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LA CRISI DELLA *RES JUDICATA* NELLA RECENTE PRODUZIONE NORMATIVA PROCESSUAL-CIVILISTICA ITALIANA E IN AMBITO COMUNITARIO

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La crisi della *Res Judicata* nella recente produzione normativa processual-civilistica italiana ed in ambito comunitario[*].

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Abstract

I. Lo scritto evidenzia il cambio di prospettiva che caratterizza la più recente produzione normativa processual-civilistica italiana in rapporto al valore della *res judicata* sostanziale. Secondo la visione dogmatica della tradizione, il giudicato sostanziale si atteggia funzionalmente quale obiettivo di stabilità degli accertamenti giurisdizionali sui diritti cui si correlano – secondo un rapporto di dipendenza – tanto l'efficacia esecutiva degli ordini giudiziali, quanto l'efficacia vincolante degli strumenti di tutela cautelari. L'esigenza di accelerazione dei procedimenti di tutela giurisdizionale ha, peraltro, indotto alla sperimentazione di nuove forme di tutela ed alla creazione di ordini giurisdizionali capaci di mantenere la loro efficacia vincolante di regolamentazione esecutiva del rapporto controverso indefinitamente nel tempo, pur in assenza di un correlato giudizio di *plena cognitio* finalizzato all'ottenimento del giudicato sul medesimo rapporto. Lo studio effettua una rassegna dei principali strumenti di tal tipo (art. 708 c.p.c., art. 148 c.c., art. 446 c.c., 186 *bis* e *ter* c.p.c., art. 19 dlg. n. 5 del 2003), evidenziando che a seguito del loro ingresso il sistema delle tutele si sdoppi secondo un duplice itinerario funzionale, avente a suo fine la certezza, in un caso, e l'effettività, nell'altro, e le ricadute che ciò determina sulla interpretazione dell'art. 111, co. 7 della carta costituzionale italiana. (Andolina)

II. Lo scritto compie una ricognizione sulla giurisprudenza della Corte di giustizia del Lussemburgo in merito alla stabilità dei giudicati civili nazionali (sentenze *Eco Swiss*, *Köbler*, *Traghetti del Mediterraneo*, *Kühne* & *Heitz*, *Kapferer, Kempter)* per ricavarne una parabola di progressivo indebolimento degli stessi in rapporto ad asserite vicende di lesione della legalità comunitaria. Il culmine di tale parabola è rappresentato dalla sentenza *Lucchini*, del 18 luglio 2007, mediante la quale viene, per la prima volta, dichiarato bisognevole di una formale revocazione giudiziale un giudicato civile italiano nella prospettiva del realizzato *vulnus*, per suo mezzo, alle competenze esclusive della Commissione in materia di apprezzamento della legalità comunitaria dei regimi di aiuto alle imprese in crisi. L'Autore argomenta le ragioni favorevoli ad una lettura rigorosa del *dictum Lucchini*, che una recente ordinanza di rimessione di altra questione pregiudiziale vertente (ancora) sulla compatibilità comunitaria dell'art. 2909 c.c., resa, ex art. 234 CE dalla Corte di cassazione italiana, con ordinanza del 2 gennaio 2008 (caso *Olimpiclub*), parrebbe, però, trascurare. (Raiti)

III. Il fenomeno della sommarizzazione dei procedimenti destinati a concludersi con provvedimenti inidonei al giudicato, tipico delle riforme che hanno riguardato il codice di rito civile nel biennio 2005/2006, ha caratterizzato altresì il processo esecutivo, ancora una volta nel dichiarato intento di imprimere un'accelerazione al corso dell'esecuzione forzata dei diritti rimasti inadempiuti.
Il legislatore ha previsto infatti che talune opposizioni esecutive, pur occasionate da esigenze eminentemente accertative, possano concludersi con provvedimenti sommari ai quali può (ma non deve) seguire lo svolgimento del giudizio a cognizione piena, e la cui efficacia è destinata dunque ad esaurirsi nell'ambito dei procedimenti in cui sono stati resi. Sono riconducibili a tale schema i

[*] Gli scritti riproducono, con la sola aggiunta delle note, il testo delle relazioni presentate dagli Autori intorno al tema della "crisi del giudicato" nel corso di un ciclo di seminari, su tematiche processualcivilistiche, tenuto nei giorni 22, 23 e 24 maggio 2008 presso la J. W. Goethe Universität di Frankfurt a. M., tra studiosi dell'Università di Catania e studiosi della locale Facoltà di Diritto, su invito del Prof. Peter Gilles, Ordinario di Diritto privato comparato.

provvedimenti contemplati nei «nuovi» artt. 624 e 512 c.p.c. che, pur dotati di vincolatività endo-procedimentale, non sono idonei ad acquistare forza di giudicato. (Marino)

Keywords

I. *Res judicata* civile - tutela anticipatoria - esecutività - certezza - effettività - ricorso straordinario per cassazione
II. *Res judicata* civile - rinvio pregiudiziale - giurisprudenza comunitaria - sentenza *Lucchini* - ordinanza Cassazione *Olimpiclub*.
III. *Res judicata* - esecuzione forzata - cognizione sommaria - efficacia vincolante endo-procedimentale - art. 624 c.p.c. - art. 512 c.p.c.

I. CRISIS OF *RES JUDICATA* AND NEW TECHNIQUES FOR DISPUTE RESOLUTION: (SELF- STANDING ANTICIPATORY) PROVISIONAL MEASURES ON THE MERITS

by Italo Andolina

Summary: 1. Function and structure of the provisional measures.- 2. Examples of fast-track summary proceedings on the merits.- 3. The double-track of Italian justice.- 4. Reflection about the concept of "final" decision to secure adequate legal guarantees also to the justice of the fast-track.- 5. The use of the extraordinary remedy provided for by art. 111 of the Italian Constitution in the field of provisional measures.- 6. The "permanent" effects produced by provisional measures on the merits. Residual doubts about the real justice even in the absence of truth and certainty assured by the *res judicata*.

1. Function and structure of the provisional measures

Traditionally the Italian civil justice system has always focused on *res judicata*, that is claim and issue preclusion in subsequent proceedings.

These preclusive effects are stayed pending the appeal of the decision, as well as they are stayed until the time for filing an appeal is expired.

In the traditional system only judgements on the merits can produce preclusive effects, whereas provisional measures cannot produce preclusive effects, because they depend from the principal proceeding on the merits. Between provisional measures and final judgment there is "functional and structural instrumentality" (using the vocabulary of scholars). From a "functional" perspective, provisional measure are used to accelerate the effects of a future decision of the merits. From a "structural" perspective provisional measures lose every effect not only when the claim is rejected on the merits but also when the plaintiff does not file the main proceeding within the time limit.

The natural result of the proceeding should be *certainty*. This is the case for the cognitive proceeding on the merits as well as for the enforcement proceeding. The result of the enforcement proceeding (for example specific goods or money assigned to the enforcing party) is also certain because the entitlement (the right) has been verified in the previously in the cognitive proceeding. If not, the entitlement can be verified in protesting (dissenting) proceeding (*opposizione*) which is a parenthesis in the enforcement proceeding.

All effects of a judicial decision are connected with *res judicata*. These effects are:

a) "enforceability" of the decision (*efficacia esecutiva*);

b) judicial mortgage;

c) provisional measures, either conservative or anticipatory, which are structurally and functionally connected with the main proceedings on the merits. In fact provisional measures are not autonomous, they lose every effect not only when the claim is rejected on the merits but also when the plaintiff does not file a request to start the main proceeding within the time limit.

Therefore in the traditional judicial system the effects of a final and binding decision depend on *res judicata*. And also the interim effects of provisional measures are justified in the prospect (expectation) of *res judicata*.

2. Examples of fast-track summary proceedings on the merits

The traditional system focused on *res judicata* is today at the crossroad. The crisis of the traditional view has been provoked by a growing need for an effective (*effettiva*) and speedy (*tempestiva*) civil justice as well as by the increasing delay of the civil justice system.

In order to satisfy this need for effectiveness and quickness, new techniques have been introduced in the judicial system. These techniques consist of simplification of proceedings:

summarization of fact-finding (*procedimento a cognizione sommaria*) and independence from *res judicata* (the effects of the decision such as enforceability or judicial mortgage are independent from *res judicata*), which means no preclusive effects (*autonomia rispetto al giudicato*).

Two kinds of solutions have been adopted so far.

A) Fast-track summary proceeding on the merits (*procedimenti a cognizione sommaria*) whose result is a judicial decision that is also an enforceable instrument (*titolo esecutivo*) but is not and never becomes *res judicata* (thus, without preclusive effect).

B) Self-standing anticipatory provisional measures, that are enforceable (anticipating the effect of the decision on the merits) and autonomous: they are not instrument of the proceeding on the merits. So there is no need to start the proceedings on the merits.

Examples of fast-track summary proceedings on the merits are:

- the temporary and urgent measures taken in the interest of the children and of the divorcing parties in the separation (art. 708 c.p.c.) or divorce proceedings (l. n. 898/1970);
- the order of payment of the sums due for the support of the children pursuant to art 148 c.c.;
- the order of payment of alimentary debts (alimony) pursuant to art 446 c.c.;
- the order of payment (*ordinanze anticipatorie di condanna*) pursuant to arts(s). 186 *bis* and 186 *ter* c.p.c.;
- the order of payment of sums or delivery of goods pursuant to art 19 of the corporate law enacted by dlg. n. 5 of January 17, 2003.

All the above judicial decision are "stable" notwithstanding they are not able to become *res judicata*.

Therefore it can be said that in the Italian system there are two kinds of civil proceedings:

1) one proceeding is aimed to obtain *res judicata*, stability of the decision and certainty of the rights;

2) the other proceeding is aimed to obtain a result in short time, no preclusive effects, effective justice and no need for certainty: verisimilitude suffices.

3. The double-track of Italian justice

The Italian justice system is a double-track system.

The first track goes slowly and takes a long time to arrive to the final destination (the *res judicata*). Its typical features are:

- Rigid typical forms;
- Preclusive effects (claim or issue preclusions);
- Rigid rules for fact-finding procedure (only typical means of proof are used);
- Fair balance of powers between the parties and between the parties and the judge.

By contrast, the second track goes much faster than the first track and never comes to *res judicata*.

Its typical features are:

- No rigid forms - informality of the proceedings - simplification of procedural tracks;
- No preclusive effects;
- No rigid rules for taking evidence (atypical means of proof are largely used);
- Strong power in the hands of the judge.

The principal aim of the first track is "certainty" (*certezza*), whereas the principal aim of the second track is "effectiveness" (*effettività*).

4. Reflection about the concept of "final" decision to secure adequate legal guarantees also to the justice of the fast-track

The principal worry is: "is this fast track safe enough for the passengers?"

Are the legal guarantees normally used for the slow track available for the fast track? In particular, is appeal to the *Italian Corte di Cassazione* available against provisional measures on the merits?

So far the answer has been "no"! Appeal to the can be proposed only against "final" and "binding" decisions (*decisorietà*). And judicial decisions can be "final" only if they are able to become *res judicata*. But provisional measures are not "final" because they are "ancillary" to the final decision and they will be absorbed by the final decision.

The system has been coherent so far. But the coherence has been jeopardized by the introduction of provisional measures on the merits which are autonomous from the *res judicata*.

In order to keep the coherence of the system, it will be convenient to re-think about the concept of "final" decision.

5. The use of the extraordinary remedy provided for by Art. 111 of the Italian Constitution in the field of provisional measures

According to art. 111 – para. 7 of the Italian Constitution "Appeals to the *Italian Corte di Cassazione* in cases of violations of the law are always allowed against sentences and against measures on personal freedom pronounced by ordinary and special courts. This rule can only be waived in cases of sentences by military tribunals in time of war"

It is clear that the word "sentence" used in art. 111 must be interpreted in order to include every judicial decisions which are final because no other appeal can be filed and no review can be done except for extraordinary appeal to *Italian Corte di Cassazione*. Therefore, the extraordinary remedy provided for in art 111 of the Constitution cannot be used for provisional measures.

However, recent judicial decision of the *Italian Corte di Cassazione* are in contrast with the above interpretation. The *Italian Corte di Cassazione* stated that some decisions (*provvedimenti camerali*), although not final, have a certain degree of stability when they can be modified only upon changing of relevant circumstances. Therefore this kind of decisions might be considered as *res judicata rebus sic stantibus*

Few scholars argue that even provisional measures should be *res judicata rebus sic stantibus* because pursuant to art. 669 *decies* they might be modified as long as circumstances change.

The majority of scholars, however, assert that the extraordinary remedy of art. 111, para. 7, is not available for provisional measures due to the their short existence and strong connection with the judgement on the merits.

6. The "permanent" effects produced by provisional measures on the merits. Residual doubts about the real justice even in the absence of truth and certainty assured by the *res judicata*

The effects produced by provisional measures on the merits laid down a completely new scenario: today legal disputes may be solved by some kinds of decisions which can be enforced (*dotate di forza esecutiva*) even though they are not, and they will never be, *res judicata*. These kinds of decisions have some important features:

a) their effects will last (*ultrattività*);

b) their effects are stable *rebus sic stantibus,* which means that the effect are stable as long as the circumstance do not change, whereas the effects will change if circumstances change (*certa stabilità degli effetti*);

c) their effects are autonomous, they do not depend on the subsequent decision on the merits (*autonomia, assenza del nesso di strumentalità col giudizio di merito*).

This new phenomenon of provisional measure on the merits inevitably leads to a new interpretation of the art. 111 of the Italian Constitution. The remedy provided for in this article should today be available even against the (new) provisional measures on the merits (*provvedimenti provvisori di merito*). If so, the growing phenomenon of provisional justice on the merits will be guaranteed by the due process model.

The question is: this double track of the Italian civil procedure should be welcomed as a good or bad thing? Is it a step forward or a step backward?

I think that it is a necessity for the new era. Today the society calls for speedy and effective justice. Therefore, prompt and fast solution of disputes is much more important than the search of truth and the stability of the decision (I mean *res judicata*). As a consequence the "truth" will be replaced by "verisimilitude", and "certainty " will be replaced by "probability"!!

The point is: shall we consider justice as real justice even in the absence of truth and certainty?

II. THE CRISIS OF CIVIL *RES JUDICATA* IN THE EC LEGAL SYSTEM

by Giovanni Raiti

Summary: 1. Introduction. – 2. The value of *res judicata* in the Community legal system.- 3. The substantial respect of *res judicata* in the *Eco Swiss*, *Köbler*, *Traghetti del Mediterraneo*, *Kühne* & *Heitz, Kapferer* and *Kempter* law cases.- 4. The judgment of the Court of Justice of EC in the *Lucchini* Case.- 5. The reasons for a restrictive interpretation of the *Lucchini* judgment.- 6. The uncertain perspectives of the *Lucchini*'s judgement developments after the preliminary ruling of the Italian Supreme Court in the *Olimpiclub* affaire.

1. Introduction

This presentation aims to make a rapid overview on the value that *res judicata* holds in Community ambit, in order to highlight conclusively how, in this ambit too, it has been going for some time towards progressive "relativizations", in particular after some prejudicial interpretative judgements of the European Court of Justice, implying unpredictable and perhaps – in the lack of well-balanced interpretations of such judgements – also dangerous developments.

Indeed, as I will attempt to clarify, the most recent European Court of Justice interpretative practice launched rather more than less strong attacks to the domestic procedural rules establishing the *res judicata* principle. The strongest attack was just delivered to the Italian provision thereof, that is Article 2909 of Civil Code, holding - by its nature of general rule – an extensive scope of application involving any non criminal jurisdictional subject matter, also including administrative and tax proceedings.

Before shortly going through the European Court of Justice case law, it seems to me right to make some preliminary remarks in order to see such case law in perspective, so contributing to outline the real extent of the crisis the *res judicata* principle seems to suffer from also in the EC legal system.

2. The value of *res judicata* in the Community legal system

As a matter of fact, also the Community Procedural system tributes the due respect to the value of substantial *res judicata*, despite not considering it included either among the guarantees of "effective remedy", inferable from art. 47 of the Charter of Nice, or among those of "fair trial", referred to by art. 6 of ECHR , more and more recalled by the EC courts. The value recognized by the Community Law to substantial *res judicata* emerges, moreover, from provisions such as:

a) articles 61, 62 *bis* and 62 *ter* of the Court of Justice Statute, which attribute to the same Court - invested respectively with the impugnation of judgements of the First Instance Courts by States or Institutions that didn't intervene in the judgement of first instance, or with the "review of the judgement" (not impugned by the parties), after proposal of the First Advocate General in case of a «serious risk for the unity or the consistency of the Community law being affected» - the power to indicate «the effects of the judgement of the Court which are to be considered as definitive in respect of the parties to the litigation»; indeed, such provisions seem to state a sort of self-responsibility of the parties to the proceedings whose lack of challenging initiative within the established terms ordinarily entails the definitive effects of the judgments (by the way vulnerable "only as far as necessary" as result of the *revisio* requested by the legitimate third parties.

b) article 68, paragraph 3 of EC Treaty, according to which – as it is well known – the Council, the Commission, or a Member State may ask the Court of Justice to pronounce a decision about the interpretation of the acts referred to in Part 4 of the Treaty or of the acts of the

institutions of the Community based on the same part, it being understood that «the judgement pronounced by the Court of Justice in response to such request *shall not be applied* to the judgments of courts or tribunals of the Member States become *res judicata*».

3. The substantial respect of *res judicata* in the *Eco Swiss*, *Köbler*, *Traghetti del Mediterraneo*, *Kühne* & *Heitz*, *Kapferer* and *Kempter* law cases

Notwithstanding this systematic general framework currently in force at the Communitarian level, the respect of *res judicata* seems to undergo some recent weakening.

The short time available for this presentation doesn't allow me a deep and overall review of the European Court of Justice case law which is already quite rich in this regard. I will confine my to reminding that from *Eco Swiss* judgment (the first case where the Court could decide as for the impact of alleged violations of the Communitarian Law in connection with the *revisio* of *res judicata*[1]) to *Kapferer* [2],the Court always had kept that *res judicata* had to be safeguarded for the value of certainty of the substantial legal relationships.

Such value was not affected either by alleged violations of substantial Communitarian Law (although regarding mandatory interests as, for instance, those protected by the competition rules in the single market: Eco Swiss), either alleged violations of procedural public policy principles, such as the manifest violation of mandatory request for preliminary rulings under article 234, par. 3 (*Köbler*[3], *Traghetti del Mediterraneo*[4], *Kühne* & *Heitz*[5]) or of special jurisdiction rules of EC regulation 44/2001 (*Kapferer* judgment).

I remind that in *Eco Swiss* the European Court of Justice excluded that the matter of validity of a contractual clause violating the anti-trust rules could have been examined by the national Court before which the arbitral award was challenged, when, once elapsed the terms for the impugnation of the award *in parte qua*, the matter was already *res judicata.*

On the other hand, *Köbler* and *Traghetti del Mediterraneo* judgments respected *res judicata,* as, by stating the principle of State liability for definitive breaches of Communitarian Law by the national Courts, recognized in the monetary recovery of damages the remedy available to individuals, under article 226 of EC Treaty.

However, *Kühne* & *Heitz* submitted the legal duty to remove *res judicata* in administrative proceedings for the violation of EC law to several serious requirements, among which the *previous existence in the national procedural system* of the power of public administration to bring his measure to legality also derogating from *res judicata*. Furthermore, in the judgment other conditions are required to complete the instance of administrative *revisio* of *res judicata.* And exactly:

- that the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that the judgment is, in the light of a decision given by the Court of Justice subsequent to the *res judicata*, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and
- that the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

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[1]Judgment of the Court of Justice of 1st June 1999, case C-126/97, *Eco Swiss China Time v Benetton International NV,* European Court reports 1999, p. I – 3055.

[2] Judgment of the Court of Justice of 16th March 2006, case C-234/04, *Kapferer v Schlank & Schick GmbH,* European Court reports 2006, p.I-2585.

[3] Judgment of the Court of Justice of 30th September 2003, case C-224/01, *Gerhard Köbler v Republik Österreich,* European Court reports 2003, p.I-10239.

[4] Judgment of the Court of Justice of 13th June 2006, case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana*, European Court reports 2006, p.I-05177.

[5] Judgment of the Court of Justice of 13th January 2004, case C-453/00, *Kühne & Heitz v Produktschap voor Pluimvee en Eieren*, European Court reports 2004, p. I-837.

Moreover, in the most recent *Kempter* judgment, of the 12th February of 2008 [6], the Court specified: *a)* that «in the context of a procedure before an administrative body for review of an administrative decision that became final by virtue of a judgment, delivered by a court of final instance, which, in the light of a decision given by the Court subsequent to it, was based on a misinterpretation of Community law, Community law does not require the claimant to have relied on Community law in the legal action under domestic law which he brought against that decision» and *b)* that the member States remain free to set reasonable time-limits for seeking remedies for review of an administrative decision that has become final, so long as «in a manner consistent with the Community principles of effectiveness and equivalence».

4. The judgment of the Court of Justice of EC in the *Lucchini* Case

However, a stronger attack against the fortress of national *res judicata* (alleged as violating the EC order) came from *Lucchini* judgment, of the 18th July of 2007[7]. In this judgment, the Court of Justice, verified a definitive judicial breach of Communitarian rules about the forbidden aids of State for the enterprises (under paragraphs 81 and 82 of the EC Treaty) made by the Italian Courts, provided for the first time – neither a simple liability for damages on the Chief of the State (as in *Köbler* and *Traghetti del Mediterraneo)*, nor a review of *res judicata* qualified by the previous existence in the national system of a similar remedy (as in *Kühne* & *Heitz*) – but a real, original communitarian obligation for national legislator to dispose a remedy for reopen the final decision so that the communitarian legality could be specifically repaired.

Lucchini case, unlike the other recalled judgments, involves immediately the theme of the resistance of the national *res judicata* in touch with the instance of communitarian legality.

That transpires from the preliminary question referred to the Court, where the Italian judge *a quo* (the Consiglio di Stato) asked «whether Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a Commission decision which has become final». As an answer to this question, the decision affirms: «Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission of the European Communities which has become final».

5. The reasons for a restrictive interpretation of the *Lucchini* judgment

Despite an evident laconicism of the purview and of the justification of the *Lucchini* judgment, which make the role it may play in the future uncertain, a restrictive interpretation is suggested. According to such interpretation of the judgement, the exceptional revocation of community source of national *res judicata* would not be justified by the generic need to restore the violated legality, but by the consideration of the *specific* violation committed by Italian judges in the matter *de qua*. Recognizing the importance of what is affirmed by the Court in the paragraphs 50-52 of the justification, we can maintain that it was – more exactly – the violation of the exclusive decisional competences reserved by the Community Law to the Commission of Aids that originated the Lucchini *dictum*. The suggested interpretation of the judgement brings numerous advantages:

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[6] Judgment of the Court of Justice of 12th February 2008, case C-2/06, *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, European Court reports 2008, p. I-00411.

[7] Judgment of the Court of Justice of 18 th July 2007, Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA.,* European Court reports 2007, p. I-06199.

1) it harmonizes with the previous jurisprudence of the Court, which clearly sided for the safeguard of national *res judicata* when the value of the "certainty" represented by the same is confronted with the generic value of the community legality of the judicial *dicta*;

2) it excludes that there may be a contrast between what is believed by the Court of Justice and what is argued especially by the Italian Constitutional Court about the intangibility of *res judicata* by laws of authentic interpretation [8](that share with the preliminary rulings of the EC Court their typical declaratory character of simple acts of legal recognition);

3) it excludes the unreasonable idea – yet sometimes (elsewhere) creeping along in the Luxembourgian jurisprudence with impact on procedures (as in *Factortame* or in *Peterboeck* judgements) – according to which the *primauté* of Community Law is a sufficient reason of non-application of the rules of organization of the national procedures;

4) finally it makes the derogation of the stability of *res iudicata* imposed by the judgement quite a rare event, which may occur only when – similarly – not the generic community legality is at stake, but the respect of hypothetical ambits of exclusive sovereignty of Community Institutions.

We can reach the conclusion that, even after the Lucchini judgement, the Community System, when entrusting the jurisdictional systems of the Member States with the safeguard of the positions of interest that it creates itself, normally continues to "trust" the respective tools and techniques of procedure organization, among which – it is known – "substantial *res iudicata*" is one of the most shared and stable.

6. The uncertain perspectives of the *Lucchini*'s judgement developments after the preliminary ruling of the Italian Supreme Court in the *Olimpiclub* affaire.

Besides, the above-mentioned reasons of caution in the reading of *Lucchini* judgment don't seem quite shared by a recent reasoned order for preliminary ruling advanced – ex Art. 234 EC treaty - by the Italian Supreme Court (Corte di cassazione) in the affair *Fallimento Olimpiclub S.r.l.*, of December, 21th 2007 (lodged on 2th January 2008 [9]). Into the order, the Italian Supreme Court, noted at first particularly the judgment of the EU Court in the affair *Halifax* [10], suitable for projecting its effects on the national case *a quo*, and moreover also rated that in this case the application of Halifax principle can involves overcoming of the tax *res judicata* [11](according to the range to it recognized by the Italian jurisprudence, since the judgement of the United Sections of the Suprema Corte di cassazione n. 13916/06), decided to submit to the Court of Justice a preliminary question to again clarify the force of the national *res judicata* in the ipothetical impact with imperative rules of communitarian legal order, even if they are irrelevant to the matter of State aids. Textually, on the basis of the mentioned order, the Italian supreme court asked to the UE Court if «Community law preclude[s] the application of a provision of national law, such as Article 2909 of the [Italian] Civil Code, laying down the principle of *res judicata*, where the application of that provision would lead to a result incompatible with Community law, thereby thwarting its application, even in areas other than State aid (in relation to which, see case C-119/05 *Lucchini SpA*) and, in particular, in matters relating to VAT and with respect to the misuse of

[8] See, recently, Corte cost., judg. 26th june 2007, n. 234, in www.cortecostituzionale.it.
[9] Case law 2/08, see *Off. Journ. of the UE*, 23.03.2008, C 79/14.
[10] Judgment of 21th .February 2006, case law C-255/02, *Halifax and Others,* European Court Report , p. I-1609.
[11] In the *Halifax* judgment, the Court of Justice had had the opportunity to clarify the notion of abusive practice in the VAT tax field, as any practice characterized: a) by the circumstance that «the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions», and, b) by other several objective factors showing that «the essential aim of the transactions concerned is to obtain a tax advantage». The nation case *Olimpiclub* concerns really to some commercial practices in the VAT field appraisable as abusive to the light of *Halifax* principles.

rights in order to obtain undue tax savings, in particular in the light also of the rules of national law - as interpreted in the case-law of this Court - according to which, in tax disputes, where a *giudicato esterno* [a final judgment drawn up by another court in a case on the same subject] contains a finding on a fundamental issue common to other cases, it has binding authority as regards that issue, even if it was drawn up in relation to a different tax period».

It's not necessary underline that the point of view of the judge of the preliminary ruling, as regards the potential force of conformation of communitarian order against the national *res judicata*, goes beyond the above proposed restrictive reading of the *Lucchini* judgment. As a matter of fact, according to the reasons of the Italian order of *Olimpiclub* case, every *violation of an imperative* rule of Community legal order, by the national judgments, could constitute the reason for overcoming the national *res judicata*. In other words, for the Italian Court the border among the area of resistance of national *res judicata* and the opposite area of her surrender in the impact with the EU order could be marked, not by the circumscribed concerning of the judicial violation to the matter of the State aid (as in *Lucchini* statement), but, more and more uncertainly, by the character imperative (or not) of violated communitarian rule.

My hope is that the Court of Justice doesn't surrender to the winning occasion for strengthening of the communitarian order offered to her by the Italian Supreme Court. It would derive the dangerous darkening of the value of certainty of the national *res judicata*, over that a fracture with the preceding case-law of the same Court of Luxemburg.

III. THE WANE OF THE *RES JUDICATA* IN THE ITALIAN ENFORCEMENT PROCEEDINGS

by Concetta Marino

Summary: 1. The "phenomenon" of the crisis of res judicata in the reformed Italian enforcement proceedings.- 2. The stay of enforcement proceedings like a measure of "extinction of the distraint" provided for by art. 624 c.p.c.: a new technique to escape a cognitive proceedings on the merits.- 3. The remedy for deciding the controversy concerning sums' distribution provided for by art. 512 c.p.c.- 4. Conclusions.

1. The phenomenon" of the crisis of *res judicata* in the reformed Italian enforcement proceedings

After the Andolina's report about the crisis of *res judicata* in the civil trial, in my report I'll deal with the topic of summary proceedings and provisional measures, as an alternative technique for dispute resolution, in the compulsory enforcement of judgements.

Before going more in depth with this issue, it's needed to remind that, quite recently the enforcement proceeding has been reformed in Italy because of a growing need for an effective and speedy civil justice, aiming at assuring an effective satisfaction of the credit rights by the compulsory execution of judgement.

The enforcement proceedings reform becomes part of the general reform of the civil justice system, aimed at assuring the 'reasonable lenght' of trials. It's important to highlight that for the calculation of the total time of trial the ECHR stated: «*Execution of a judgement given by any court must therefore be regarded as an integral part of the "trial" for the purpose of art 6 ECHR*», because there is a functional continuity between cognition and enforcement proceedings.

In such a perspective the legislator, aiming also at reducing the case overload in civil matters, has tried to speed up the implementation of judicial decisions. Even in the compulsory execution of a judgement (or of any other Enforcement Order) summary proceedings and provisional measures are so used to accelerate the effects of a future decision on the merits.

This transformation has produced important changes especially in the cognition proceedings on the merits to verify (*accertare*) the credit entitlement. The entitlement can be verified in the opposition proceedings which is a parenthesis in the enforcement proceedings. The debtor brings the action against the creditor(s) during or at the end of the enforcement proceedings, when the enforcement judge has provided the plan of distribution of sum sales proceeds.

They are cognition proceedings whose lenght increases the total lenght of the enforcement proceedings which they originated from. For this reason the law provides for the possibility to come to an earlier end of the opposition proceedings trough a provisional measure, that is not suitable for *res judicata*, whose effects come about only in the enforcement proceedings.

2. The stay of enforcement proceedings like a measure of "extinction of the distraint" provided for by art. 624 c.p.c.: a new technique to escape a cognitive proceedings on the merits

The most interesting change concerns the opposition proceedings (*opposizione all'esecuzione*) that the debtor brings against the distrainee creditor (art. 615 c.p.c.). The debtor can get soon the stay of

the execution when there are grounds for that (art. 624 c.p.c.). The enforcement judge decides the stay of the enforcement proceedings and he himself can issue a new measure of "extinction of the distraint", when the stay of the enforceable judgement cannot be challenged any more. This measure is issued upon request of the debtor, that is the party who is more interested in an earlier conclusion of the enforcement proceedings. The debtor may prefer an early end of the enforcement proceedings to the cognition proceedings destined to a judgement suitable for *res judicata* on the existence of credit entitlement. In fact in this way the debtor gets redemption of the distrained goods before their sale.

When even the creditor doesn't want to go on with the cognition proceedings to verify his entitlement to credit, the just started proceedings come to an end. In that case the opposition proceedings cannot continue. The measure speeds up the favourable effects of a future decision on the merits concerning the debtor, but it would not anyway have a strong preclusive effect. In fact, the effects of this measure are only confined to the enforcement proceedings and cannot give out of this context. After the end of the enforceable judgement the proceedings on the merits of the entitlement can always start, as well as a new enforcement proceedings.

Doing so the parties prove not to be interested in the continuation of cognition proceedings and in the judicial decision connected with *res judicata.* The parties temporarily cease hostilities and are satisfied with the provisional measure.

This new technique has been developed for improving effectiveness and quickness of the judicial system, for reducing delays and making the procedural track simplified. However, it is only an alternative and not a substitutive of the cognitive proceedings on the merits. Therefore, its success will be reduced because the preclusive effects of the measure don't take place out of the enforcement proceedings.

In case the parties choose to go on with opposition proceedings, the issue is a judgement suitable for *res judicata* about the credit's entitlement, that is claimed and issue preclusion in subsequent proceedings.

Another very important change has been the abolition of the possibility to appeal the sentence. It's like an attempt to reduce the trial to only one stage, without the sentence losing its suitability for *res judicata.* In this way the execution of a judgement would be faster but this rule has been regarded as not being consistent with constitutional principles, as the decision about the credit right can not be appealed, but only challenged before the *Italian Corte di Cassazione* (art. 111, co. 7, Cost.), also when the contested credit right is attested in an non-judicial Enforcement Order.

For this reason there is the opinion that excludes the claim preclusion of this judgement in a subsequent proceedings. So the sentence issued in the opposition proceedings has a preclusive effect only for the other, subsequent enforcement proceedings, not for another cognition proceedings on the merits aimed at verifying the same credit right. I personally do not agree with such an opinion.

Even without an appeal the judgement is suitable to become *res judicata* as far as it concerns the entitlement, that is the subject of the cognition proceedings on the merits.

3. The remedy for deciding the controversy concerning sums' distribution provided for by Art 512 c.p.c.

Another important example of provisional judicial measures in the enforcement proceedings is provided for by the law (art. 512 c.p.c.). The debtor or one of the creditors can bring action against the (other) creditors at the end of enforcement proceedings, when the judge has provided the plan of distribution of sum sales proceeds among the creditors.

It is a summary proceedings where the judge issues a provisional measure on the existence or on the exact amount of the credit rights, when they are challenged.

The measure is given limited to indispensable means of proof. The effects of this measure (an order and not a sentence) take place only in the enforcement proceedings and cannot have a full preclusive effect out of this context. By issuing this measure the judge orders the distribution of sum sales proceeds among the creditors, without any cognition proceedings on the merits to verify the challenged credit rights.

Before the reform, when the credit rights were challenged at the end of the enforcement proceedings, they had to be verified trough an autonomous cognition proceedings on the merits and the sentence was suitable for *res judicata*.

Today these rights are implicitly recognised (*incidenter tantum*), but the measure is not suitable for *res judicata* and would not anyway give a strong preclusive effect. In fact, the remedy for deciding the controversy concerning sums' distribution is carried out in the enforcement proceedings. The judge decides about the acknowledgement of the credit rights for the distribution of sum sales, but this decision is not suitable for *res judicata*. It is necessary only for compulsory execution of credit rights, but is not intended to ground their judicial verification suitable for *res judicata*. The judge issues the measure without an ordinary cognitive proceedings on the merits, but having recourse to summary proceedings.

The measure may be challenged. In that case, if an contestation is filed (with the opposition to the executive acts), cognition proceedings on the merits follows. I personally believe the subsequent judgement cannot give a full preclusive effect. In fact, the sentence provides how the sum sales proceeds must be shared up among the creditors. The sentence nothing decides on the merit of the challenged credit right.

The judge issues the measure to decide if the creditor can share in the distribution of sum sales. Whether the judge gives the measure in a summary proceedings or in a cognition proceedings (after the contestation of the measure), it isn't suitable for *res judicata*. In this way the credit right is implicitly recognised and can be still contested in the future, in other proceedings.

For this reason the competent judge is the judge of the enforcement stage; the measure is not a sentence; the measure cannot be challenged by an appeal, but only trough the opposition to executive acts (*opposizione agli atti esecutivi*).

So, after the enforcement proceedings the debtor can claim back the sum that the creditor has got *in executivis*. The creditor, excluded from the distribution of sum sales, can bring action against the debtor.

Therefore the issue about the credit right can be decided in a subsequent proceedings. Only the sentence that provides the existence of the credit right in an independent and autonomous cognitive proceedings on the merits, not in the enforcement proceedings, is suitable for *res judicata*.

4. Conclusions

The above-mentioned measures are helpful to respond to the growing need for an effective and speedy civil justice, but they are provisional and would not anyway get a strong preclusive effect.

When the parties choose the fast-track proceedings on the merits without preclusive effects, they know that the measures are not unalterable, but the issue of speeding up proceedings prevails on the preclusive effects of the *res judicata*. Moreover the effects of the "provisional" aforementioned measures are kept in the future time.