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# Unjustified Interruption of the Taking Evidence by the Court of Origin as a Ground to Refuse Cross-Border Enforcement Under the Brussels I Rules

*Note to: Corte di Cassazione (Sez. I civile), F.L. v. Ministry of the Interior and Attorney General at the Court of Appeal of Naples, 26 February 2021, No. 5327*

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## Abstract

The contribution examines a recent decision by the Italian *Corte di Cassazione* rendered in matters of recognition and enforcement of foreign judgments issued in other European Union Member States. By analysing the reasoning of the Italian *Corte di Cassazione* in the application of the public policy test as a ground to refuse enforcement in Italy of a Polish ruling, the *Corte di Cassazione's* methodological approaches are scrutinised against the background of the founding principles of mutual trust and free movement of decisions in the European judicial space. The conclusions of the Italian *Corte di Cassazione* are supported as it emerges from the commented decision that the public policy exception is applied in such a way to avoid an application that would go beyond its scope and purpose. More specifically, the circumstance a foreign decision has been adopted without an evidence being taken has not been considered to be in violation of a general substantive “right to evidence,” whilst it has been deemed that, in relevant fields of life, the lack of taking of an evidence already admitted to trial by the court of origin does constitute a breach of a (constitutionally protected) procedural fair trial in Italy.

## Keywords

recognition of decisions – public policy exception – right to evidence in foreign proceedings – freedom of the court to evaluate evidence

## 1 Abstract of the Decision

A civil judgment adopted by the court of another EU Member State in civil and commercial matters may not be recognised and enforced in Italy if the defendant, in the foreign proceedings, was not allowed to present an evidence it was specifically requested to produce by the court itself. The possibility to file evidences after being requested from the court is part of the Italian procedural public policy for the purposes of Art. 45 Brussels Ibis Regulation. On the contrary, the fundamental right to defence does not extend, and consequently so does not the public policy exception, in such a way as to grant the defendant the right to present any evidence before a court that has not been admitted, nor to have specific evidences (such as the DNA test) evaluated in specific ways, as another fundamental principle of the Italian legal systems remains that the court is, in general, free in the evaluation of evidences submitted.

## 2 Key Passages from the Ruling

(Paragraph 8) The pleas all relate to the manner in which the trial held in Poland was actually conducted and concluded with the judgment of the Tarnow court in favour of the recognition of natural paternity. It is pointed out, in particular, that the Polish court – since defendant did not appear at the hearing (allegedly because of the excessive and unlawful shortness of the time of service), the Court of Poland decided in May 2003 to delegate to the Italian *Tribunale di Nola* the task of examining the defendant and, in the event of the defendant's failure to acknowledge paternity, to appoint an expert witness to carry out certain haematological examinations. The Italian Court was subsequently contacted from the expert witness who, amongst others, exposed the impossibility of carrying out the blood test as requested by the order of the Court of Tarnow, since they are tests that are obsolete and do not correspond to the blood tests currently used in Italy for the recognition of paternity. The *Tribunale di Nola* requested precise directives to the Polish Court regarding the haematological examination to be carried out.

A recognition of paternity has been delivered by the Polish Court, without any further coordination with the Italian authorities concerning the taking of evidence.

(Paragraph 12) The party's view is that there has been a breach of public policy in the mere failure to carry out the DNA test, despite his declared willingness to do so, cannot be shared.

The high evidential value of DNA testing has been repeatedly emphasised by the case-law of Court, especially when assessing the alleged father's refusal to undergo such a test. The refusal has been held to have "such a high circumstantial value" that it "alone allows the application of recognition of paternity to be considered well-founded".

The point is, rather, that this evidentiary tool is included in a system which places at its centre the principle of the judge's free interpretation under article 116 of the Code of Civil Procedure.

Nothing in principle precludes that the proof of natural paternity may also follow paths completely different from those traced – negatively, as well as positively – by the DNA test.

(Paragraph 13) On the other hand, the appellant's second ground of appeal, alleging breach of procedural public policy, is to be shared. In the foreign proceedings, proof of paternity by DNA test, following the request for a letter rogatory, had become part of the proceedings that were taking place.

The defendant had declared his willingness to carry out the test and the order of the *Tribunale di Nola* was interlocutory in nature: as a matter of fact, the DNA test was being carried out.

There is no justification – from the point of view of the "fundamental guarantees" and the defendant's right to defence – for interrupting the taking of evidence.

Even less could such an interruption be justified as the defendant was not given any supporting reasoning (either in the body of the judgment subsequently delivered or in any other separate document).

If, under the current (Italian) system, the court may also "revoke" an already admitted evidence, this must be done before the commencement of their taking, by means of an *ad hoc* measure and provided, above all, that the "revocation" is "rational and justified and therefore adequately motivated [...]".

(Paragraph 14) It must thus be concluded with the following legal principle: "The foreign decision concerning sensitive issues (such as a paternity test) rendered during a proceedings where there has been an unreasonable and unjustified interruption of the taking of an already admitted evidence, even more so where the defendant declared its intention to take DNA tests, is apodictic and unreasonable".

### 3 Comment

#### 3.1 Preliminary Remarks

The historical and procedural facts underlying the judgment of the *Corte di Cassazione*<sup>1</sup> are relatively straightforward. In Poland, a paternity relationship was judicially established and, consequently and subsequently, the Polish territorial court ordered the father to pay monthly sums to his child. The Italian Ministry of the Interior, in its capacity as intermediary authority within the meaning of the 1956 New York Convention on the Recovery Abroad of Maintenance,<sup>2</sup> applied for enforcement of the Polish decision in so far as it required the father to pay the sums in question.

Before analysing the grounds of non-recognition and non-enforcement invoked by the debtor and the criteria applied by the Italian courts in the case at hand, it is worth briefly lingering on the relevant applicable instrument governing the free movement of decisions. As is clear from the judgment of the Italian *Corte di Cassazione*, the substantive decision of the Polish court was rendered in 2007, following which the Italian Ministry, on an unspecified date, requested the enforcement of the foreign measure. The Italian decree ordering the enforceability of the Polish decision was issued in 2017 by the *Corte d'Appello di Napoli*. This was subsequently challenged and then recourse before the Cassation was filed.

At the time the Polish decision was rendered, the European Union law instrument governing the free movement of decisions in civil and commercial matters was the Brussels I Regulation – Regulation 44/2001.<sup>3</sup> As is well known, this instrument also included within its material scope of application, maintenance obligations, in respect of which a specific forum, alternative to the general one, was specifically identified in Article 5(2). The applicability of the Brussels I rules on free movement of decisions have not been affected by the subsequent entry into force and applicability of both Regulation 4/2009,<sup>4</sup> specifically devoted to

1 On which see already PIZZOLANTE, “L’effettivo perseguimento della verità biologica tra ordine pubblico processuale e tutela dei diritti umani”, *Ilfamiliarista.it*, 30 June 2021, available at: <<https://ilfamiliarista.it/articoli/giurisprudenza-commentata/l-effettivo-perseguimento-della-verit-biologica-tra-ordine>>.

2 Convention on the Recovery Abroad of Maintenance, 29 June 1956, entered into force 25 May 1957.

3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23 (‘Brussels I Regulation’).

4 Council 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, OJ L 7, 10.1.2009, p. 1–79.

maintenance obligations, and the Brussels I *bis* Regulation.<sup>5</sup> With reference to the former, and even though this constituted *lex specialis* with respect to the Brussels I Regulation, the same Regulation 4/2009 specified that its own regime for the movement of judgments is applicable to decisions given in the Member States before the date of application of the instrument if the declaration of enforceability has been requested after that of applicability of the regulation.<sup>6</sup> Assuming that the request for enforceability of the 2007 Polish decision has been submitted by the Italian Ministry before the applicability of Regulation 4/2009, the relevant instrument to govern the topic has remained the Brussels I Regulation.<sup>7</sup>

Not even the 2012 Brussels I *bis* Regulation Recast, as mentioned, has changed the legal framework governing the recognition and enforcement of the Polish decision. The Brussels Recast, that – as known – established an advanced regime providing for direct enforceability of decisions, precisely due to this sensitive innovation, is only applicable to decisions rendered in the contexts of proceedings started after the applicability of the instrument itself<sup>8</sup> (*i.e.*, 10 January 2015). In this sense, as emerges from the above, as a preliminary remark, one has to conclude on the correctness of the instrument that has been applied by Italian courts in the enforceability procedure. Additionally, it must be stressed that the circumstance that the “old” Brussels I Regime has been applied, in no way negatively affects the relevance of the decision on

5 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32 (‘Brussels I *bis* Regulation’).

6 Council Regulation (EC) No 4/2009, *cit. supra* note 4, Art. 75(2)(a). Article 72(2) also makes clear that ‘Regulation (EC) No 44/2001 shall continue to apply to procedures for recognition and enforcement under way on the date of application of this Regulation’.

7 In the scholarship, on the relationship between the Brussels I Regime and Regulation No 4/2009, see *ex multis*, MANKOWSKI, “Art. 67 Brüssel Ia-VO”, in RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht, Band I, Brüssels Ia-VO*, Köln, 2016, p. 1215 ff.; ID., “Article 67”, in MAGNUS and MANKOWSKI (eds.), *Brussels Ibis Regulation*, Köln, 2016, p. 1020 ff.; MANSEL, THORN and WAGNER, “Europäisches Kollisionsrecht 2009: Hoffnungen durch den Vertrag von Lissabon”, IPRax, 2010, p. 7 ff.; QUEIROLO, TUO, CELLE, CARPANETO, PESCE and DOMINELLI, “Art. 67 Brussels I bis Regulation: An Overall Critical Analysis”, in TUO, CARPANETO and DOMINELLI (eds.), *Brussels I bis Regulation and Special Rules: Opportunities to Enhance Judicial Cooperation*, Roma, 2021, p. 13 ff., at p. 113–117; POCAR and VIARENGO, “Il regolamento (CE) n. 4/2009 in materia di obbligazioni alimentari”, RDIPP, 2009, p. 805 ff.; PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell’Unione europea*, Roma, 2013.

8 Brussels I *bis* Regulation, *cit. supra* note 5, Art. 66(2). See KRAMBERGER ŠKERL, “The Application ‘Ratione Temporis’ of the Brussels I Regulation (Recast)”, EU and Comparative Law Issues and Challenges Series, 2017, p. 341 ff.

public policy delivered by the Italian *Corte di Cassazione*. Such a ground to refuse recognition and enforcement of foreign decisions is, in fact, known in many and diverse EU law instruments of international civil procedure<sup>9</sup> (and as a matter of general principles, in light of the history of the Brussels Recast, does not seem destined to be abandoned<sup>10</sup>). As the public policy constitutes an “horizontal” exception to the free movement of decisions, the commented Italian judgments will be able to further shed light on the domestic application of the exception in general, also in fields not directly touched upon by the *Corte di Cassazione* in the case at hand.

### 3.2 *Public Policy, Fair Trial, and Unreasonable Revocation of Evidence: The Decision of the Italian Corte di Cassazione*

Assuming that in traditional public international law there is no clear obligation on States to recognise and enforce foreign judicial measures, which are the expression of the authoritative power of the legal order whose courts settle the dispute between parties, the possibility of enforcing foreign judgments is

9 Cf Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, p. 1–115; Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, p. 1–29; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, p. 30–56; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in OJ L 201, 27.7.2012, p. 107–134.

10 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, 2, and final, 3; in the scholarship, see SCHLOSSER, “The Abolition of Exequatur Proceedings – Including Public Policy Review?”, IPRax, 2010, p. 101 ff.; BEAUMONT and JOHNSTON, “Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?”, IPRax, 2010, p. 105 ff.; BEAUMONT and JOHNSTON, “Can Exequatur be Abolished in Brussels I Whilst Retaining a Public Policy Defence?”, JPIL, 2010, p. 249 ff.; OBERHAMMER, “The Abolition of Exequatur”, IPRax, 2010, p. 197 ff.; CUNIBERTI and RUEDA, “Abolition of Exequatur. Addressing the Commission’s Concerns”, *RebelsZ*, 2011, p. 286 ff., and BIAGIONI, “L’abolizione dei motivi ostativi al riconoscimento e all’esecuzione nella proposta di revisione del Regolamento Bruxelles I”, *RDIPP*, 2011, p. 971 ff.

more or less conditioned by the rules in force in the requested State.<sup>11</sup> At the same time, with a change of perspective, some obligations concerning recognition and enforcement of foreign decisions might derive on States from human rights law treaties and fundamental human rights in general, as the question of ‘movement’ of rights incorporated in judgments is strictly connected with the right to an effective remedy.<sup>12</sup>

As is well known, in the construction of an integrated European judicial space, the European Union has adopted specific, albeit sectoral, rules to govern the cross-border recognition and enforcement of decisions in civil and commercial matters. Although there is no single model valid in every sector, and it is not yet possible to speak of a full faith and credit clause between Member States with a general and absolute value as could be found in some federal systems,<sup>13</sup> the method and approaches used in the European Union enhance the principle of mutual trust between Member States and are characterised by an openness of national systems to “European” decisions.<sup>14</sup> An openness

11 On the topic, see TUO, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, Milano, 2012; VON MEHREN, “Recognition and Enforcement of Foreign Judgments. General Theory and the Role of Jurisdictional Requirements”, *RCADI*, 1980, Vol. 167, p. 13 ff., p. 51, and MICHAELS, “Recognition and Enforcement of Foreign Judgments”, *Max Planck Encyclopedia of Public International Law*, 2012.

12 *Hornsby v. Greece*, Application No. 18357/91, Judgment of 19 March 1997, para. 40 ff., and *Panorama Ltd and Miličić v. Bosnia and Herzegovina*, Applications Nos. 69997/10 and 74793/11, Judgment of 25 July 2017, para. 62. More in particular, the European Court of Human Rights, when interpreting Article 6 (fair trial) of the European Convention of fundamental rights and liberties, confirmed that the provision at hand applies to any stage of proceedings, *exequatur* included (to that effect, see *Saccoccia v. Austria*, Application No. 69917/01, Judgment of 18 December 2012). At the same time, however, in the Court’s eye, the same principle of fair trial imposes the necessity for the requested court to exert a minimum control over the compatibility of the foreign decision with the human rights law standards enshrined in the convention itself, in particular if the decision has been rendered in a non-party State (cf *Pellegrini v. Italy*, Application No. 30882/96, Judgment of 20 July 2001, para. 40). In the scholarship, extensive on the matter, see HAZELHORST, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial*, Den Haag, 2017; BIAGIONI, “L’art. 6 della Convenzione europea dei Diritti dell’Uomo e l’ordine pubblico processuale nel sistema della Convenzione di Bruxelles”, *RDI*, 2001, p. 723 ff., and MATSCHER, “Der verfahrensrechtliche ordre public im Spannungsfeld von EMRK und Gemeinschaftsrecht”, *IPRax*, 2001, p. 428 ff.

13 FRACKOWIAK-ADAMSKA, “Time for a European ‘Full Faith and Credit Clause’”, *CMLR*, 2015, p. 191 ff. See also GEIER, *Internationales Privat- und Verfahrensrecht in föderalen Systemen*, München, 2013.

14 *Ex multis* CARBONE and TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il Regolamento UE N. 1215/2012*, Torino, 2016, p. 1 ff., and SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione). Evoluzione e continuità del “sistema Bruxelles-I” nel quadro della cooperazione giudiziaria europea in materia civile*, Milano, 2015, p. 18 ff.

which, although functional to the creation of the internal market to the extent that it has been argued by some scholars that the free movement of judgments constitutes the “fifth fundamental freedom” of the European Union,<sup>15</sup> cannot be absolute and devoid of any form of control by the requested Member State.

With reference to the ‘Brussels I system’,<sup>16</sup> the Member State requested of recognition and enforcement has the possibility, under certain strict conditions, to exert some control over the foreign decision in order to refuse its recognition and enforcement where the interested party invokes the existence of one or more grounds of refusal permitted by secondary EU law. Among these exhaustive grounds for non-recognition and non-enforcement, the limit of public policy remains.<sup>17</sup> If the recognition or enforcement of the foreign judgment, rather than the judgment as such, is contrary to the public policy of the

15 Clearly in these terms, CARBONE and TUO, *cit. supra* note 14, p. 4.

16 On whether the EU rules of private international law *lato sensu* can be qualified as a “system” or not, see BARIATTI, *Casi e materiali di diritto internazionale privato comunitario*, Milano, 2009, p. 86, and cf LUZZATTO, “Riflessioni sulla c.d. comunitarizzazione del diritto internazionale privato”, in VENTURINI and BARIATTI (eds.), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar, Vol. II*, Milano, 2009, p. 613 ff., in particular p. 619 ff.

17 *Ex multis* see SALERNO, “La costituzionalizzazione dell’ordine pubblico internazionale”, RDIPP, 2018, p. 259 ff.; ID., “Il diritto processuale civile internazionale comunitario e le garanzie processuali fondamentali”, in PICONE (ed.), *Diritto internazionale privato e diritto comunitario*, Padova, 2004, p. 99 ff.; MARINO, “Il limite dell’ordine pubblico processuale alla circolazione delle decisioni giurisdizionali nella recente prospettiva delle Corti europee”, DUE, 2017, p. 105 ff.; SPERDUTI, “Ordine pubblico internazionale e ordine pubblico interno”, RDI, 1960, p. 303 ff.; CLERICI, “Rapporti di lavoro, ordine pubblico e convenzione di Roma del 1980”, RDIPP, 2003, p. 809 ff.; CONTALDI, “Ordine pubblico”, in BARATTA (ed.), *Dizionari del diritto privato. Diritto internazionale privato*, Milano, 2011, p. 273 ff.; TUO, “La nozione di ordine pubblico processuale tra Bruxelles I e CEDU”, DUE, 2010, p. 923 ff.; ID., “Armonia delle decisioni e ordine pubblico”, in BIAGIONI (ed.), *Il principio dell’armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino, 2015, p. 161; NASCIMBENE, “Riconoscimento di sentenza straniera e «ordine pubblico europeo»”, RDIPP, 2002, p. 659 ff.; ANGELINI, *Ordine pubblico ed integrazione costituzionale europea. I principi fondamentali nelle relazioni interordinamentali*, Padova, 2007, p. 103 ff.; MOSCONI, “Qualche riflessione in tema d’ordine pubblico nel progetto di riforma e nella convenzione di Bruxelles del 1968”, in CAMPIGLIO (ed.), *Scritti di diritto internazionale privato e penale*, Padova, 2009, p. 53 ff.; BOSCHIERO, “Ordine pubblico ‘internazionale’ e norme di applicazione necessaria”, in PREITE and GAZZANTI PUGLIESE DI COTRONE (eds.), *Atti notarili. Diritto comunitario e internazionale. Vol. I, Diritto internazionale privato*, Milano, 2011, p. 137 ff.; PIRRONE, “L’ordine pubblico di prossimità tra tutela dell’identità culturale e rispetto dei diritti dell’uomo”, in CATALDI and GRADO (eds.), *Diritto internazionale e pluralità delle culture*, Napoli, 2014, p. 147 ff.; PERLINGIERI and ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, and FERACI, *L’ordine pubblico nel diritto dell’Unione europea*, Milano, 2012.



requested Member State,<sup>18</sup> this may refuse to recognise and enforce the foreign judgment, at least with respect to those passages and parts contrary to the fundamental principles of the *lex fori*. The complexity of the hermeneutical operation judges are called upon when assessing possible violations of the public policy remains undisputed.<sup>19</sup> Precisely because of the constraints imposed by European Union law, the exception in question cannot constitute a means of reassessing the jurisdiction of the court of origin,<sup>20</sup> and the investigation needed to determine breaches of public policy must be weighed against the prohibition on reviewing a foreign judgment,<sup>21</sup> a principle that is fundamental in the construction of an integrated European judicial space.

In the case dealt with by the Italian *Corte di Cassazione*, the debtor argued his rights of defence had been violated on the ground that the court of origin had not taken the evidence initially admitted to trial. More specifically, the Court of origin ordered the taking, in Italy and in application of the Taking

18 MOSCONI and CAMPIGLIO, *Diritto internazionale privato e processuale. Volume I. Parte generale e obbligazioni*, Milano, 2020, p. 340 ff.

19 On which, extensively, see PERLINGIERI and ZARRA, *cit. supra* note 17, p. 82 ff.

20 Now Brussels I bis Regulation, *cit. supra* note 5, Art. 45(3). On the prohibition to review jurisdiction, see in the different instruments FORCADA MIRANDA, *Comentarios prácticos al Reglamento (UE) 2019/1111. Competencia, reconocimiento y ejecución de resoluciones en materia matrimonial, responsabilidad parental y sustracción internacional de menores*, Madrid, 2020, p. 441 ff.; FRANCQ and MANKOWSKI, "Article 45", in MAGNUS and MANKOWSKI (eds.), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Köln, 2016, p. 863 ff.; HAUSMANN, *Internationales und Europäisches Ehescheidungsrecht*, München, 2013, p. 700; MARI, *Il diritto processuale civile della Convenzione di Bruxelles*, Padova, 1999, p. 727 ff.; RICCI, "Article 39. Prohibition of Review of Jurisdiction of the Court of Origin", in VIARENGO and FRANZINA (eds.), *The EU Regulations on the Property Regimes of International Couples*, Cheltenham, 2020, p. 360 ff.; SIEHR, "Article 24", in MAGNUS and MANKOWSKI (eds.), *European Commentaries on Private International Law, Volume IV, Brussels Ibis Regulation*, Köln, 2017, p. 314 ff.; TUO, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, *cit. supra* note 11, p. 141 ff., and WELLER, "Article 24. Prohibition of Review of Jurisdiction of the Court of Origin", in ALTHAMMER (ed.), *Brussels IIa Rome III Article-by-Article Commentary*, München, 2019, p. 180 ff.

21 Now Brussels I bis Regulation, *cit. supra* note 5, Art. 52. In the scholarship, on the necessity to balance the prohibition to review as to the substance and the public policy exception, see *ex multis* COLLIER, "Fraud Still Unravels Foreign Judgments", *The Cambridge Law Journal*, 1992, p. 441 ff.; FRANCQ and MANKOWSKI, "Article 45", *cit. supra* note 20, p. 863 ff.; GÖSSL, "The Public Policy Exception in the European Civil Justice System", *The European Legal Forum*, 2016, p. 85 ff.; MANKOWSKI, "Article 52", in MAGNUS and MANKOWSKI (eds.), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Köln, 2016, p. 963 ff., and TUO, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, *cit. supra* note 11, p. 27 ff.

of evidence Regulation,<sup>22</sup> of the defendant's blood to determine the existence of a parental relationship. The expert, appointed by the local Italian court, raised the inadequacy of the evidence requested in comparison with biological evidences usually obtained in Italy for the same purposes, thus requesting indications from the Italian judiciary which, on an interlocutory basis, sent the documents to Poland and awaited further instructions. In the face of the attempted coordination between judges, the Polish court proceeded to judgment without making further requests to Italy and, therefore – in the absence of any blood evidence – judicially established the existence of the parental relationship condemning, to that effect, the father to pay a sum of money.

The debtor considered that the Polish court's failure to take evidence constituted a violation of the EU Regulation on the cross-border taking of evidence, as well as a breach of the fundamental right of defence violating both the substantive and procedural public policy in that the decision was exclusively based on the evidence and declarations offered by the mother in the original proceedings.<sup>23</sup>

By reforming the previous decision of lower Italian court that dismissed the challenges of the debtor, the Italian *Corte di Cassazione* has dwelled on the lack of taking of evidence and the Italian public policy exception to ultimately support (some of) the debtor's arguments and deny enforcement of the Polish decision in respect to the payment of alimony.

Firstly, the *Corte di Cassazione* excludes a violation of the Italian substantive public policy in so far as – in general terms – the debtor invokes his right

22 See now Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2.12.2020, p. 1–39.

23 On human rights and the private international law, other than the already quoted scholarship, see IVALDI and TUO, "Diritti fondamentali e diritto internazionale dell'Unione europea nella prospettiva dell'adesione alla CEDU", RDIPP, 2012, p. 7 ff.; HESS, "EMRK, Grundrechte-Charta und europäisches Zivilverfahrensrecht", in MANSEL, PFEIFFER, KRONKE, KOHLER and HAUSMANN (eds.), *Festschrift für Erik Jayme* München, 2004, p. 339 ff.; KINSCH, "Private International Law Topics Before the European Court of Human Rights – Selected Judgments and Decisions", YPIL, Vol XIII, 2010/2011, p. 37 ff.; MACCARONI, "Equo processo, attuazione del contraddittorio e tutela del convenuto nel procedimento di exequatur secondo il regolamento Bruxelles I / Ibis", Diritto comunitario e degli scambi internazionali, 2015, p. 301 ff.; DOEHRING, *Völkerrecht*, Heidelberg, 2004, p. 422; DE BOER, "Unwelcome Foreign Law: Public Policy and other Means to Protect the Fundamental Values and Public Interests of the European Community", in MALATESTA, BARIATTI and POCAR (eds.), *The External Dimension of EC Private International Law in Family and Succession Matters*, Milano, 2008, p. 295 ff., and PARRA-ARANGUREN, "General Course of Private International Law: Selected Problems", RCADI, 1988, Vol. 210, p. 9 ff., p. 158.

to present to the court a specific evidence, namely DNA. Despite the importance a specific evidence might acquire, although there is a fundamental right to defence in the Italian legal system, the *Corte di Cassazione* rationalises the principles of the system by emphasising that, in Italy, the judge's persuasion is free and not linked to some predetermined value attributed to an evidence, whether this is typical or atypical. This means, according to the Court, the right to defence does not grant individuals with a general and abstract right to have a specific evidence admitted to trial.<sup>24</sup>

Secondly, notwithstanding the absence of an abstract absolute substantive right to present any evidence deemed useful, the *Corte di Cassazione* considers that there had been a breach of the rights of defence in this case. This was not so much because the debtor had not been given the opportunity to invoke an abstract substantive right to present a specific evidence, but rather because the admission at trial of the blood evidence ordered by the Polish court had "brought" that evidence (and the effective right to that evidence) into the trial. In other words, the debtor's right had moved from the abstract substantive plane, into the concrete practical procedural field. In this sense, once a specific evidence is admitted to trial, preventing – in law or in fact – one of the parties from having recourse to that specific evidence constitutes a violation of the Italian public policy, namely constitutional principles of due process of law and fair trial.<sup>25</sup> An exclusion of a previously admitted evidence, although possible, must necessarily be motivated by the judge given that the evidence has become available to the parties. Since the Italian courts did not refuse to take the blood evidence, as they merely requested further instructions by means of interlocutory orders, and given that the party concerned did not refuse to submit to the blood evidence, the adoption of the decision on the merits by the Polish court without having taken the evidence previously admitted to trial, and without stating any reasons on the point, constituted a violation of the party's effective rights of defence and, consequently, of the constitutional principles of due process of law.

Based on these considerations, the Italian *Corte di Cassazione* thus concluded that, with regard to the enforceability of foreign judgments related to an important asset of life (such as the establishment of biological paternity), the judgment based on an apodictic reasoning is not enforceable, for example

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24 On the different issue of the admission of evidences allowed by the foreign law rather than by the *lex fori processus*, see FIORE, *Diritto internazionale privato*, Torino, 1889, p. 220 ff.

25 SALERNO, "La costituzionalizzazione dell'ordine pubblico internazionale", *cit. supra* note 17, p. 259.

when the foreign judgment is given after having admitted and then unreasonably withdrawn the DNA evidence.

#### 4 Comments and Conclusive Remarks

The decision of the *Corte di Cassazione* in the case at hand should be agreed with both in terms of method and conclusion.

With reference to the method adopted to determine the existence of a violation of the Italian public policy, or a lack thereof, on the one hand the *Corte di Cassazione* has correctly adopted a narrow interpretation of public policy as exception to the free movement of decisions. On the other hand, the ruling implicitly confirms that diverging regimes of taking and evaluating evidence in the various Member States are not in themselves sufficient to establish a breach of public policy. Just as in the past it has been accepted that English measures convicting a defendant in default of appearance for *ficta confessio* are not necessarily incompatible with the Italian public policy,<sup>26</sup> in the present case there are no particular (Italian) conditions imposed to the foreign judge's evaluation of the evidence admitted at trial, provided that the foreign decision is compatible with the due process of law.

Additionally, with regards to the relationship between the public policy exception and the prohibition of the requested court to review the foreign decision, scholars<sup>27</sup> have noted that, due to this relationship, recourse to the public policy exception is in practice limited. As a matter of principle, the Court of Justice of the European Union has given guidelines on the point. In the Court's eye,

“[r]ecourse to the public-policy clause [...] can be envisaged only where recognition or enforcement of the judgment delivered in another [Member] State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of

26 SALERNO, “Compressione e rimodulazione della sovranità processuale degli Stati membri dell'UE dopo il Regolamento UE n. 1215/2012”, in CORTESE (ed.), *Studi in onore di Laura Picchio Forlati*, Torino, 2014, p. 237 ff., p. 244. Moreover, consistently with such line of argument, domestic courts have excluded that differences in procedural laws or erroneous applications of foreign procedural laws are per se sufficient to refuse recognition, unless the breach is so gross as to violate the rule of law (cf. Swiss Federal Tribunal, *Y v. Z*, Judgment of 31 August 2007, 4A\_80/2007/len, para. 5.2, available at: <<https://www.bger.ch/>>).

27 FRANCO and MANKOWSKI, “Art. 45”, *cit. supra* note 20, p. 883, and TEIXEIRA DE SOUSA and HAUSMANN, “Art. 34”, in SIMONS and HAUSMANN (eds.), *Brüssel I-Verordnung. Kommentar zu VO (EG) 44/2001 und zum Übereinkommen von Lugano*, München, 2012, p. 782 ff., p. 788.

the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order”.<sup>28</sup>

Always according to the position of the Court of Justice of the European Union,

“[...] fundamental rights form an integral part of the general principles of law whose observance the Court ensures [...]. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms ... has particular significance [...]. The Court has thus expressly recognised the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights [...]”.<sup>29</sup>

In this sense, to conclude, it seems that – despite the public policy exception being not so often successfully applied in civil and commercial matters<sup>30</sup> – the Italian *Corte di Cassazione* has adopted an acceptable solution that is consistent with the case law of the Court of Justice of the European Union. The violation at hand, the issuance of the decision on the merits without the taking of the previously admitted evidence, and without any justification whatsoever on the point, does not necessarily seem to have determined an unlawful review of the facts and of the legal principles already decided by the foreign court. As the definition of the public policy exception is on its own undetermined, and considering that the exception may often been given substance by way of cases that are not public policy,<sup>31</sup> it seems that the present ruling will bear relevance to domestic courts called to apply such exception in practical cases.

28 Case C-7/98, *Dieter Krombach v. André Bamberski*, 2000, para. 37. See also Case C-394/07, *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, 2009, para. 27 ff.

29 *Dieter Krombach v André Bamberski*, *cit. supra* note 28, para. 25 f. Cf. also *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, *cit. supra* note 28, para. 37, and Bundesgerichtshof (Germany), Decision of 14 June 2012, IX ZB 183/09, *Zeitschrift für Wirtschafts- und Bankrecht*, 2012, p. 1445.

30 SCHRAMM, “Enforcement and the Abolition of Exequatur under the 2012 Brussels I Regulation”, *YPIL*, Vol. XV, 2013/2014, p. 143 ff., p. 144.

31 MOSCONI and CAMPIGLIO, *cit. supra* note 18, p. 342.