes, banker's drafts and instruments issued by certain banks), tax demands rendered enforceable by the tax authorities, contractual documents received by a notary public expressing the will or obligation to pay a sum of money (but not obligations to act or refrain from acting), and, following the 2006 reform, parts of authenticated private documents relating to payment obligations.

1.2 The court authorization to enforce claims

It is not necessary to obtain the court's authorization to initiate enforcement proceedings, as the nature of the claim has been established in the decision or instrument. It is sufficient for the Clerk's Office at the court responsible for enforcement to check if the claim is formally in order and to proceed with issuing the “execution order”, i.e. a formula laid down by law requiring public bodies to act in accordance with their field of competence (judicial bodies and enforcement/execution bodies, which are called on to provide assistance if necessary). To this end the formula must be in the form required by law and must bear the Clerk's Office seal. Similar rules apply to other documents received by a notary public.

1.3 Rules on the status, role, responsibilities and powers of bailiff's agents

Forced execution of judicial decisions is entrusted to bailiffs, who are public officials, part of justice administration. Bailiffs are in charge of taking the necessary actions to enforce the decision, with assistance, whenever needed, of other subjects, such as experts in determining the value of assets or custodians/administrators of assets that need to be held in custody. However, any action assigned to public enforcement agents may be supervised and directed by the court. Therefore, wherever problems or conflicts emerge, the bailiffs, the notary public or the parties inform the court directing enforcement, which then summons the parties and issues the appropriate instructions.

Enforcement proceedings are structured in the same way as trial proceedings because a court orders them. They are conducted based on instruments, which are issued or authorized by the court that has heard the parties in adversarial proceedings and may give rise to actual trials. By the virtue of the nature of the enforcement proceedings **defense counsels are always required.**

1.4 The prerequisite/conditions that enable the court to enforce decisions

As mentioned in the previous sections there are formal and substantial conditions to be satisfied in order to enable a forced enforcement/execution. However, despite these conditions another one (condition) shall be met before the procedure of requesting the forced execution can take place. The creditor must send to the debtor a document, known as a *precetto* (writ), in which he/she calls on the debtor to voluntarily fulfill the obligation incumbent upon him/her in the decision (judgment etc.. He (the creditor)

shall set a date and advise the debtor that failure to comply with it will result in a forced enforcement/execution of the decision. The aim is to give the debtor a deadline by which to comply with the judgment voluntarily and thereby avoid the forced execution of the decision.

1.5 Recuperation of the amounts on bank accounts as executive title for the banks.

Based on Art. 50 of the legislative decree No. 385, date 1.09.2003, the bank can require the decree/court order, foreseen by Art. 633 of C.Pr.C, based on the statement of account, certified in conformity with entry accounting from one of the banking directors, which has to declare that the credit is certain and due.

Moreover, Art 633 of the C.Pr.C foresees that based on the request for fulfillment of a monetary obligation made by the creditor, the competent judge can pronounce the injunction for the payment of the amount of money (the monetary obligation), in case that the pretended right is proved by a written document. So, according to the Italian rules, the request for the injunction is based on written evidences in case of the above-mentioned Art. 50, there is an absolute autonomy of such a rule compared to the single hypotheses of written evidences foreseen by the C.Pr.C.

The bank account's statement is a document, which certify the account's balance, its actual liquidity, but also all the operations that have been taking place and have contributed to form it. This document have to indicate the result of all the lines of credits and debts realized during the considered period of time, including account's commissions, expenses, the fiscal retains as well as the active and passive interests, etc. The time period taken into consideration is the one between the date of the statement indicated in the last statement of account received by the client and the date of the issuance of the bank account's statement that will be exhibited in the trial.

The bank account's statement, can be used, also, against the guarantors, for example in case of a guarantor of bank credit provided to credit taker that result as a non-paying. In this case the bank have to issue a bank statement of the account covering all the period of guarantee/warranty. This kind of statement issued by the bank is considered to be self-certified, so that the bank to not need any further certification for the documents issued by itself.

II. EXECUTION AGAINST STATE INSTITUTION ON ITALY

The execution of monetary obligations (amounts in money), against budgetary institutions, on the amounts of their bank accounts, generally is on the form of the sequestration/cease of the amounts at third parties, so usually, the creditors can request the sequestration or the blocking of the debtor's accounts in all the banks that perform their activities in the Republic of Italy. We have to take into account that the banks here by palying the role of custodians are considered as third parties.

On the execution of monetary obligations (amounts in money) against budgetary institutions all the provisions that regulate the execution of obligations on the goods of the private debtors are applied, with the only change foreseen by Art 14 of the Law Nr. 30, Date 28.02.1997: “The public administration and the non-economic public entities shall complete the execution procedure of the court decision or arbitration’s decisions, which has come into force and determine the amount of the obligation in money, within 60 days starting from the day that they come into knowledge of the executive title. The creditor does not have the right to request a forced execution of the executive title against public administration or public entities prior to end of this term and as such no enforcement/execution order can be decided by the court. The Italian legislation has determined that the term of 60 days from the notifying day is an adequate term for the voluntary fulfillment of the obligation, suspending during this term the right of the private subjects to request the forced execution procedure.

The term of 60 days (foreseen by the Law Nr.180, Date 11.06.1998, modified with the Law Nr. 267, Date 08.08.1998) has been changed and prolonged in 180 days for the execution procedure of the court and arbitration decisions, this due the debates in relation to need of completion of the public work/investment including programs of reconstruction of the territory, stroked by natural calamity, whose completion might be in threat due to unforeseen debts and planned budget for such obligation against creditors.

Furthermore, the Italian jurisprudence has affirmed the application against State and Public Entities of the general principle that the debtor shall fulfill his obligations with all his present and future goods (Art. 2740 of the C.C), so stressing once again the exposure of State and of the Public Entities in the forced execution procedure in case of a non-voluntary execution of the execution’s order.

However, the exposure of State and of the Public Entities on the forced execution procedure of the monetary obligations or pecuniary credits has been denied in case that these amounts of money or pecuniary credits are part of the undisposable (which cannot be used) assets, i.e in case their destination is for accomplishment of public services. Another case is also when the obligation are arising due to execution of *potesta publica* of these entities.

The non-exposure of the state or public entities in relation to forced execution procedure for monetary obligations in regard to pecuniary credits, arises once again from the jurisprudence using the same principal that this credits cannot be touched and used to fulfill monetary obligation in case they constitute undisposable assets (art. 2740 of the C.C. has been used by Italian courts as legal basis).

The interpretation of the law by the Italian court in this regard has been as follows: “The State Budget, as far as it does not enable the link of single entries (credits) to single exits (debits), can not be considered as a ground to deny to condition the destination of particular amounts in the technical perspective, so that these amounts, would not be available for the executive action taken by the creditors against the State and public entities. Nevertheless, there exist special laws that consent the Public Administration to suspend the executive procedure (For example in case of the payment of the public services) or actually to limit the execution on some goods

(such as the amounts designated for the payment of the employers' salaries of the public entities)

To reduce the negative effects on the assets of the Public Entities, the Italian legislator has intervened with legislative initiatives, sometimes also by suspending the creditors' rights to act in "executives" or enlarging the category of the goods which can not be exposed to the execution procedure

Some examples of special legal provisions are: Art. 9 of the Law No. 96, Date 03.04.1993, which foresees the suspending of the forced execution procedure in order to make possible first the completion of the transaction, by paying only a reward amount of not more than 40% of the obligation as a reward, which is greater than the one that was foreseen in Art. 7, of the Law No. 244, Date 08.08.1995, that was amounting in limits of 35% of the pretended obligation as a reward. Another example is also the provision of Art. 113 of the Law No. 77, Date 25.02.1995, modified, which foresees the exclusion from the forced execution of monetary obligation, of the amounts from the budget of and in competence of the communes, provinces and of the local entities partnerships which are designated to cover payment of the employees' salaries.

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