

# The Reform of Italian Private International Law

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## A. Introduction

### *I. Reasons for the reform*

In recent years the Italian system of private international law was the object of a thorough reform. The procedure was quite long: an expert Committee worked from 1985 to 1989 and issued a draft proposal, according to which a Bill was submitted to Parliament; after a rather complicated *iter* and some important amendments, the final text was approved on 31 May 1995.<sup>1</sup> It entered into force on 1 September 1995, except for Title IV, which entered into force on 1 January 1997.<sup>2</sup> The new law applies to all proceedings initiated after its entry into force, except for situations exhausted under the previous discipline.

Several reasons motivated this reform. Italian conflict rules stemmed almost unchanged from the Civil Code of 1865 and were no longer adequate for the needs of modern economy and society. In the field of family law, some rules had been declared unconstitutional due to gender discrimination, the husband's (or the father's) national law taking precedence over the wife's (or the mother's); a lacunae which could not be filled by mere interpretation. Also, the old system consisted of few rules of very broad application, and many situations (like divorce) were not specifically regulated. Finally, it was necessary to co-ordinate domestic rules with the international conventions on the choice of law, many of which are applicable *erga omnes*, that have entered into force in Italy in the past few years.

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<sup>1</sup> Law of 31 May 1995, No. 218; it is published in the Italian Official Journal (*Gazzetta Ufficiale*) 3 June 1995, No. 68. It is also published in German in (1996) *IPRax*, pp. 356–369. As the literature concerning the new law is mainly published in Italian, the references will be limited here to some general works.

<sup>2</sup> See *infra*, 'Recognition of Foreign Judgments' in this article.

## II. Structure and main principles of the reform

The law of 1995 covers all areas of private and procedural international law, and is therefore composed of three main sets of rules, concerning Italian jurisdiction (Title II), the choice of law (Title III), and the recognition of foreign judgments in Italy (Title IV). There are many areas of interest regarding the new law, particularly the original solutions which are quite new without, as well as within, the Italian tradition.

One of the most interesting innovations can be found in the relationship between domestic rules and international conventions. In many cases, both in the field of jurisdiction and conflicts of law, reference is made to an international convention, which is therefore applied as such to all the situations regulated by domestic law.<sup>3</sup> In other words, the choice of law rules contained in the convention are applied *in any case (in ogni caso)*, that is even beyond the field of application of the convention itself.<sup>4</sup> The result is a high degree of homogeneity in the discipline of the matters concerned, although this technique may create some problems of implementation.

Difficulties may arise, for example, when determining the field of temporal application of an international convention in all the cases where its application is a result of the reference made by domestic law. Should one apply the temporal provisions contained in the convention itself or the general provision of the Law 218/95?<sup>5</sup> There is no unanimous answer to this question<sup>6</sup> and case law has not been issued yet. The second solution seems preferable, however, if one considers that the

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<sup>3</sup> Such a reference is made to The Hague Convention of 1961 on the Protection of Minors, The Hague Convention of 1973 on the Law Applicable to Alimony Obligations, to the Rome Convention on 1980 on Contracts (OJ L 266 of 9 October 1990) and to the two 1931 Geneva Conventions on Drafts and Cheques. A partly different solution applies to the Brussels Convention of 1968 on Jurisdiction (OJ C 189 of 28 July 1990): *see infra*, 'Jurisdiction' in this article.

<sup>4</sup> The principle corresponds to the 'material reference' known in the doctrine of private international law. In the Expert Committee Report on the draft proposal this technique is defined as 'an extension of the application' of conventional rules to the whole matter regulated by the national rules; the rules of the conventions are 'incorporated' through a 'material reference'. *See* Mosconi, *Diritto internazionale privato e processuale, Parte generale e contratti* (Torino, 1996), at pp. 18–19; Boschiero, *Appunti sulla riforma del sistema italiano di diritto internazionale privato* (Torino, 1996), at p. 19.

<sup>5</sup> For example, the Rome Convention of 1980, according to its Art. 17, applies to all contracts made after its entry into force (1 April 1991 for the first seven ratifying states); according to the temporal provisions of Law 218/95, it should apply to all proceedings initiated after 1 September 1995, even if the contract was made before 1 April 1991.

<sup>6</sup> Giardina, 'Riforma del sistema italiano di diritto internazionale privato. Commentario (Articolo 72)', *Rivista italiana di diritto internazionale privato e processuale* (1995), at p. 1271 and Pocar, *Il nuovo diritto internazionale privato italiano* (Milan, 1997), at p. 14 argue for the application of temporal provisions contained in the conventions. Ballarino, *Diritto internazionale privato* (Padua, 1996), at p. 591, facing the problem in relation to the Rome Convention prefers the opposite solution.

reference to the conventions implies that the field of application (either personal, material or temporal) of the conventional rules is determined by domestic law.<sup>7</sup>

Another controversial question is the interpretation of the text of the conventions, following their incorporation into domestic law. There is a consolidated opinion in the sense that interpretation should always be respectful of the international nature of the text. However, in the case of the Brussels and Rome Conventions, there is a problem of co-ordination with the competence of the European Court of Justice<sup>8</sup> and application by the national judges should be consistent with the principles of uniform interpretation.<sup>9</sup>

As regards the relationship between domestic and conventional law in general, Article 2 of the Law 218/95 contains the general principles of precedence of conventions which are in force in Italy and uniform interpretation of conventional texts.

Other characteristic features of the reform are the nature of the choice of law rules, which are much more varied and flexible than in the past: in a number of cases some use is made of the 'proper law' doctrine, which is completely new to Italian domestic conflict rules. Rules are also more detailed than before and many new areas are now regulated.

Finally, a mention should be made of the reform regarding the effects of foreign judgments in Italy: in principle, foreign judgments are now effective in Italy without the need of any judicial proceeding. However, it is necessary to start a special proceeding before enforcing the foreign judgment, which does limit the impact of such a revolutionary development.

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<sup>7</sup> This solution refers of course only to the cases when the convention is applied beyond its proper field of application, that is only to the extension operated by domestic law.

<sup>8</sup> Protocol concerning the Interpretation by the Court of Justice of the Brussels Convention of 1968, signed in Luxemburg on 3 June 1971 (OJ L 204 of 2 August 1975); two Protocols concerning the interpretation by the Court of Justice of the Rome Convention of 1980, signed in Brussels on 19 December 1988 (OJ L 48 of 20 February 1989).

<sup>9</sup> The European Court of Justice has agreed to give preliminary rulings on Community law in cases falling outside its field of application, when the national law made a reference to some rules of Community law (see Joined Cases C-297/88 and C-197/89 of 18 October 1990, *Dzodzi* [1990] ECR I-3763; C-231/89 of 8 November 1990, *Gmurzynska-Bscher* [1990] ECR I-4003). In the only case concerning the Convention, however (*Kleinwort Benson*, Case C-346/93, 28 March 1995), the Court denied its competence and refused to rule on the case: the national judge had addressed to the Court a request for a preliminary ruling concerning the interpretation of the Brussels Convention, in order to apply it to a national law the text of which was 'substantially identical' to the Convention. The Court affirmed, on the one hand, that the national law did not simply make reference to the Convention, but it reproduced the text of the Convention with some differences and therefore the Convention was not applicable 'as such' in the national law; on the other hand, the national judges were not obliged to comply with the interpretation of the Court of Justice. On this problem see Gaja, 'L'interpretazione di norme interne riproduttive della convenzione di Bruxelles da parte della Corte di Giustizia' in (1995) *Rivista di Diritto Internazionale*, at p. 757; Balena, 'I nuovi limiti della giurisdizione italiana' in (1996) *IV Foro Italiano*, at p. 212. See also Struycken, 'Les conséquences de l'intégration européenne sur le développement du droit international privé' in (1992-I) *Recueil des Cours de l'Académie de Droit International*.

## B. Jurisdiction

### I. General criteria

Title II contains the general criteria for jurisdiction, while special, additional criteria are contained in Title III together with the specific discipline of the choice of law. Contrary to the previous system, which was mainly based on nationality,<sup>10</sup> Italian jurisdiction is now recognized according to the general principle of the residence or domicile of the defendant.

Additional, general criteria, for matters regulated by the Brussels Convention on Jurisdiction and the Enforcement of Judgments of 1968, are those contained in Title II, sections 2, 3 and 4 of the Convention itself,<sup>11</sup> even if the domicile of the defendant is in a non-Member State. As to matters which are not regulated by the Brussels Convention (for example arbitration or bankruptcy), additional criteria are those established by Italian law for (internal) territorial jurisdiction.<sup>12</sup>

The choice to submit to the same criteria international and internal competence, although limited to a restricted number of matters, is perhaps one of the most controversial developments of the reforms. It adds several criteria, sometimes conflicting with those contained in the Law 218/95 itself, and occasionally leading to an exorbitant competence of Italian judges. For example, Article 18 of the Code of Civil Procedure indicates as a criteria for territorial competence, if the defendant is not resident in Italy or its residence is unknown, the place of residence of the plaintiff. Also, the Law of 1970 on divorce contains an Article 4 according to which, if one spouse is resident abroad, the competence belongs to the tribunal of the place of residence of the plaintiff. Referring to such rules for international competence means allowing the resident plaintiff the possibility of suing in Italy the non-resident defendant in any case.<sup>13</sup>

Italian jurisdiction may finally result from a written jurisdiction clause or by appearance of the defendant, if competence is not challenged. This possibility of voluntarily ousting Italian jurisdiction in favour of a foreign judge or in favour of a

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<sup>10</sup> According to the now abrogated Art. 4 of the Italian Code of Civil Procedure, limits to the jurisdiction of Italian courts existed only with respect to foreigners, who in principle could be summoned before Italian judges only if they were resident in Italy or had accepted Italian jurisdiction.

<sup>11</sup> That is: special criteria for jurisdiction; jurisdiction for insurance matters; jurisdiction for consumer contracts.

<sup>12</sup> The general principles are contained in Arts. 18–30 of Italian Code of Civil Procedure. For bankruptcy, in Art. 9 of the Law 267/42 (the place where the main seat of the undertaking is located).

<sup>13</sup> In this sense Attardi, 'La nuova disciplina in tema di giurisdizione italiana' in (1995) *Rivista di diritto civile*, at p. 732. This conclusion is considered unacceptable by some authors who would interpret the rule as excluding any reference to general criteria, like Art. 18 of the Code of Civil Procedure (Ballarino, 'Diritto internazionale privato' (Padova, 1996), at pp. 110–111).

foreign arbitration is totally new. This clause must also be written and should concern disposable rights.

## ***II. Special criteria***

Italian jurisdiction is excluded with regards to property claims concerning real estate situated abroad (Art. 5). It exists, in addition to the general criteria, in the following cases:

- (a) with regards to separation or divorce, if one of the spouses is an Italian national or the wedding took place in Italy (Art. 32);
- (b) with regards to relations between parents and children and adoption, if one of the (adoptive) parents or the (adoptive) child is an Italian national or resident in Italy, or if the adoptive child is a minor abandoned in Italy (Arts. 37 and 40);
- (c) with regards to successions, if the deceased was an Italian national at the moment of death or if the majority of the estate is in Italy (Art. 50).

## ***III. Lis alibi pendens***

Under the former rules, a proceeding pending before a foreign court was not a reason for Italian judges to decline their jurisdiction. The principle, strictly related to the idea of sovereignty, was clearly phrased in the law. It was following the application of the Brussels Convention of 1968 that the idea of *lis alibi pendens* before a foreign court was gradually accepted as a general rule in the Italian legal order.

Article 7 of the new law allows the Italian judges to suspend the proceeding every time they estimate that a claim, (previously) pending before a foreign court between the same parties and having the same object and same cause of action, might produce effects in Italy. In case the foreign court declines its competence or the foreign judgment is not recognized in Italy, the suspended proceeding may be reinstated.

# **C. Choice of Law Rules**

## ***I. General questions***

General questions of private international law are strictly connected to the nature of the application of foreign law by Italian judges. One of these issues is *renvoi*. The Italian system of private international law traditionally excluded *renvoi*, considering that conflict rules only refer to foreign substantial law and not to foreign conflict rules: in the first draft of the reform and in the Bill submitted to Parliament, this exclusion was maintained. The rule was changed however during parliamentary discussion and *renvoi* is now admitted, although subject to a number of exceptions.

The principle is to admit only *renvoi* 'backwards', that is to Italian law, and only if the foreign applicable law accepts *renvoi*. It is moreover excluded in a number of cases *ratione materiae*.<sup>14</sup>

A most controversial question under the former system was the duty of Italian judges to know foreign applicable law (*iura novit curia*). The case law was not uniform in this respect, sometimes charging the parties with the burden of proof concerning the content of foreign applicable law, sometimes recognizing the principle *iura novit curia* as applicable to foreign law. It is now stated that the judge must ascertain foreign law *ex officio*; in case of difficulty, questions may be put to the Ministry of Justice or to experts and finally the help of the parties may be asked. If it is not possible to ascertain foreign law, Italian law is applicable.

The usual saving for public policy (Art. 16) is completed by the following principles: in case the applicable law is contrary to *ordre public*, other possible choice of law rules should be applied; only if there are none Italian law is applicable.

Finally, the new law formally mentions the saving (already largely recognized by the case law) for Italian *loi d'application immédiate* (*norme di applicazione necessaria*), that is for mandatory domestic rules which cannot be derogated in consideration of their object or aim.

## ***II. Capacity and rights of natural and legal persons***

Matters relating to capacity and rights of natural persons are in principle regulated by the national law of the person concerned. The national law deals with legal capacity and capacity of contracting. Capacities specific to a relationship (for example, capacity to marry), however, are regulated by the law applicable to that relationship. As to the capacity of contracting, the good faith in the capacity of the other party is protected.

The national law also governs the existence and content of fundamental rights, with the exception of rights deriving from family relationship. The violation of fundamental rights is subject to the law applicable to torts.

Legal persons are in principle regulated by the law of the country where they were founded. Italian law is applicable if the seat or the main activity is located in Italy.

## ***III. Family relationship***

Before the reform, divorce was one of the most controversial issues concerning conflict rules. As the law, which in 1970 introduced divorce in Italy, does not contain any choice of law rule, divorce used to be regulated either by the general rule for family relationship or by that for matrimonial relationship. However, while the first rule led to national law, leaving unsolved the problem for couples of different

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<sup>14</sup> That is (a) when the foreign law is applicable because of a choice of the parties; (b) in the matters concerning formal validity of contracts; (c) in matters concerning non-contractual obligations and torts.

nationalities, the latter had been partly declared unconstitutional due to the reference it made to the husband's national law.<sup>15</sup> This combination of legislative lacunae demanded that new solutions be found; the choice was made for flexible criteria, rather new for Italian tradition which is not accustomed to the 'proper law' principle.

The new rules read as follows:

- (a) the capacity to marry is regulated for each spouse by their national law;
- (b) the wedding is formally valid if it satisfies the formal requirements either of the law of the country where it was celebrated, or the national law of one of the spouses, or the law of the country where they resided at the time of the celebration;
- (c) matrimonial relations, including economical relations, are regulated by the common national law of the spouses or, in default, by the law of the country where married life is mainly located;
- (d) the spouses may choose, in the form of a written agreement, the law applicable to the economical relations arising out of the matrimonial relationship;
- (e) separation and divorce are regulated by the national law which is common to the spouses at the time when they ask for separation or divorce and, in default, by the law of the country where married life is mainly located.

An important new development concerns the issue of where applicable law does not allow separation or divorce: in the past, such a law was considered contrary to public policy and therefore inapplicable. Now it is stated that in such cases Italian law is to be applied.

Parental relationship was another controversial matter before the reform, as again the rule referring to the father's national law had been declared unconstitutional.<sup>16</sup> Now the principle is totally changed and under the new rule the national law of the child regulates both the status of child and the parental relationship, including parental authority.

Adoption is in principle regulated by the common national law of the adoptive parents or in default by the law of common residence or the law of the country where their married life is mainly located. The same law governs personal relations between adoptive parents and children.

In order to regulate the protection of minors and alimony obligations, a reference is made<sup>17</sup> to the 1961 and 1973 Hague Conventions. Finally, the protection of disabled majors is regulated by the national law of the disabled person.

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<sup>15</sup> Italian Constitutional Court, judgment of 5 March 1987, No. 71, in Mengozzi (ed.), *Atti normativi e giurisprudenza in materia di diritto internazionale privato* (Bologna, 1994), at p. 151.

<sup>16</sup> Italian Constitutional Court, judgment of 10 December 1987, No. 477, in Mengozzi (ed.), *supra* note 15, at p. 161.

<sup>17</sup> See *supra* 'Introduction' in this article.

#### ***IV. Succession***

The main criteria for the law applicable to succession has always been, under Italian law, the national law of the deceased at the moment of death. Although it was maintained, this rule is now subject to an important exception, that is the possibility of a choice of law contained in the testament: this choice may only refer to the law of residence of the testator, and is valid only if the residence is still the same at the moment of death.

If the estate of an Italian national is concerned, the choice about applicable law cannot jeopardize the rights granted by Italian law to close relatives (spouse, children and parents) to a minimum share of the estate. The national law regulates the testamentary capacity, the capacity to succeed and the assignment of the estate.

#### ***V. Property rights***

*Lex rei sitae* regulates all property rights, either real or personal, including security rights like mortgage and pledge. The rule was contained in the previous system and represents no special change: the innovation is in a more detailed regulation of the matter.

The law of the country where the good is located regulates the content of the right, that is the property that it confers. It also regulates the acquisition and loss of the right, except for rights arising from succession, family relationship or contracts (which are subject to the specific conflict rule).

Determining the *lex rei sitae* may be difficult in a number of cases, some of which have now a legislative solution:

- (a) intangible property, like patents and trade marks, is regulated by the law of the country where the rights are used;
- (b) *res in transitu*, that is goods being transported across borders with a specific destination, are governed by the law of the country of destination;
- (c) the filing system of agreements concerning property rights is regulated by the *lex rei sitae*.

For chattels moving from one state to another, according to an established principle it is necessary to distinguish between the acquisition of the rights, to which the original *lex rei sitae* is applicable, and the effects of such rights, which are regulated by the law of the country of their present situation. This solution can be well-maintained under the new law.

#### ***VI. Contracts***

As already mentioned above, the choice of law rule for contracts is given by reference to the Rome Convention of 1980. This means that all contracts, irrespective of the scope of the Convention as limited in its Article 1 and with the only exception of donations, are governed according to the uniform rules: by the law chosen by the parties (Rome Convention, Art. 3) or, in default, by the law of the country with

which it is most closely connected (Rome Convention, Art. 4); special rules for consumer and employment contracts also apply. As the Rome Convention (which entered into force for Italy on 1 April 1991) is applicable *erga omnes*, even with respect to non-contracting states, the new rule partly confirms an existing situation.

Differing from other contracts, donations are governed by the national law of the donor, although the donor may choose as applicable the law of her or his country of residence.

### ***VII. Non-contractual obligations and torts***

The set of rules governing non-contractual obligations is as follows:

- (a) unilateral promises are governed by the law of the country where they are made;
- (b) bills of exchange, promissory notes and cheques are regulated 'in any case' by the two Geneva Conventions of 7 June 1930; other negotiable instruments are governed by the law of the country where the instrument was issued;
- (c) agency is governed by the law of the country where the agent is established or where the agent practised his activity.

Torts are governed as a general rule by the *lex loci delicti*. In cases when the deed and the damage occurred in different states, it used to be debatable as to which of the two states was to apply; the second solution was generally preferred. Reference is now explicitly made to the country where the event (damage) took place, but this rule is made more flexible by two exceptions.

First, the injured person may claim the application of the law of the country where the deed took place; secondly, when the tort involves only nationals and residents of a certain state, it is governed by the law of that state.

Finally, a special conflict rule is given for torts deriving from product liability. Here the injured person may choose either the law of the country of the producer or that of the country where the product was bought.

## **D. Recognition of Foreign Judgments**

According to the new rules, foreign judgments which fulfil some given conditions are in principle effective in Italy from the moment when they are effective in their country of origin. Only in order to enforce the judgment, or if its application is challenged, a judicial proceeding is necessary. This is a complete turn-around with respect to the former system, according to which no foreign judgment could produce any effect in Italy without judicial recognition.

### ***I. Conditions for recognition***

Foreign judgments produce effect automatically in Italy provided that:

- (a) the foreign judge was competent according to Italian principles on jurisdiction;
- (b) a writ of summons was served to the defendant and essential defence rights were respected;
- (c) the parties appeared or their default was properly declared;
- (d) the foreign judgment has become binding;
- (e) the foreign judgment is not contrary to a binding Italian judgment;
- (f) there is no proceeding pending in Italy between the same parties and with the same object initiated before the foreign proceeding;
- (g) the foreign judgment is not contrary to public policy.

These conditions aim in general at the respect of contradictory rights and rights of the defence, and at the avoidance of divergences between Italian and foreign judgments.

### ***II. Measures regarding persons and family relations***

Partly different conditions are required for foreign measures (judgments, but also administrative measures) regarding:

- (a) the capacity of persons;
- (b) existence of family relations;
- (c) existence of fundamental rights.

When such measures were issued by the authorities of the country the law of which governs the relation according to Italian private international law, automatic recognition is 'simplified' and submitted only to the two conditions of respect of public policy and of essential rights of the defence.

For example, according to Italian private international law, the status of a child is determined according to the national law of the child; this means that a judgment declaring fatherhood issued by the judges of the country of nationality of the child would be granted a 'simplified' recognition.

### ***III. Judicial proceeding***

In order to enforce the judgment, or if its application is challenged, it is necessary to start a judicial proceeding before the *Corte d'Appello* territorially competent with regards to the place of enforcement. As the foreign judgment is in principle effective in Italy, the aim of the proceeding is not to give effect to it but only to verify the fulfilment of the conditions stated by the law. The most important consequence is that, in contrast to what happened in the past, the suit is not subject to prescription and may be proposed at any time.

Another very important change is that the proceeding is not necessary in order to have the judgment filed into Public Registrar, including Registers of births, marriages and death (*stato civile*).