

# **THE EXTRATERRITORIAL APPLICATION OF LABOUR LAW**

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## **1. THE ITALIAN SOURCES OF LAW**

### **1.1 Conflict of laws**

The scope of application of Italian law is determined by Law No. 218 of 31<sup>st</sup> May 1995 (hereinafter, “Law 218/95”), which provides for rules aimed at identifying the applicable law in the event that a situation shows connections with more than one jurisdiction.

As far as contractual obligations are concerned, the applicable law is identified through the criteria set forth by the Rome Convention of 19<sup>th</sup> June 1980, implemented into Italian law by Law No. 975 of 18<sup>th</sup> December 1984, as replaced by the EC Regulation n. 593/2008 (hereinafter, the “Rome I Regulation”), to which article 57 of Law 218/95 expressly refers.

According to article 3 of the Rome I Regulation, a contract shall be governed by the law chosen by the parties. Lacking any choice by the parties, the contract shall be governed by the law of the country with which it is most closely connected, irrespective of the fact that such law is that of a State which does not adhere to the Rome I Regulation.

Article 8 of the Rome I Regulation contains a specific provision concerning labour relationships, which applies *in lieu* of the above article 3. According to such article, unless otherwise agreed upon between the parties, the employment agreement is regulated by either:

- the law of the country in which the employee usually performs the working activity, even if he/she has been temporarily seconded to another country; or
- if the employee does not usually perform the working obligation in any one country, by the law of the country in which the business through which he was engaged is situated, unless it appears from the circumstances that the contract is more closely connected with another country, in which case the contract shall be governed by the law of such other country.

In other words, lacking any choice by the parties in respect of the governing law, Italian law applies if the employee usually works in Italy or was hired there.

If the parties choose the law of a foreign country granting to the employee terms and conditions, which are more favourable than those provided for under Italian law, such foreign law shall apply.

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In any event, the choice of the applicable law made by the parties shall not deprive the employee from the protection granted to him/her by the mandatory rules:

- of the State where the employee usually carries out his/her activity;
- of the State where the employee was hired, if the employee does not carry out his/her activity in the same place.

According to the Rome I Regulation, therefore, the mandatory provisions of Italian law apply with respect to employees of a foreign country (usually working in Italy or if the employee was hired in Italy and does not work in a foreign country on a permanent basis.

Moreover, according to article 9 of the Rome I Regulation, notwithstanding the choice of the governing law effected by the parties, certain mandatory provisions of the law of another country may apply - upon certain conditions being met - having regard, *inter alia*, to the particularly close connection existing between the employment relationship and such other country.

Furthermore, the Convention does not prejudice the application of the rules of the law of the forum in a situation where they are mandatory, irrespective of the law otherwise applicable to the contract.

In this respect, it is worth to mention also article 21 of the Rome I Regulation, which provides that the application of a rule of the law of any country specified by the Convention may be refused only if such application is manifestly incompatible with the public policy ("*ordre public*") of the forum.

## **1.2 Secondment**

### **1.2.1 Legislation**

A definition of secondment was introduced into Italian Law by Legislative Decree No. 276 of 10<sup>th</sup> September 2003 (hereinafter, the "D.Lgs. 276/03" or "Biagi Reform"), according to which the secondment of an employee occurs whenever an employer puts one or more of its employees at the temporary disposal of another entrepreneur, in its own interest and for the purpose of carrying out a specific labour activity. Secondment has been declared admissible even if the seconding company and the beneficiary company belong to the same group (in this respect, see Circular of the Ministry of Welfare No. 3/2004).

As a general rule, the seconded employee remains subject to the managing and disciplinary power of the seconding employer, who may partially delegate such powers to the beneficiary of the secondment. Moreover, the seconding employer remains liable for the payment obligations (in respect of the wage and all social security contributions) vis-à-vis the seconded employee.

The functions assigned to the employee cannot be modified as a consequence of the secondment without the employee's prior written consent, and secondment to a productive unit being more than 50 km far from the branch to which the employee was assigned, is conditional upon the occurrence of technical, productive or organisational reasons.

The secondment of employees is also ruled by Legislative Decree No. 72 of 25<sup>th</sup> February 2000 (hereinafter, the "D.Lgs. 72/00"), which implemented the EU Directive 96/71/CE of 16<sup>th</sup> December 1996 (see below), and by the EU

Regulation No. 1408 of 14<sup>th</sup> June 1971 concerning social security obligations of the employer (see below, paragraph 1.4).

According to D.Lgs. 72/00, an employee seconded to an Italian company is subject to the same employment terms and conditions provided by the law, by the national collective labor agreements ("CCNLs") and statutory provisions applicable to specific categories of employees performing analogous labour activities in Italy.

Specific rules have been set forth in respect of the secondment effected by an EU employer to an Italian entrepreneur. In this case, the duration of the secondment cannot exceed 12 months, save the parties' faculty to renew or extend such period, upon certain conditions being met.

As for secondment from non-EU countries, the assignment of personnel is governed by international conventions which may be from time to time applicable. For instance, secondment of personnel from the United States to Italy is governed by Law No. 86 of 24<sup>th</sup> February 1975, implementing the bilateral convention executed between Italy and the USA on 23<sup>rd</sup> May 1973, and later amended by the additional agreement governed by Law No. 609 of 14<sup>th</sup> October 1985, entered into force on 1<sup>st</sup> January 1986. According to said convention, the duration of the secondment cannot exceed 24 months and cannot be extended. It is worthwhile to mention also the European directive No. 96/71/EC, concerning *the secondment of workers in the framework of the provision of services*. The directive requires each Member State to ensure that a worker seconded to its territory from an undertaking of another Member State is guaranteed the terms and conditions of employment, in respect of certain matters, that employees are guaranteed under the law of such other Member State.

For this purpose, article 3 of European directive No. 96/71/EC provides that laws or collective agreements or arbitration awards "*which have been declared universally applicable*" guarantee to seconded workers:

- (a) *maximum work periods and minimum rest periods;*
- (b) *minimum paid annual holidays;*
- (c) *the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*
- (d) *the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;*
- (e) *health, safety and hygiene at work;*
- (f) *protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;*
- (g) *equality of treatment between men and women and other provisions on non-discrimination.*

*For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted."*

Article 6 of the directive also provides that "*in order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State*".

### 1.2.2 Case Law

A definition of secondment has been also introduced by the Italian Courts, according to which secondment indicates the assignment of an employee by an employer to a third company, which avail itself of the employee's working activity on a temporary basis.

The main features of such definition are:

- the exercise by the seconding employer of the managing and disciplinary power over the employee;
- the limited duration of the secondment;
- the interest of the seconding employer to effect the secondment in favour of a third entrepreneur.

In respect of point 1), managing power of the employer is ruled by specific provisions of Italian law and is subject to limitations provided by the Italian Civil Code. Accordingly, for the purposes of the definition of secondment, this point does not need any particular clarification.

As for point 2), the employer is not required to predetermine the duration of the secondment. The parties may provide that the secondment shall simply last as long as the employer shall have an interest thereto (see below). Moreover, according to some Courts' opinion, an entrepreneur may also hire an employee for a limited time period with the express purpose to assign him/her to a third company (Supreme Court, decision No. 2880 of 17<sup>th</sup> March 1998).

In respect of the "interest" of the seconding employer to assign the worker (point 3), such "interest" must arise "*either at the beginning of the secondment, or at any time during the same*" (Supreme Court, decision No. 1751 of 13<sup>th</sup> April 1989).

Even though no precise definition of "interest" arises from the Courts' decisions, it is common opinion that such interest must be "real" and "relevant":

- The interest must be appreciated by the Court as referring to the concrete business activity of the employer ("real"). For instance, the Supreme Court has not qualified as "real" the interest of an entrepreneur "*in the collaboration between enterprises of the same business sector, or in the stipulation of an agreement for mutual help in case of pressing economic needs, because in this case the interest of the entrepreneur to receive help prevails over the interest to second the employee to the other company*" (Supreme Court, decision No. 12224 of 2<sup>nd</sup> November 1999);
- The interest must be "relevant", i.e. the secondment must be effected in such a manner as to satisfy relevant direct or indirect needs of the employer (Supreme Court, decision No. 5721 of 10<sup>th</sup> June 1999). A mere individually profit-oriented interest of the entrepreneur is not considered as a "relevant" interest.

When seconding an employee, the employer does not terminate the employment agreement, nor does he enter into any new employment agreement. Both the employer and the employee still have the same obligations arising from the employment agreement (Supreme Court, decision No. 8567 of 10<sup>th</sup> August 1999; Circular of the Ministry of Labour No. 5/25814/70/VA of 8<sup>th</sup> March 2001). It is worth underlining that Courts also tend to admit the

secondment of employees hired on part time basis (Supreme Court, decision No. 7762 of 23<sup>rd</sup> August 1996).

### **1.2.3 The intermediation of work forces**

The Biagi Reform has definitively abrogated the prohibition of intermediation of labour forces, as provided by Law No. 1369 of 23<sup>rd</sup> September 1960 (hereinafter, “Law 1369/60”), prohibiting the mere intermediation of work forces, and preventing the entrepreneur from supplying to other undertakings mere labor activities to be performed by workers he hires and pays.

Notwithstanding the above, under the Biagi Reform, intermediation of work forces is still subject to restrictions and statutory requirements. Pursuant to the Biagi Reform, an (Italian or foreign) entrepreneur may recourse to authorised job agencies for the supply of temporary work forces. However, the recourse to temporary workers must be justified by the occurrence of technical, productive or organisational reasons.

Moreover, the use of temporary workers is limited to specific quantity thresholds, which are determined by the applicable CCNL. Breach of the provision concerning the maximum number of temporary workers employed (as well as the use of temporary workers in the absence of the above reasons) may lead to the payment of a criminal sanction ranging between € 250, 00 and € 1.250, 00.

Job agencies may also supply work forces to be employed for unlimited time periods, provided that such workers are employed for the carrying out of such specific activities as provided by the Biagi Reform (including, *inter alia*, consultancy services).

The contract of supply entered into between the job agency and the user must be executed in writing and shall provide, *inter alia*, details of the workers required by the user, the tasks to which they will be assigned, the duration of the assignment, the reason for the hiring, the working hours and the wage which shall be paid to them.

The contract must also include an express undertaking by the user that, in case of default of the job agency, the user shall be liable vis-à-vis the workers for any outstanding claim for unpaid salaries or social contributions.

### **1.3 Work permit**

As far as EU citizens are concerned, according to articles 45 and following of the Treaty on the functioning of the European Union, providing the freedom of movement of workers, once a worker has complied with any national measures that may be in place, he/she must be guaranteed with the same treatment as any domestic worker, and may move freely within the territory of the EU for the purpose of employment in accordance with the provisions governing the employment of nationals of each Member State.

As for non-EU nationals, under Italian immigration law, the quotas of foreign employees to be admitted within the Italian territory are established every year by the Italian government. Under the Law No. 189 of 30<sup>th</sup> July 2002 (hereinafter, “Law 189/02”), the procedure for the hiring of a non-EU citizen may be summarised as follows:

(a) The employer must request the authorisation to hire a non-EU citizen at the Prefect's office. The employer must guarantee the availability of an accommodation for the worker and must submit the proposed draft employment contract;

(b) The Prefect's office transmits the employer's request to the competent labour office, which spreads the same, in order to acquire possible applications by Italian or European workers;

(c) If there are no applications by Italian or European workers within 20 days, the Prefect's office issues the authorisation for the hiring of the non-EU citizen. The authorisation is forwarded to the competent Italian consular office for the issuance of the Visa;

(d) Prior to the entering into the Italian territory, the worker must obtain the Visa from the Italian consulate established in the country of origin;

(e) Upon arrival of the foreign worker in Italy, his/her presence must be communicated to the police authorities within 48 hours;

(f) Within 8 days from his/her arrival in Italy, the worker must obtain a permit to stay (*"permesso di soggiorno"*) from the police authorities. In case of a limited time employment contract, the permit to stay has a maximum duration of 12 months. The permit to stay can be renewed once for the same duration;

(g) The permit to stay is issued upon execution of the employment agreement between the employer and the worker before the police authorities. The employer must guarantee the availability of an accommodation and must undertake to pay for the worker's expenses to travel back to his/her country of origin.

The above procedure is simplified in case of employees of non-EU companies that are seconded to Italy for a limited time. In such case, points (a), (b) and (c) above do not apply. Moreover, seconded workers can enter the Italian territory, irrespective of the annual quotas fixed by the Government.

According to article 21 of the Schengen Treaty executed on 14<sup>th</sup> June 1985 and enclosed to the Treaty of Amsterdam, a non-EU citizen "*holding a residence permit issued by one of the Contracting Parties may, under cover of that permit and of a travel document, both documents still being valid, move freely for up to three months within the territories of the other Contracting Parties provided he fulfils the conditions of entry referred to in Article 5(1) (a), (c) and (e)<sup>(1)</sup> and is not on the national reporting list of the Contracting Party concerned*".

#### **1.4 Social Security system**

Italian law provides mandatory rules in respect of social security contributions to be paid by employers. Provisions concerning this matter are set forth also by international conventions as well as by EU regulations and directives.

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<sup>1</sup> Such conditions are: (i) he/she must possess a valid document or documents permitting to cross the border; (ii) he/she must possess documents "*substantiating the purpose and the conditions of the planned visit and has sufficient means of support, both for the period of the planned visit and to return to their country of origin or to travel in transit in a Third State, into which their admission is guaranteed, or is in a position to acquire such means legally*"; (iii) he/she is not considered to be "*a threat to public policy, national security or the international relations of any of the Contracting Parties*".

1.4.1 Secondment to employees to EU countries, or to countries adhering to agreements on social security with EU countries

As a general rule, provisions on social security (in particular, those laid down by the international conventions) apply only within a certain territorial extent: unless otherwise provided, the obligation to pay social security contributions is governed by the law of the place where the working obligation is performed. This rule is aimed at avoiding duplications in the fulfilment of the accounting formalities and procedures related to social security contributions, and, thus, possible inconveniences deriving from the payment of the same contributions in more than one country.

However, according to the EC Regulation No. 1408/71, in case an employee is seconded to an EU country, he/she is entitled to maintain all social security benefits deriving from the law of his/her country “of origin”, for a period to be calculated on the basis of the applicable international conventions (if any) existing between the involved countries.

The application of such rule is conditional upon the following circumstances having occurred:

- An employment relationship between the worker and the seconding enterprise must be kept in place for the whole duration of the secondment. The seconding employer remains liable for all obligations arising from the employment agreement;
- The secondment must have been planned for a limited time period. The duration of the secondment cannot exceed 12 months, save as otherwise provided for by international conventions (if any). Such duration can be renewed or extended upon request of the employer, and provided that the competent authority of the country of the beneficiary of the secondment has given the appropriate authorisation (as far as EU countries are concerned, such authorisation can be directly requested to and released by the competent authority. As for any other country, the authorisation must be requested through the intermediation of the Ministry of Welfare).

According to the convention executed between Italy and the USA on 23<sup>rd</sup> May 1973 and implemented into Italian law by Law of No. 86 24<sup>th</sup> February 1975 (hereinafter, the “Washington Convention”), in case of secondment of an Italian employee to the USA, unless otherwise chosen by the parties (i.e., the seconding employer, the employee and the beneficiary of the secondment), the Italian social security system applies, and the amount of the social security contributions is determined pursuant to Italian law. On the other hand, sickness and maternity benefits (to the extent applicable) are determined in the light of the law of the country of the enterprise utilising the seconded employee, whilst the relevant costs are borne by the Italian social security Institutions.

As for professional diseases, the convention executed by Italy and Switzerland on 14<sup>th</sup> December 1962, implemented into Italian law by Law No. 1781 of 31<sup>st</sup> October 1963, provides for the application of the law of the country in which dangerous activities were lastly performed (see also: Supreme Court, decision No. 1740 of 18<sup>th</sup> February 1995).

Upon request of the employer or of the seconded worker, the National Social Security Institute (*Istituto Nazionale di Previdenza Sociale*, known as INPS) issues a *documento di distacco* (“certification of secondment”), aimed at certifying, vis-à-vis the social security institution of the country of destination

of the worker, that all social security-related obligations have been duly fulfilled in compliance with Italian law.

In the end, it is worth mentioning article 48 of the Treaty on the functioning of the European Union, which provides that “*the European Parliament and the Council shall [...] adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States*”. In this respect, Regulation of the Council No. 1408/71 has been enacted, for the aim to coordinate national social security legislation in order to protect the social security rights of persons moving within the EU territory.

1.4.2 Secondment to non-EU countries, which do not adhere to international conventions on social security with Italy.

In the event of secondment of an Italian employee to non-EU countries, lacking any international convention between Italy and the involved country, all rules laid down by the law of such foreign country apply, save the application of the minimum social security treatment provided by Italian law. Accordingly, lacking any international conventions between the involved countries, inconveniencies arising from the duplication of procedures relating to social security may occur.

Law No. 398 of 3<sup>rd</sup> October 1987 provides for a minimal mandatory protection in favour of the employee. A specific social security insurance must be underwritten by the employer in connection with the activity of the seconded employee, providing coverage for the following events:

- disability / retirement;
- unemployment;
- accidents at work and professional diseases;
- sickness;
- maternity.

Social security contribution is calculated on the basis of a “conventional” salary, which is determined through a decree of the Minister of Labour within 31<sup>st</sup> January of each year.

### **1.5 Tax Law issues**

In general terms, the following laws apply to tax issues:

- Presidential Decree No. 917 of 22<sup>nd</sup> December 1986 (known as the Italian Consolidated Law on Income Tax, or “TUIR”) as amended to July 31, 2010;
- Law No. 342 of 21<sup>st</sup> November 2000 (in particular, article 36).



An employment relationship, in which an employee <sup>(2)</sup> is seconded to a foreign country (i.e., other than that of the seconding employer), would appear to be subject to a double taxation, i.e.:

- in the country to which the employee has been seconded, pursuant to the law of such country;
- in Italy, on the basis of a “conventional” salary determined through a decree of the Ministry of Finance, pursuant to article 51, sub-paragraph 8bis, of TUIR.

However, the effects of said double taxation can be reduced or completely cancelled by resorting to the tax credit provided by article 18 of TUIR. Accordingly, the amount exceeding the tax due by the taxpayer for a certain year can be recovered by means of a tax credit mechanism available under Italian law.

#### 1.5.1 Double tax treaties

Several countries arrange solutions for situations in which a transaction should be subject to double taxation by means of “double tax treaties” (“DTT”), most of which are based on the OCDE model convention, aimed at preventing situations where taxation is levied by more than one State at the same time, by determining which State is entitled to levy taxes in respect of a certain transaction.

Double taxation is usually avoided either: (i) by means of tax credits or (ii) by exempting incomes from taxation in the country which, according to the applicable DTT, is refrain to tax.

As a general principle (provided by article 15 of the OCDE model convention), income is taxed in the country where it is produced, i.e. where the working activities are performed (irrespective of the fact that this country differs from the “producer”’s residence country).

By way of derogation to the above principle, OCDE model convention provides that taxation may be levied in the residence country only, if it differs from the country where the employee works, if the following conditions are met:

- The employee is physically present in the country where the work activities are performed for a period of less than 183 days;
- The wage is paid by an employer who is not resident in the country where the working activities are performed;
- The wage is not paid by a permanent establishment of the employer in the State to which the employee has been seconded.

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<sup>2</sup> As a preliminary remark, we assume that the employee: (i) has (at least before the beginning of the secondment to the other country) his/her residence for tax purposes in Italy; (ii) works in a foreign country -as a consequence of the secondment- for more than 183 days in a year.

