

## Italian rules on adjudicatory jurisdiction and recognition and enforcement of foreign judgments

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In 1995, Italy enacted a comprehensive new legislation on private international law (hereinafter the "Act")<sup>1</sup>. As the opening provision of the Act indicates, rules on adjudicatory jurisdiction and recognition and enforcement of foreign judgments are also included in the Act, in addition to the conflicts rules. Legislatively, this consolidated approach is gaining momentum internationally and was greeted favorably by Italian scholars<sup>2</sup>. The old provisions laid down in the Code of Civil Procedure of

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<sup>1</sup> An English translation of the Act has been published in 35 I.L.M. 1996, at 760-782 (with an Introductory Note by A. Giardina); for a general presentation of the Act in English language, see Ballarino/Bonomi, *The Italian Statute on Private International Law of 1995*, Yearbook of Private International Law 2000, at 99-131. Adjudicatory jurisdiction respecting some specific matters, such as insolvency, admiralty, trademarks and patents, is still regulated in the relevant special legislation (which was not repealed by Art. 73 of the Statute): see, among others, Pocar, Art. 1, RDIPP 1995, at 5; Brogini, Art. 3, *Nuove leggi civili commentate* (hereinafter "NLCC") 1996, at 907-908.

<sup>2</sup> Ballarino/Bonomi (note 1), at 102, describe this as a "wise decision"; see also Luzzatto, *Sulla riforma del sistema italiano di diritto processuale civile internazionale*, in *Raccolta in ricordo di E. Vitta*, Milan 1994, 151, at 158; Pocar (note 1), at 4; Boschiero, *Appunti sulla riforma del sistema italiano di diritto internazionale privato*, Turin 1996, at 90. The Court of Cassation (23 November 2000, n. 1200, RDIPP 2001, 994, at 995) spoke of a "complete system of private international law, encompassing both procedural (...) and substantive matters (...)"; according to Walter, *Reform des italienischen internationalen Zivilprozessrechts*, *Zeitschrift für Zivilprozessrecht* 1996, 3, at 12, the influence of the Swiss codification in this regard is "undeniable".

1942 have thus been superseded. Arguably, this new topography is not devoid of both theoretical and practical implications, for it clearly suggests that private international law ultimately rests on a single unitary experience, to be explored globally.

Exactly ten years have now elapsed since the entry into force of most of the provisions of the Act<sup>3</sup>. This anniversary offers a welcome opportunity to briefly consider the new rules on adjudicatory jurisdiction, on the one hand (I), and those of recognition and enforcement of foreign judgments, on the other (II), in light of scholarly discussion as well as their practical application thus far.

## I. Adjudicatory Jurisdiction

First, the new conception underlying the Act with respect to adjudicatory jurisdiction will be briefly illustrated (1). Next, the scope of the new rules will be examined (2). The main general and specific bases for jurisdiction designed by the Act will then be set out (3). Two significant innovations, *lis alibi pendens* and the displacement of forum jurisdiction through a choice of a foreign adjudicator, will finally be considered (4).

### 1. The New Foundations of Adjudicatory Jurisdiction

Scholars generally agree that the new legislation brings about, or rather reflects, a notable change in the legislator's perception of the interests involved in the "jurisdictional problem"<sup>4</sup>.

The old rules were based on the assumption that sovereignty concerns are primarily at stake when it comes to adjudicatory jurisdiction<sup>5</sup>. This rationale, which historically found its first expression in Articles 14

<sup>3</sup> The Act became effective on 1 September 1995, with the exception of the rules on recognition and enforcement (Art. 64-71), for which the entry into force was delayed until 31 December 1996 (the reasons for this delay will be set out under Point II 4 below).

<sup>4</sup> For this terminology, see Von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil Law Systems* (1996), RCADI 2002, t. 297, at 78.

<sup>5</sup> On the theory of adjudicatory jurisdiction based on "public interests" in Italy, see Ballarino, *Diritto internazionale privato* (in collaborazione con A. Bonomi), 3<sup>th</sup> ed., Padua 1999, at 100-101; Luzzatto, *Art. 3-12, RDIPP 1995*, at 20-21; Boschiero (note 2), at 91 et seq.; Queirolo, *Gli accordi sulla competenza giurisdizionale*, Padua 2000, at 31 et seq.

and 15 of the French Civil Code<sup>6</sup>, also inspired Articles 2-4 of the Code of Civil Procedure. This explains the primacy enjoyed by nationality as a general basis for jurisdiction<sup>7</sup>. Furthermore, the old system was permeated by the idea of universality of jurisdiction<sup>8</sup>. The few principles specifically set forth in the Code were designed to establish a limited number of exceptions to an otherwise unlimited adjudicatory authority<sup>9</sup>. Within these broad limits, Italian adjudicators had both the power and the duty to dispense justice and they were naturally perceived to be the best suited or in any event the only available to do so<sup>10</sup>. Arguably, the positivistic research paradigm of the separation of legal orders, that ultimately resulted in their mutual conceptual exclusion<sup>11</sup>, so vehemently expounded by Italian scholars earlier in the twentieth century, took its toll here<sup>12</sup>. This idea led, almost as a logical necessity, to a great indifference to foreign adjudications. A *lis alibi pendens* had no significance whatsoever in the forum. Similarly, displacement of forum jurisdiction to the benefit of foreign adjudicators was hardly conceivable<sup>13</sup>. Finally, unlike in other legal systems, a sharp distinction had traditionally been drawn by the Italian system between adjudicatory jurisdiction and venue, these being perceived as two separate problems<sup>14</sup>.

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- 6 Brogginì, Riconoscimento ed esecuzione delle sentenze civili straniere, RDIPP 1993, 833, at 838.
- 7 Starace, Le champ de la juridiction selon la loi de réforme du système italien de droit international privé, Rev. crit. 1996, 67, at 68.
- 8 Luzzatto (note 2), at 153, Id. (note 5), at 20; Brogginì (note 6), at 837; Carbone, Art. 4, NLCC 1996, at 919.
- 9 See Morelli, Diritto processuale civile internazionale, 2<sup>nd</sup> ed., Padua, 1954, at 87 et seq.; Starace (note 7), at 69.
- 10 Luzzatto (note 2), at 151.
- 11 According to this doctrine, in the words of Cappelletti, Il valore delle sentenze straniere in Italia, Riv. dir. proc. 1965, 192, at 199, "every legal order views itself as the only one and of such nature as to exclude the juridical character of any other"; this is, in the author's view, the far-reaching consequence of what Yntema, Die historische Grundlagen des internationalen Privatrechts, Festschrift E. Rabel, I, Tübingen 1954, 531, at 532, termed the "ruthless logic of the sovereignty dogma" ("umbarmherzige Logik des Souveränitätsdogmas").
- 12 Cappelletti (note 11), at 198-199; Starace (note 7), at 69.
- 13 See e.g. the considerations set out by Tribunal of Milan, 11 December 1997, RDIPP 1998, 854, at 855 et seq. The inner consistency of the old approach is emphasized by Luzzatto (note 2), at 151; see also Queirolo (note 5), at 38 et seq.
- 14 See Morelli (note 9), at 88; Ballarino (note 5), at 103-104; Luzzatto (note 2), at 161; Boschiero (note 2), at 98.

By the middle of the 20th century, growing social mobility and pace of economic intercourse favored the development of a powerful trend away from sovereignty considerations in the theory of adjudicatory jurisdiction, in Italy as elsewhere<sup>15</sup>. The awareness that jurisdiction, as well as conflict rules, rests rather on private interests than on state concerns continued to deepen ever since<sup>16</sup>. It became increasingly clear that fairness to private individuals and litigational convenience call for domicile or residence rather than nationality as general basis for jurisdiction. Moreover, the existence of foreign adjudicators having an equally reasonable claim to jurisdiction was deemed to be a fact which could hardly be completely ignored if the parties were to obtain justice. The appropriateness of asserting jurisdiction, no longer taken for granted, had to be carefully assessed in each category of cases<sup>17</sup>.

A crucial step towards this change of jurisdictional paradigm was represented by the bilateral and multilateral conventions entered into by Italy, most notably the Brussels Convention of 1968<sup>18</sup>. All bilateral conventions to which Italy is a party adopted domicile<sup>19</sup>. According to one author, the Brussels system led to a "Copernican revolution" in the handling of the jurisdictional problem in Italy<sup>20</sup>, for it tangibly showed how "geocentric"<sup>21</sup>, as well as unable to pursue any interest deserving protection, the national system was. Indeed, with each passing decade, it became clear that there was no real justification for maintaining two such divergent philosophies respecting adjudicatory jurisdiction, domestic and international<sup>22</sup>.

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<sup>15</sup> See for this process generally, and for the US and Germany specifically, Von Mehren, (note 4), at 95 et seq.

<sup>16</sup> Brogginì (note 6), at 837.

<sup>17</sup> Cf. Mosconi, *Diritto internazionale privato e processuale*, 2<sup>nd</sup> ed., Padua 2003, at 66.

<sup>18</sup> Brogginì (note 6), at 837; Id. Art 3, NLCC 1996, at 906; Boschiero (note 2), at 93; Queirolo (note 5), at 40-41.

<sup>19</sup> See, also, for a list of these conventions, Brogginì (note 6), at 835-836 and 838. As will be explained below, under Point 2 of this Section I, however, domicile served in these conventions as a basis for the "jurisdictional test" and not as a basis for asserting adjudicatory jurisdiction.

<sup>20</sup> Luzzatto (note 2), at 159; Brogginì (note 6), at 835.

<sup>21</sup> Luzzatto (note 2), at 159; in a similar vein, Cappelletti (note 11), at 199, had already described the old system as "Ptolemaic".

<sup>22</sup> Carbone (note 8), at 918; Boschiero (note 2), at 96; see already Gaja, *La convenzione di Bruxelles del 1968 e la riforma delle norme italiane sulla giurisdizione e sul riconoscimento delle sentenze straniere*, in *La Convenzione giudiziaria di Bruxelles del 1968 e la riforma del processo civile italiano*, Milan 1985, at 13 et seq.

The Act follows this new theoretical and practical trend<sup>23</sup>. Domicile and, to a lesser extent, residence have displaced nationality as general bases for jurisdiction<sup>24</sup>. The idea of universality has faded away<sup>25</sup>. The Act no longer aims at setting "limits" to jurisdiction, but it purports, on a more modest scale, to actively determine the "scope of jurisdiction"<sup>26</sup>. Inevitably, the design of jurisdictional provisions<sup>27</sup> is now far more detailed and complex<sup>28</sup>. An unprecedented freedom of the parties to displace forum jurisdiction<sup>29</sup>. Extensive taking into account of concurrent foreign proceedings through both *lis pendens* and, as it will be seen, a more expeditious recognition of foreign judgments, has also found its way in the new codification. Any discrimination in access to justice between foreigners and nationals has been removed<sup>30</sup>. The reciprocity basis for jurisdiction has been abolished, the fundamental right to sue being also conferred on aliens who are domiciled or resident in Italy<sup>31</sup>.

On the whole, adjudicators have been quick to take into account such new foundations and to adjust to them. In a thought-provoking ruling, the Constitutional Court emphasized the growing awareness of the "basic interchangeability of adjudicatory jurisdiction" and of its "impres-

<sup>23</sup> For a quick overview of the main changes brought about by the Act with respect to jurisdiction, see Starace (note 7), at 81-82, and Luzzatto (note 5), at 20-21.

<sup>24</sup> For this terminology with respect to grounds for jurisdiction in the case-law, see e.g. Court of Cassation, 11 June 2003, n. 9365, RDIPP 2004, 654, at 659; Court of Cassation, 12 May 1998, n. 4770, RDIPP 1999, 294 at 296; Court of Cassation (Sez. un.), 17 November 1999, n. 785, RDIPP 2000, 1022, at 1033.

<sup>25</sup> See e.g. Starace (note 7), at 82.

<sup>26</sup> Pocar, *La legge di riforma del diritto internazionale privato*, 2<sup>nd</sup> ed., Milan 2002, at 20.

<sup>27</sup> See for this terminology, Von Mehren (note 4), at 68 et seq.

<sup>28</sup> Salerno, *Il coordinamento dei criteri di giurisdizione nella legge di riforma*, RDI 1996, 882, at 882; Luzzatto (note 5), at 26.

<sup>29</sup> This point is emphasized e.g. by Tribunal of Milan, 11 December 1997 (note 13), at 854.

<sup>30</sup> This point is emphasized e.g. by Court of Cassation (Sez. un.), 11 February 2003, n. 2060, RDI 2003, 576, at 577 et seq., as well as by Tribunal of Milan, 21 November 2002, RDIPP 2003, 539, at 541; also see Attardi, *La nuova disciplina in tema di giurisdizione italiana e di riconoscimento delle sentenze straniere*, Riv. dir. civ. 1995, 727, at 729.

<sup>31</sup> See e.g. Court of Cassation, 8 February 2001, n. 46, RDIPP 2002, 137, at 138; Starace, *La disciplina dell'ambito della giurisdizione italiana nel disegno di legge*, Raccolta in ricordo di E. Vitta, Milan 1994, 243, at 244, views the abandonment of reciprocity negatively to the extent that it weakens the protection against exorbitant assertions of jurisdiction by foreign States.

sive delocalization"<sup>32</sup>. The forum's claim to assert jurisdiction has been placed by the legislature on an equal footing with that of foreign countries. In the Court's view, competition among adjudicatory authorities is an international fact that should be taken into account<sup>33</sup>. The preservation of State adjudicatory monopoly is no longer a primary objective<sup>34</sup>, for there exist "interests of international character that the legislature may well, in its discretion, deem predominant"<sup>35</sup>. On the other hand, the Court stresses the increased significance of the fundamental rights to defense and due process, whose origins are, as it has been noted, European and international at large<sup>36</sup>. Particularly, the driving force of the Brussels system has been extensively recognized by adjudicators over the first ten years of practical experience<sup>37</sup>.

## 2. Scope of the New Domestic Rules

Art. 2 of the Act reserves the application of the rules of international source, including, of course, those on adjudicatory jurisdiction. As the number and complexity of international rules grow, drawing the borderline between these rules and the domestic ones becomes increasingly complex. In general terms, in matters covered by the Brussels

<sup>32</sup> Order of 18 October 2000, n. 428, in RDI 2001, 165, esp. at 167 (also in RDIPP 2001, 645). Under constitutional attack was Art. 4(2) of the Act, which provides that a writing is not required for the validity of a choice of court agreement but only for evidentiary purposes (see Point 4 of this Section I below). Since Art. 1341 and 1342 of the Civil Code provide that agreements on change of venue must on occasion meet specific formal requirements as a condition of validity, the lower court had doubts as to whether this difference of treatment between agreements on displacement of venue and those on displacement of jurisdiction were really justified. These doubts were held by the Court to be unfounded. For an extensive comment on this ruling, see Salerno, *Deroga alla giurisdizione e Costituzione*, RDI 2001, 33; in the author's words, this ruling does have "implications of various kind on the question of derogation as well as on the whole system of international civil procedure at large" (at 36). On the overall phenomenon of delocalization of jurisdiction, see, in the Italian literature, M.A. Lupoi, *Conflitti transnazionali di giurisdizioni*, Milan 2002, t. I, at 553 et seq.

<sup>33</sup> Salerno (note 32), at 33.

<sup>34</sup> Salerno (note 32), at 40.

<sup>35</sup> Order of 18 October 2000 (note 32), at 167.

<sup>36</sup> Salerno (note 32), at 64; on the rise of a "European public order", see, in the Italian literature, Nascimbene, *Riconoscimento di sentenza straniera e "ordine pubblico europeo"*, RDIPP 2002, 659.

<sup>37</sup> See e.g. Court of Cassation (Sez. un.), 11 February 2003, n. 2060, RDIPP 2003, 547; Tribunal of Varese, 9 May 2002, RDIPP 2003, 468, as well as the rulings mentioned below, at note 72.

Convention – now, with a few changes, Regulation 44/2001<sup>38</sup> – European jurisdictional rules apply if the defendant has its domicile in one of the Member States (Art. 2) or if there exists a basis for exclusive jurisdiction (Art. 16 of the Convention and 22 of the Regulation) or a valid prorogation of jurisdiction (Art. 17 and 22 respectively)<sup>39</sup>. If any of these connecting factors points to Switzerland, Norway or Iceland, the Lugano Convention of 1988 applies<sup>40</sup>. With respect to matrimonial matters and matters of parental responsibility, Regulation No. 1347/2000, now Regulation No. 2201/2003, applies if the defendant has either nationality or residence in the EU<sup>41</sup>. A number of multilateral Conventions dealing with specific matters and including jurisdictional rules are in force in Italy, such as the Hague Convention of 1961 on protection of minors<sup>42</sup> and the Hague Convention of 1973 on maintenance obligations<sup>43</sup>.

Italy is also party to a wealth of bilateral conventions, which remained untouched by the Act. These include the treaty with France (1930)<sup>44</sup>, Switzerland (1933)<sup>45</sup>, Germany (1937)<sup>46</sup>, Austria (1971)<sup>47</sup> and Russia (1979)<sup>48</sup>, to mention only those which were addressed in recent

<sup>38</sup> For the transposition of the Brussels Convention into Regulation 44/2001, see in the Italian literature, Bertoli, *La disciplina della giurisdizione civile nel Regolamento comunitario N. 44/2001*, RDIPP 2002, 625.

<sup>39</sup> See e.g. Gaja, *Il rinvio alla Convenzione di Bruxelles in tema di giurisdizione*, in *Convenzioni internazionali e legge di riforma del diritto internazionale privato* (F. Salerno ed.), Padua 1997, at 22.

<sup>40</sup> On the respective scope of the Brussels and Lugano Conventions, see Mari, *Il diritto processuale civile della Convenzione di Bruxelles*, Padua 1999, at 24 et seq.

<sup>41</sup> See in the Italian literature Bonomi, *Il regolamento comunitario sulla competenza e sul riconoscimento in materia matrimoniale e di potestà dei genitori*, RDI 2001, 298, esp. at 329; Ballarino, *Manuale breve di diritto internazionale privato*, Padua 2002, at 36; Mosconi (note 17), at 57 et seq.

<sup>42</sup> See particularly Art. 1 of the Convention, allocating primary jurisdiction to authorities, both judicial and administrative, of the country of the habitual residence of the minor, as well as Art. 3, 4 and 5, allocating alternative jurisdiction to national authorities.

<sup>43</sup> See Art. 7 and 8 of the Convention: see Brogini (note 1), at 907.

<sup>44</sup> See for an application Court of Appeal of Venice, 13 June 1997, RDIPP 1997, 975.

<sup>45</sup> See for an application Court of Cassation, 21 April 1997, n. 3411, RDIPP 1997, 860.

<sup>46</sup> See for an application Court of Cassation, 14 January 2003, n. 365, RDIPP 2003, 201, as well as Court of Cassation (Sez. un.), 8 February 2001, n. 47, RDIPP 2001, 1014.

<sup>47</sup> See for an application Court of Cassation (Sez. un.) 7 August 1998, n. 7759, RDIPP 1999, 586.

<sup>48</sup> See for an application Court of Cassation, 13 June 2003 (note 24), as well as Court of Appeal of Ancona, 21 July 1999, RDIPP 2000, 169.

case-law. Nonetheless, though jurisdictional bases are included in these instruments, their significance is limited to recognition (*compétence internationale indirecte*)<sup>49</sup> and *lis alibi pendens*<sup>50</sup>. On the contrary, the old consular treaty between Italy and Switzerland of 1868, which is still in force, also deals with adjudicatory jurisdiction in succession matters and recently triggered an interesting question of interpretation<sup>51</sup>.

### 3. General and Special Bases for Jurisdiction

In accordance with a distinction generally accepted by Italian scholars<sup>52</sup>, jurisdictional bases may be general or special. A general basis for jurisdiction is one available irrespective of the specific type of claim involved. Jurisdictional grounds applying to very broad categories of disputes, such as all non-contentious proceedings<sup>53</sup> or provisional measures, are also categorized as general. A special basis is one available for types of claim involving specific matters only. The relationship between these two categories of jurisdictional grounds, particularly the question whether the special bases are exclusive of, or merely alternative to, the general bases, is not always apparent. The resulting system is highly complex and, as it has been said, only practical application may reveal all the fine-tuning necessary for it to work properly<sup>54</sup>.

#### A. General Bases for Jurisdiction

Four general jurisdictional bases are available for ordinary, contentious proceedings (a). The first and the fourth cover virtually any type of claim. The second and the third apply to very broad categories of disputes, the third encompassing virtually every matter which does not fall under the second. Although each is alternative to the first and the fourth, the second and the third bases for jurisdiction are mutually exclusive.

<sup>49</sup> "Giurisdizione indiretta" in the words of Court of Cassation, 13 June 2003, n. 9365 (note 24), at 658.

<sup>50</sup> See e.g. Court of Appeal of Venice, 13 June 1997 (note 44), as well as Court of Cassation, 13 June 2003 (note 24).

<sup>51</sup> Tribunal of Brescia, 25 November 1999, RDIPP 2000, 1041, with a commentary by Fumagalli, *Questioni di diritto internazionale privato delle successioni in una giurisprudenza recente*, RDIPP 2000, 931.

<sup>52</sup> See e.g. Ballarino (note 5), 105-106; Attardi (note 30), at 736; Starace (note 31), at 244; Luzzatto (note 5), at 22-23.

<sup>53</sup> See Honorati, Art. 9, NLCC 1996, at 972 et seq.

<sup>54</sup> Luzzatto (note 5), at 26. On the coordination between the special and the general bases for jurisdiction set forth in the Act, see particularly Salerno (note 28), at 921 et seq.



General bases in respect of non-contentious proceedings and provisional measures are also contemplated in the Act (b).

*a) Contentious proceedings*

1. Adjudicatory jurisdiction exists if the defendant has either its domicile or its residence in Italy<sup>55</sup>, or has a legal representative in Italy having the power to appear in Court pursuant to Art. 77 of the Code of Civil Procedure (Art 3(1) of the Act)<sup>56</sup>. The concepts of domicile, residence and legal representative are those of Italian law<sup>57</sup>. As one court ruled, legal representation must have been granted for substantive, not only procedural, matters<sup>58</sup>. Residence and legal representation should not involve a significant extension of the scope of jurisdiction, so that it could hardly be maintained that they are exorbitant<sup>59</sup>. Absent any indication to the contrary in this respect, domicile is generally held to be equal to place of business (or seat) for legal persons<sup>60</sup>. As in the Brussels system, according to the prevailing view, the place of business should be defined pursuant to the Italian conflicts rule<sup>61</sup>.

2. With respect to matters covered by the Brussels Convention, jurisdiction may also be entertained on the basis of the connecting factors under Sections 2, 3 and 4 of the Convention, which deal with special jurisdiction and jurisdiction over consumer and insurance contracts (Art. 3(2) first sentence of the Act). This audacious extension<sup>62</sup> of the Brussels system was decided in the very last stretch of the long legislative process of the new codification<sup>63</sup>. A foreign author described this "internaliza-

<sup>55</sup> For a case of residence in Italy without domicile, see Tribunal of Genua, 11 September 1997, RDIPP 1998, 576.

<sup>56</sup> For an application of the basis for jurisdiction consisting in the existence of a legal representative, see Court of Cassation (Sez. un.), 30 June 1999, n. 369, RDIPP 2000, 741.

<sup>57</sup> Ballarino (note 5), at 107; Morelli (note 9) at 101, Gaja (note 39), at 24. See for the interpretation of the concept of residence according to Italian law, Court of Cassation (Sez. un.), 3 February 2004, n. 1994, RDIPP 2004, 1390, at 1391.

<sup>58</sup> Court of Cassation, 17 November 1999, n. 785, RDIPP 2000, 1023, esp. at 1033; in this scholarship, see Ballarino (note 5), at 108; see also Walter (note 2), at 12.

<sup>59</sup> So e.g. Gaja (note 39), at 25.

<sup>60</sup> See Court of Cassation (Sez. un.), 25 July 2002, n. 10994, RDIPP 2003, 503. see also Court of Cassation, 19 November 1999 (note 58), at 1038; Mosconi (note 17), at 66; Gaja (note 39), at 24.

<sup>61</sup> Salerno (note 28), at 917 et seq.; cf. Brogginì (note 1), at 907.

<sup>62</sup> So Ballarino/Bonomi (note 1), at 104.

<sup>63</sup> Gaja (note 39), at 26; Brogginì (note 1), at 905-906.

tion<sup>64</sup> as "masterful"<sup>65</sup>. Courts have already had extensive recourse to this rule<sup>66</sup>, not only in disputes falling under Article 5, but also, for example, with respect to consumer contracts under Art. 13<sup>67</sup>, actions on a warranty or guarantee under Art. 6.2<sup>68</sup> and counter-claims under Art. 6.3<sup>69</sup>. The internalization of the Brussels regime does however entail certain problems. First, there has been considerable debate concerning whether this reference also includes Articles 12, 12-*bis* and 15 dealing with derogation from jurisdiction in consumer or insurance contracts. The opinions are mostly negative<sup>70</sup>. Scholars generally agree that Italian courts, when applying the Convention's rules, should refer to the case-law of the Court of Justice<sup>71</sup>. Such appears to have been the case so far, adjudicators having often indulged in extensive quotations of the ECJ's rulings<sup>72</sup>. As to the possibility of obtaining a preliminary ruling from the ECJ, scholars' views are divided<sup>73</sup>. Some case-law of the ECJ<sup>74</sup> may be

64 This terminology is taken from Kaye, *Interpretation of Jurisdiction under the new Italian Private International law Statute. Some reflections and the English experience*, in *Convenzioni internazionali e legge di riforma del diritto internazionale privato* (ed. by F. Salerno), Padua 1997, 37, at 39.

65 Walter (note 2), at 12.

66 See e.g. Court of Cassation (Sez. un.), 24 July 2003, n. 11526, RDIPP 2004, 678; Court of Cassation (Sez. un.), 7 May 2003, n. 6899, RDIPP 2004, 635; Court of Cassation (Sez. un.), 11 February 2003, n. 2060, RDI 2003, 577, also in RDIPP 2003, 547; Court of Cassation (Sez. un.), 17 January 2002, n. 503, RDIPP 2002, 436; Court of Cassation (Sez. un.), 19 June 2000, n. 448, RDIPP 2001, 416; Court of Cassation, 19 November 1999, n. 794, RDIPP 2000, 1035; Court of Cassation (Sez. Un.), 10 August 1999, n. 579, RDIPP 2000, 988.

67 See e.g. Tribunal of Rome, 30 September 2002, RDIPP 2003, 181.

68 See e.g. Court of Cassation (Sez. un.), 10 August 1999 (note 66).

69 Court of Cassation (Sez. un.), 17 January 2002 (note 66).

70 Gaja (note 39), at 28; Starace, *La disciplina dell'ambito della giurisdizione* (Art. 3-11), *Corr. Giur.* 1995, 1234; *Id.* (note 7), at 70; Luzzatto (note 5) at 935; more hesitant Brogginì (note 1), at 908; for the opposite view, Pocar (note 1), at 24-25.

71 See e.g. Ballarino/Bonomi (note 1), at 105; Luzzatto (note 5), at 28-29; Brogginì (note 1), at 909.

72 See e.g. Court of Cassation (Sez. un.), 7 May 2003, n. 6899, RDIPP 2004, 635; Court of Cassation (Sez. un.), 11 February 2003, n. 2060, RDI 2003, 577; Court of Appeal of Milan, 20 March 1998, RDIPP 1998, 170.

73 See, for the negative view, Brogginì (note 1), at 909, and Luzzatto (note 5), at 29; for the affirmative view, Gaja, *L'interpretazione di norme interne riprodotte della Convenzione da parte della Corte di giustizia*, *Riv. dir. int.*, 1995, 757, and Mosconi (note 17), at 68.

74 *Kleinwort Benson Ltd. v. Glasgow City Council*, Case C-346/93, [1995] ECR, p. I-615 et seq., RDIPP 1995, 773; for a commentary of this case see Kaye (note 64), at 43 et seq. as well as Walter (note 2), at 13-14.

understood to suggest that this is possible, though no clear indication is ultimately inferable<sup>75</sup>. A further question is whether the mention of the Brussels Convention is now to be read as referring to Regulation 44/2001. This question may have practical implications, because the contents of the two instruments are not entirely identical<sup>76</sup>. Since both views appear to be supported by solid arguments<sup>77</sup>, a legislative solution has been unanimously advocated<sup>78</sup>. Both scholars and courts agree that no recourse is possible to rules on venue if the dispute is related to a matter covered by the Brussels Convention<sup>79</sup>.

3. In matters other than those covered by the Brussels Convention, jurisdiction is available when a basis for venue ("territorial competence" in the Italian phraseology) exists<sup>80</sup> (Art. 3(2), last sentence of the Act). This is held by some to be the most significant innovation<sup>81</sup>. Indeed, uniform treatment of jurisdiction and venue is not traditional in Italy. Arguably, the German system had its influence here<sup>82</sup>. As one court recalls, the defendant must not have its domicile in a EU country or the Brussels Convention will apply exclusively, which may well deny jurisdiction to Italian courts<sup>83</sup>. The courts have also used reference to venue extensively to date, notably in family and insolvency matters<sup>84</sup>. Indeed,

<sup>75</sup> According to Kaye (note 64), at 46, it is not inconceivable that the ECJ "[might] be willing to entertain a request for Convention interpretation for the purposes of the application of the new Italian statute", though such a finding would, in his view, "be open to serious challenge on policy grounds".

<sup>76</sup> Particularly with regard to the definition of domicile of legal persons, identification of place of enforcement of the contractual obligation, and the moment of pending proceedings: see, in the Italian literature, Bertoli (note 38), esp. at 630 et seq.

<sup>77</sup> See Bertoli (note 38), at 630, note 14; for the negative view, see Bonomi (note 39), at 306, note 13.

<sup>78</sup> See references in the previous note, adde Bariatti, *La compétence internationale et le droit applicable au contentieux du commerce électronique*, RDIPP 2002, at 19.

<sup>79</sup> Particularly explicit on this point are Court of Cassation (Sez. un.), 11 February 2003, n. 2060 (note 66), and Court of Cassation (Sez. un.), 7 May 2003, n. 6899, RDIPP 2004, 635; for the scholarly view, see Boschiero (note 2), at 104.

<sup>80</sup> For a list of the bases for territorial competence which are extended to adjudicatory jurisdiction, see Ballarino (note 41), at 39.

<sup>81</sup> For example Starace (note 31), at 245.

<sup>82</sup> Migliazza, *Rilievi sulla giurisdizione, sulla competenza territoriale e sulla competenza internazionale*, Raccolta in ricordo di E. Vitta, Milan 1994, 363, at 364; Attardi (note 30), at 731; Brogini (note 1), at 910.

<sup>83</sup> Court of Cassation, 26 June 2001, n. 8745, RDIPP 2002, at 417.

<sup>84</sup> See e.g. Court of Cassation (Sez. un.), 13 December 2002, n. 17912, RDIPP, 2003, 1002, as well as Court of Cassation 11 May 2001, n. 8745, RDIPP 2002, 412.

reference to venue is not limited to rules laid down in the Code of Civil Procedure, but also extends to special legislation<sup>85</sup>, such as that concerning insolvency. It has been debated at length whether this reference also covers the residence of the plaintiff as a general basis for jurisdiction in case the defendant has his or her domicile or residence abroad, as provided in Art. 18 of the Code of Civil Procedure. According to the prevailing scholarly view, this is not, or should not be, the case<sup>86</sup>, the main argument being that the general personal forum is already laid down in Art. 3(1) of the Act. This argument, however, has been rejected by a number of decisions, including decisions of the Court of Cassation, which positively ruled that jurisdiction may be grounded on plaintiff's residence<sup>87</sup>. This parochial interpretation has already sparked some criticism<sup>88</sup>, and is likely to do so again in the near future. The case-law at issue, however, essentially involves matrimonial proceedings.

4. Another general basis for jurisdiction is the consent of the parties (Art. 4(1) of the Act). There is virtually no restriction for this "prorogation" of forum jurisdiction. Consent of the parties may be express, through a choice of court agreement, or tacit, through the parties' conduct during proceedings. The only formal requirement for an express choice of court is that the agreement be evidenced in writing. Tacit or, as one court puts it<sup>89</sup>, presumptive consent takes place when the defendant appears without challenging jurisdiction in his or her first statement of defense<sup>90</sup>. This is a most rigid rule<sup>91</sup>: failure to allege lack of jurisdiction

<sup>85</sup> Ballarino (note 5), at 115; for a discussion of reference to the provision on venue contained in Art. 9 of the Insolvency Act of 1942, see Boschiero (note 2), at 120; if the center of the main interests of the debtor is situated in the Community, Regulation No. 1346/2000 of 29 May 2000 applies, containing in Art. 3 a basis for "international jurisdiction".

<sup>86</sup> Ballarino/Bonomi (note 1), at 104; cf. also Salerno (note 28), at 888 as well as Starace (note 31), at 262 et seq.; for the opposite view, see e.g. Attardi (note 30), at 733, who, however, does not seem to approve of this legislative extension.

<sup>87</sup> Court of Cassation (Sez. un.), 27 November 1998, n. 12056, where the "whole application to the alien of Art. 18 Cod. Proc. Civ." is mentioned; Tribunal of Milan, 27 February 2002, RDIPP 2002, 1040; Court of Cassation (Sez. un.), 3 February 2004, n. 1994, RDIPP 2004, 1390. Somewhat hesitant appears to be Court of Cassation, 19 November 1999 n. 794, RDIPP 2000, 1035, though in an "obiter dictum", at 1038.

<sup>88</sup> M.A. Lupoi (note 32), t. II, at 960.

<sup>89</sup> Tribunal of Milan, 11 December 1997, RDIPP 1998, 854, esp. at 860, where the tribunal mentions "the tacit (rather presumptive) acceptance" of the jurisdiction by the defendant.

<sup>90</sup> See for an application Court of Cassation (Sez. un.), 23 November 2000, n. 1200, RDIPP 2001, 994.

in the very first pleading, even if other procedural motions challenging the power of the court to adjudicate on the merits are raised, is a sufficient ground for asserting jurisdiction. The actual consent, albeit tacit, of the defendant ultimately plays no role at all<sup>92</sup>. The Court of Cassation further ruled that challenge of venue may not be considered to imply challenge of jurisdiction<sup>93</sup>.

The four above-mentioned general bases for jurisdiction are subject to two exceptions. The first is immunity of foreign states or organizations (to be inferred from Art. 11, last sentence, of the Act). The case-law is abundant on this subject and in line with that developed under the old rules<sup>94</sup>, the basic idea being that of an immunity restricted to *acta iure imperii*<sup>95</sup>. The second exception is represented by actions *in rem* on immovables situated abroad (Art. 5 of the Act). As one court ruled, these do not include contractual claims arising out of immovables, such as tenancies<sup>96</sup>. These two exceptions also apply to prorogation of jurisdiction. As a result, jurisdiction in these cases may be challenged by the defendant and dismissed by the court on its own motion at any time during the proceedings, whereas in any other circumstances the court verifies the existence of a basis for jurisdiction only in the context of default proceedings (Art. 11 of the Act). Finally, it should be noted that for preliminary, related questions, the answer to which are necessary to adjudicate the proposed question, domestic jurisdiction may be asserted<sup>97</sup>.

#### a) *Non-contentious proceedings and provisional measures*

The Act contains a general provision on jurisdiction over non-contentious matters, which was previously unregulated. Jurisdiction exists

<sup>91</sup> Consolo, Preclusione delle eccezioni in senso stretto, c.d. accettazione tacita e difetto di giurisdizione italiana, RDIPP 1996, 181, at 184 et seq.

<sup>92</sup> Consolo (note 91), at 191-192; Attardi (note 30), at 735.

<sup>93</sup> Court of Cassation (Sez. un.), 24 July 2003, n. 11526, RDIPP 2004, 678.

<sup>94</sup> See Court of Cassation (Sez. un.), 2 August 2000, n. 531, RDIPP 2001, 423.

<sup>95</sup> Court of Cassation, 12 November 2003, n. 17087, RDIPP 2004, 1034; Court of Cassation (Sez. un.), 3 August 2000, n. 530, RDI 2000, 1155; Court of Cassation (Sez. un.), 18 March 1999, n. 149, RDIPP 2000, 472; Court of Cassation, (Sez. un.), 12 June 1999, n. 328, RDIPP 2000, 727; Court of Cassation (Sez. un.), 12 June 1999, n. 331, RDIPP 2000, 727; Court of Cassation (Sez. un.), 6 May 1997, n. 3957, RDI 1997, 1162; Court of Cassation (Sez. un.), 15 July 1999, n. 395, RDIPP 2000, 757. For a detailed account of this abundant case-law, see Mosconi (note 17), at 73 et seq.

<sup>96</sup> Court of Cassation (Sez. un.), 25 July 2002 (note 60), at 503 et seq.

<sup>97</sup> See Luzzatto (note 5), at 43.

if a venue is available, if the proceedings involve an Italian national or a foreigner resident in Italy or if Italian law is applicable to the case<sup>98</sup>. The characterization of proceedings, whether contentious or non-contentious, may on occasion give rise to some difficulties. A lower court eschewed this problem with respect to incapacitation proceedings considering that both characterizations would have enabled it to entertain jurisdiction<sup>99</sup>.

As regards provisional measures, jurisdiction exists in two alternative circumstances<sup>100</sup>: if the measure is to be enforced in Italy, typically on an immovable located here<sup>101</sup>, or if Italian courts have jurisdiction over the merits (Art. 10 of the Act). As one lower court ruled, the latter ground for jurisdiction cannot be used if the parties have selected a foreign forum<sup>102</sup>, although this should not prevent recourse to the first ground<sup>103</sup>. On the other hand, jurisdiction over the merits may also be used also if proceedings are already pending abroad, provided that an Italian judge could also have entertained the action<sup>104</sup>. Identification of the place of enforcement has raised some difficulties when the measure consists of an order not to do something, typically not to enforce a bank guarantee. It was argued that the place of enforcement is in this instance the place of performance of the main obligation. One court rejected this argument on the dubious ground that this would have undermined the duality of jurisdictional bases, the place of performance already justifying jurisdiction over the merits. Place of enforcement – the court ruled – is rather that (or one of those) where non compliance with the negative order would cause prejudice to the other party<sup>105</sup>. Whatever the exact meaning of this may be, it appears that the concept of place of enforcement in the case of negative orders must be interpreted extensively.

<sup>98</sup> See on this provision, among others, Honorati (note 53), at 974; Starace (note 7), at 79-81; Attardi (note 30), at 754 et seq.

<sup>99</sup> Tribunal of Pordenone, 7 March 2002, RDIPP 2002, 1052.

<sup>100</sup> See particularly, Tribunal of Udine, 21 July 2000, RDIPP 2001, 974. In the scholarship, see Salerno, Art. 10, NLCC 1996, 983; Ballarino (note 5), at 119-121; Mosconi (note 17), at 81 et seq.

<sup>101</sup> Tribunal of Rome, 22 January 1998, RDIPP 1998, 442.

<sup>102</sup> Tribunal of Milan, 10 November 1998, RDIPP 1999, 598.

<sup>103</sup> Tribunal of Rome, 22 January 1998, RDIPP 1998, 442.

<sup>104</sup> Tribunal of Alba, 14 May 1996, Tribunal of Rome, 22 January 1998, Tribunal of Milan, 10 November 1998, all quoted in Mosconi (note 17), at 81.

<sup>105</sup> Tribunal of Udine, 21 July 2000 (note 100), esp. at 979.

## B. Special Bases for Jurisdiction

As discussed, there are a number of special rules on jurisdiction scattered throughout the Act, involving both contentious and non-contentious matters. These include the declaration of absence and death (Art. 22), matrimonial proceedings (Art. 32), parent-child relationships (Art. 37), adoption (Art. 40), protection of minors (Art. 42) and adults (Art. 44) and successions (Art. 50)<sup>106</sup>. The provision concerning protection of minors "internalizes" the Hague Convention of 1961<sup>107</sup>. The other contain such a large list of wholly domestic jurisdictional grounds that on occasion they stretch beyond the scope of jurisdiction that existed prior to the new codification<sup>108</sup>. This shows the extent to which the risk of "judicial tribalism" is never far away<sup>109</sup>. These special grounds are usually alternative to the general ones<sup>110</sup>. Sometimes, however, such as in most non-contentious matters<sup>111</sup> and matters of succession<sup>112</sup>, they are, or in any event appear to be, exclusive of the corresponding general ground. In family and succession matters<sup>113</sup>, jurisdiction is still grounded on nationality<sup>114</sup>, so much so that an author concluded that at the end of the day nationality, far from being put to rest by the new codification, has merely been turned into a special basis for jurisdiction<sup>115</sup>. Though being on occasion clearly exorbitant<sup>116</sup>, these special bases for jurisdiction have been used by adjudicators quite broadly thus far<sup>117</sup>.

<sup>106</sup> See among others Starace (note 7), at 75; Brogginì (note 1), at 908; Boschiero (note 2), at 105.

<sup>107</sup> See for an application Court of Cassation (Sez. un.), 9 January 2001, n. 1, RDIPP 2002, 128, with a commentary by Montanari, *Giurisdizione e riconoscimento delle decisioni sulla protezione del minore bipolide tra convenzione dell'Aja e diritto comune*, RDIPP 2002, 99.

<sup>108</sup> Luzzatto (note 2), at 159.

<sup>109</sup> This terminology is used by Brogginì (note 6), at 853.

<sup>110</sup> See e.g. Court of Cassation, 27 November 1998, n. 12056, RDI 1999, 526, at 529, regarding Art. 32 on matrimonial proceedings.

<sup>111</sup> Honorati (note 53), at 973, and Starace (note 7), at 75.

<sup>112</sup> See e.g. Attardi (note 30), at 739.

<sup>113</sup> See for an application Tribunal of Brescia, 25 November 1999, RDIPP 2000, 1041, at 1043.

<sup>114</sup> For divorce proceedings where Art. 32 has been given application, see Court of Cassation (Sez. un.), 8 February 2001, n. 47, RDIPP 2001, 1014.

<sup>115</sup> Starace (note 31), at 251; *id* (note 7), at 70; also see Boschiero (note 2), at 113.

<sup>116</sup> Brogginì (note 1), at 908.

<sup>117</sup> See case-law quoted above, at note 110, 113 and 114.

Interestingly, a new unwritten specific basis for jurisdiction has been identified by one court with respect to the payment of attorney's fees: if the case for which legal representation was carried out has been heard by an Italian court, the same court has jurisdiction with respect to recovery of the fees, despite the foreign domicile and residence of the client<sup>118</sup>.

#### 4. Choice of Foreign Adjudicator and *lis alibi pendens*

Under the old rules, displacement of domestic jurisdiction in favor of foreign courts was permitted only exceptionally, i.e. in disputes concerning obligations and having a weak connection to Italy<sup>119</sup>. This possibility is now generally allowed, regardless of how strongly the case is connected to Italy (Art. 4(2) of the Act)<sup>120</sup>. The only conditions imposed are that the dispute must involve alienable rights and that written evidence of a choice by the parties of a foreign adjudicator, whether a court or an arbitrator, be provided. Designation of all judges of a particular foreign jurisdiction should be sufficient<sup>121</sup>. There is no particular requirement for the validity of this derogation agreement, regardless of whether one of the parties deserves special protection under domestic law<sup>122</sup>: as the Constitutional Court has indicated, the legislator is free to give priority to international policies over merely domestic ones<sup>123</sup>. A derogation agreement, which was not valid at time of conclusion because it was entered into by two Italian nationals domiciled in Italy, was nonetheless held valid because the key moment for the purposes of assessing validity is the moment when action is brought<sup>124</sup>. Identification of what exactly is to be intended by "alienable rights" may be a matter of dispute. It would appear that reference should be made to theory and practice devel-

<sup>118</sup> Court of Appeal of Milan, 27 December 2001, RDIPP 2002, 695, with a commentary by Villata, *Onorari professionali, giurisdizione italiana e Convenzione di Lugano del 16 Settembre 1988*, RDIPP 2002, 665.

<sup>119</sup> Under Art. 2 Code of Civil Procedure, derogation was permitted only between two foreigners or a foreigner and a national, who had neither residence or domicile in Italy: see e.g. Queirolo (note 5), at 74; Attardi (note 30), 742; Boschiero (note 2), at 132.

<sup>120</sup> See for a discussion Tribunal of Milan, 11 December 1997, RDIPP 1998, 854. In the scholarship, see Queirolo (note 5), *passim*; Ballarino (note 5), at 127 et seq.; Mosconi (note 17), at 70 et seq.; Boschiero (note 2), at 132 et seq.; Carbone (note 8), at 918 et seq.; Attardi (note 30), at 742 et seq.

<sup>121</sup> Carbone (note 8), at 928.

<sup>122</sup> Starace (note 7), at 77.

<sup>123</sup> See the decision mentioned *supra*, at note 32.

<sup>124</sup> Court of Cassation (Sez. un.), 30 June 1999 (note 126), 741; also see Court of Cassation, 30 December 1998, n. 12907, RDI 1999, 521.



oped with respect to the arbitrability of disputes<sup>125</sup>, however vague and uncertain these may sometimes be<sup>126</sup>. According to one author, the mandatory character of domestic rules of the forum is not in itself sufficient to refuse the parties the right to displace domestic jurisdiction, unless the choice of a foreign adjudicator exclusively occurred with a view to avoiding application of these rules<sup>127</sup>. In an interesting ruling, one court held that since the parties may not derogate from the rules in the Civil Code which protect the commercial agent, a choice of foreign court has no effect in this instance<sup>128</sup>. A lower court ruled that, unless otherwise stipulated by the parties, the foreign forum merely possesses concurrent, non-exclusive jurisdiction, such that access to the domestic forum is permissible<sup>129</sup>.

Another sweeping innovation introduced by the Act is the treatment of *lis alibi pendens*. Under the old system, no significance was given to the fact of overlapping foreign proceedings<sup>130</sup>. "For – as a court points out – self-evident reasons of procedural economy as well as the goal of avoiding the possibility of contradictory judgments"<sup>131</sup>, Italian courts should now stay proceedings when an action between the same parties involving the same issue and the same cause of action is already pending before a foreign court (Art. 7(1) of the Act). As one author points out, this new rule rests further on the assumption of a basic equivalence between the foreign proceedings and the domestic ones<sup>132</sup>. The fact that a third party is also party to one of the two concurrent proceedings does not stand in the way of giving application to the rule<sup>133</sup>. The meaning of the identity of

<sup>125</sup> See Art. 806 of the Code of civil procedure; Carbone (note 8), at 924, Queirolo (note 5), at 225; Luzzatto (note 2), at 159.

<sup>126</sup> Luzzatto (note 2), at 158, Queirolo (note 5), at 225.

<sup>127</sup> So Carbone (note 8), at 926.

<sup>128</sup> Court of Cassation (Sez. un.), 30 June 1999, n. 369, RDIPP 2000, 740.

<sup>129</sup> Tribunal of Milan, 11 December 1997, RDIPP 1998, 854 (also quoted by Mosconi (note 17), at 71; see also Carbone (note 8) at 928.

<sup>130</sup> For an historical and comparative analysis of *lis pendens* in Italy, see Lupoi (note 32), t. II, at 797 et seq., and Consolo, Profili della litispendenza internazionale, in Nuovi problemi di diritto processuale civile internazionale, Milan 2002, 121, esp. at 123 et seq. For a detailed comment on Art. 7, see Di Blase, Art. 7, NLCC 1996, at 947. Also see Ballarino (note 5), at 131-132; Mosconi (note 17), at 79-80.

<sup>131</sup> Tribunal of Milan, 11 December 1997, RDIPP 1998, 854; Tribunal of Varese, 9 May 2002, RDIPP 2003, 468 also mentions the objective "of avoiding duplication of judicial activities".

<sup>132</sup> Starace (note 31), at 255.

<sup>133</sup> Tribunal of Varese, 9 May 2002, RDIPP 2003, 468.

causes of action is likely on occasion to give rise to practical difficulties<sup>134</sup>. The case-law has thus far shown that there is no identity of causes of action, for example, between separation and divorce proceedings<sup>135</sup>. Contrary to what is stated in the Brussels Convention, a motion for *lis alibi pendens* must be made by one of the parties<sup>136</sup>, including, according to case-law, the plaintiff<sup>137</sup>. A further condition is that the domestic adjudicator anticipates that the foreign decision will be enforceable in Italy<sup>138</sup>. This recognition test is new, and one may wonder whether this should be understood in terms of reasonable certainty or mere probability of recognition. According to one ruling, proceedings shall be stayed if the court "cannot exclude the possibility that the foreign decision will be enforceable in the Italian legal order"<sup>139</sup>. Difficulties are likely to arise in practical application: depending on which stage the foreign proceedings have reached, it may on occasion be difficult to anticipate, say, any violation of procedural public policy<sup>140</sup>. With respect to related actions, it is within the discretion of the court to stay the domestic proceedings, provided that, here again, the prospective foreign judgment has good prospects of successfully passing the recognition test (Art. 7(3) of the Act)<sup>141</sup>.

Arguably, this presents some similarities with the *forum non conveniens*<sup>142</sup> mechanism, which has not been adopted by the Italian legislator – regrettably, according to some authors<sup>143</sup> – the exercise of jurisdic-

<sup>134</sup> See for a discussion Lupoi (note 32), t. II, at 818; Consolo (note 130), at 232; Di Blase (note 130), at 950-951.

<sup>135</sup> Tribunal of Venice, 14 November 1996, RDIPP 1997, 158, at 163, ruled that the two proceedings concern "completely different matters, despite the similarity of the debated issues"; see more recently Court of Cassation (Sez. un.), 20 July 2001, RDIPP 2002, 420.

<sup>136</sup> See Court of Appeal of Venice, 13 June 1997 (note 44), at 978, as well as Court of Cassation (Sez. un.), 19 June 2000, n. 448, RDIPP 2001, 416. As Di Blase (note 130), at 954, notices, the letter of Art. 4 is "unambiguous" in this regard; Consolo, *Evoluzioni nel riconoscimento delle sentenze*, in *Nuovi Problemi di Diritto processuale civile internazionale*, Padua 2002, 3, at 49, observes that is against the Italian tradition.

<sup>137</sup> Tribunal of Milan, 11 December 1997, RDIPP 1998, at 854.

<sup>138</sup> See on this test Lupoi (note 32), at 853; Di Blase (note 130), at 953 et seq., Attardi (note 30), at 746 et seq.

<sup>139</sup> Tribunal of Milan, 11 December 1997 (note 137), at 855; see Lupoi (note 32), at 833.

<sup>140</sup> Cf. Luzzatto (note 5), at 47.

<sup>141</sup> See e.g. Di Blase (note 130), at 964 et seq.; Attardi (note 30), at 751.

<sup>142</sup> Cf. Luzzatto (note 5), at 47.

<sup>143</sup> Ballarino/Bonomi (note 1), at 104.

tion, once a basis for this is available, being not discretionary, but obligatory<sup>144</sup>. Particularly with respect to related actions, where the stay of proceedings is optional, the domestic court, though in principle possessing jurisdiction over the action, may nonetheless dismiss it, at least temporarily, after satisfying itself of the appropriateness or "convenience" of the jurisdictional claim by the foreign adjudicator. The crucial difference is, however, that a suit must actually be pending abroad: the mere possibility for the parties, most notably the plaintiff, to bring it there, which is enough for *forum non conveniens*, will not be sufficient to trigger *lis alibi pendens*.

Finally, procedure in Italy is now expressly governed by Italian law (Art. 12 of the Act). This solution is likely to give rise to the traditional difficulties in connection with distinguishing between procedure and substance. By way of example, the Court of Cassation was faced with the issue of whether the preliminary assessment of the reasonableness of commencing proceedings for judicial declaration of paternity, contemplated by Italian law, is a substantial or procedural requirement. The latter solution was ultimately adopted<sup>145</sup>. According to case-law, the validity of a power of attorney for the purposes of a case litigated before an Italian judge is governed by Italian law<sup>146</sup>. In a recent ruling, however, it was held that the validity of the power of attorney must be assessed according to *lex loci actus*, which may be foreign, provided however that the core of the foreign law is similar to that of Italian law<sup>147</sup>. In this vein, a private writing devoid of authentication has been held to have no effect<sup>148</sup>. No indications concerning the law applicable to evidence are provided in the Act. According to one author, the solution adopted by the Rome Convention may represent a useful reference in this regard<sup>149</sup>.

## II. Recognition and Enforcement of Foreign Judgments

First, the historical background and the scope of the new rules on recognition and enforcement of foreign judgments will be illustrated (1). Next, the conditions for recognition and enforcement detailed under Art.

<sup>144</sup> Luzzatto (nota 5), at 20-21.

<sup>145</sup> Court of Cassation, 1 December 1999, n. 13408, RDIPP 2001, 164.

<sup>146</sup> See recently Court of Cassation, 12 July 2004, n. 12821, RDIPP 2005, 145.

<sup>147</sup> Court of Cassation (Sez. un.), 26 June 2001, n. 8744, RDIPP 2002, at 407 et seq.

<sup>148</sup> Court of Cassation (Sez. un.), 15 January 1996, n. 264, RDIPP 1997, at 126 et seq.

<sup>149</sup> Mosconi (note 17), at 83.

64 will be set out (2). The already "classical"<sup>150</sup> problem of how the scope of Art. 64, 65 and 66 interrelate will then be discussed (3). Finally, a few details about the *exequatur* proceedings will be provided (4).

### 1. Historical Background and Scope of the New Rules

Italian thinking and practice on recognition and enforcement of foreign decisions evolved in a rich, at times convoluted, historical setting. For the present purposes, suffice it to say that four periods may be distinguished<sup>151</sup>. The first, stretching from the Code of 1865, which was inspired by Mancini, up to the extensive amendments it underwent in 1919<sup>152</sup>, was characterized by a considerable reliance on foreign adjudications: in the silence of the law, mere recognition was generally held to require no procedure<sup>153</sup> and preconditions were few, finality of judgment and absence of a suit pending in Italy not being among them<sup>154</sup>. The second period was largely a reaction to this "internationally-mindedness"<sup>155</sup>, reliance on foreign adjudications generally being considered to be misplaced. As a result, *exequatur* procedure was extended to recognition, a review of the substance of default judgments was introduced, and the recognition test was strengthened<sup>156</sup>. A great deal of scholarly energy – arguably surprising in retrospect, particularly for foreign observers – was devoted to explaining how the foreign judgment and the domestic *exequatur* decision enforcing it conceptually interrelate<sup>157</sup>. By the thirties, however, some scholars had started working towards a relaxation of this parochial approach<sup>158</sup>, which nonetheless still permeated the Code

<sup>150</sup> See Consolo (note 137), at 51.

<sup>151</sup> So Brogginì (note 6), at 831.

<sup>152</sup> This liberalism had already been attacked by Anzilotti by the turn of the century, *Dei casi in cui è necessario il giudizio di delibazione di una sentenza straniera*, Giur. it., LIII (1901), Opere di D. Anzilotti, IV vol., Padua 1963, 192. On Anzilotti's thinking respecting recognition of foreign judgments, see Condorelli, *La funzione del riconoscimento di sentenze straniere*, Milan 1967, at 85 et seq.

<sup>153</sup> Cappelletti (note 11), at 198, Consolo (note 137), at 5.

<sup>154</sup> Consolo (note 137), at 4.

<sup>155</sup> This word is used by Nussbaum, *The Enforcement of Foreign Judgments in Civil Law Countries*, in *Selected Readings on Conflict of Laws* (M.S. Culp), St. Paul, Minnesota, 1956, at 446-447, to describe Mancini's reliance on foreign adjudications: see Cappelletti (34), at 198.

<sup>156</sup> Consolo (note 137), at 7-8; Brogginì (note 5), at 835.

<sup>157</sup> See for references Consolo (note 137), at 8-10, Brogginì (note 6), at 840.

<sup>158</sup> Consolo (note 137), at 8-10.

of 1942, although greatly mitigated through the "incidental" *exequatur*<sup>159</sup>. By the late sixties, the international codification movement, boosted by the Brussels Convention, produced recognition rules largely departing from the rigidity of the domestic system. At the same time, new scholarly researches emphasize the fundamental unity of the ultimate goal underlying recognition and conflicts rules, both aiming towards avoiding contradictory orders or decisions for private individuals<sup>160</sup>, and passionately advocated the abandonment of the parochial approach resting dogmatically on the dubious basis of sovereignty and exclusivity of the forum order<sup>161</sup>.

This complex historical process has led to the present rules, which demonstrate an increased reliance on foreign adjudications, particularly, in the absence of any procedure for recognition and the removal of review of the substance in the case of a default judgment. Adjudicators on the whole have been aware of this new trend: in a recent ruling, the Court of Cassation's attention was drawn to the "unprecedented acceleration of the movement of goods, individuals and ideas"<sup>162</sup>, which is, in the words of a lower court, at the basis of the "growing awareness of the need to pursue the interests of cooperation towards the international community", on which the new approach to recognition is ultimately held to rest<sup>163</sup>.

As to their scope of application, the new rules do not apply to decisions of EU countries with respect to matters covered by the Brussels Convention, now Regulation No. 1344/2000. As regards family matters falling under Regulation No. 1347/2000, this applies in principle if the decision is rendered by a Member State<sup>164</sup>. Other multilateral conventions are reserved in specific matters<sup>165</sup>. As to bilateral treaty, the issue

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<sup>159</sup> So particularly Cappelletti (note 11), at 207; see also Consolo (note 137), at 13-14; Luzzatto (note 170), at 216 and 223-224.

<sup>160</sup> Condorelli (note 151), Cappelletti (note 11).

<sup>161</sup> Cappelletti (note 11), at 192.

<sup>162</sup> Court of Cassation, 28 May 2004, n. 10378, RDI, 2005, 209.

<sup>163</sup> Tribunal of Rome, 18 September 1998, Foro it. 1998, 3654.

<sup>164</sup> For a comparison between Regulation 1347/2000 and Regulation 44/2001 regarding recognition, see Mosconi, *Un confronto fra la disciplina del riconoscimento e dell'esecuzione delle decisioni straniere nei recenti regolamenti comunitari*, RDIPP 2001, 545.

<sup>165</sup> See for a list Civinini, *Il riconoscimento delle sentenze straniere*, Milan 2001, at 11-12.

arises as to whether the international rules must be given priority over the domestic rules even if the former ones are less favorable to recognition than the latter. Scholars generally appear to opt for the *favor recognitionis*, unless expressly excluded by the treaties<sup>166</sup>. Whenever possible, courts have concluded that recognition and *lis pendens* can be granted, or cannot be granted, under both sets of rules<sup>167</sup>. A lower court, however, appears to have given effect to the domestic rules where the conventional rules did not allow recognition<sup>168</sup>.

## 2. Requirements for Recognition and Enforcement

The most significant change introduced by the Act – which, as mentioned above, is nothing else than a step backwards into a now rather remote past – is the distinction between recognition and enforcement with respect to *exequatur*<sup>169</sup>. Recognition allows a decision to have effects in the forum when no form of coercion by the forum authorities is needed. Enforcement is necessary when the cooperation of public force is required<sup>170</sup>. Recognition no longer requires a particular procedure – it is accorded “automatically” – unless the compliance with any of the requirements is expressly challenged. Enforcement, on the contrary, requires an *exequatur* procedure. A foreign ruling may in part be simply recognized and in part have to be enforced: this is the case for a divorce decree containing measures with respect to children<sup>171</sup>. The requirements for recognition and enforcement include the jurisdictional test (a), a number of other preconditions (c), as well as the public policy test (c).

<sup>166</sup> Mosconi (note 17), at 214; Civinini (note 164), at 11-12; Carlevaris, *Il nuovo procedimento per accertare l'efficacia delle sentenze straniere e le prime difficoltà applicative*, RDI 1999, 1005, at 1007 et seq.

note 220), at 1029; Bariatti, *Riflessioni sul riconoscimento delle sentenze civili e dei provvedimenti stranieri*, Studi Broggin, Milan 1997, 29, at 31.

<sup>167</sup> Court of Appeal of Venice, 13 June 1997 (note 44); also see Court of Cassation, 14 January 2003 (note 46), at 201.

<sup>168</sup> Court of Appeal of Bari, mentioned in Court of Cassation of 14 January 2003 (note 46).

<sup>169</sup> On this, see especially Maresca, Art. 64-65, NLCC 1996, at 1462; Civinini (note 164), at 29 et seq.; Luzzatto, *Il riconoscimento di sentenze e provvedimenti stranieri nella riforma del diritto internazionale privato italiano*, in *Convenzioni internazionali e legge di riforma del diritto internazionale privato* (F. Salerno ed.), Padua 1997, 217. Also see Tribunal of Milan, 27 February 2002, RDIPP 2002, 1044; Court of Appeal of Milan, 27 July 1999, RDIPP 2000, 763. A comparative analysis is provided by Consolo (note 137), at 16 et seq.

<sup>170</sup> See Maresca (note 170), at 1461 et seq.

<sup>171</sup> Tribunal of Milan, 27 February 2002, RDIPP, 2002, 1045.

### a) Jurisdictional test

The first – and foremost<sup>172</sup> – requirement is the jurisdictional test. The rule is that the foreign adjudicator rendering the judgment shall have asserted jurisdiction “pursuant to the principles of adjudicatory jurisdiction of the Italian legal order” (Art. 64 lit. a), it being understood however that no review of the factual circumstances on which jurisdiction has been based is permitted<sup>173</sup>. This phraseology is generally understood to incorporate the “mirror principle” (*Spiegelbildprinzip*<sup>174</sup> in German) or the “bilateralism rule” (*bilatéralité* in French). Although the old rule was almost identical, the exclusive character of nationality as a basis for jurisdiction when an Italian was involved lead to a frequent denial of recognition<sup>175</sup>. As courts have promptly realized, reference to the “Italian principles” of adjudicatory jurisdiction cover not only the jurisdictional grounds under Art. 3<sup>176</sup>, including those under the Brussels Convention<sup>177</sup>, but also the consent of the parties under Art. 4<sup>178</sup>, and any special basis included in the Act<sup>179</sup>. The rationale behind the “bilateralism rule” has been criticized by some authors as being unnecessarily rigid<sup>180</sup>. Some scholars insist on the difference between “principles” and “rules” and argue that the choice of the word “principles” means that no full coincidence between the Italian and foreign jurisdictional bases is necessarily required, a mere “reasonableness test” with respect to foreign assertion of jurisdiction being sufficient as well as more in line with the ultimate objective of recognition<sup>181</sup>. Apparently, the

<sup>172</sup> So e.g. Court of Appeal, 28 December 1999, RDIPP 2000, 1081, at 1084.

<sup>173</sup> Court of Cassation, 25 June 2002, n. 9247, RDIPP 2003, 491.

<sup>174</sup> Luzzatto (note 2), at 165; Walter (note 2), at 22.

<sup>175</sup> Brogini (note 6), at 837; Walter (note 2), at 22.

<sup>176</sup> See Boschiero (note 2), at 153-154; Ballarino (note 5), at 160 et seq.

<sup>177</sup> See for example Court of Cassation, 19 September 2000, n. 12398, RDIPP 2001, at 980 et seq.

<sup>178</sup> Court of Cassation, 14 January 2003 (note 46), at 207 et seq., where it is said that “This basis justifies the assertion of jurisdiction by the Italian judge and, consequently, that of the foreign judge as well” (at 208); also see Court of Appeal, 28 December 1999, RDIPP 2000, 1081, at 1084.

<sup>179</sup> See explicitly Court of Cassation, 22 July 2004, n. 13662, RDIPP 2005, 153. For an application of Art. 32 in divorce proceedings for the purposes of the jurisdictional test, see Court of Cassation, 28 May 2004, n. 10378, RDI 2005, at 209.

<sup>180</sup> See e.g. Maresca (note 170), at 1472 (quoting the French case law); Migliazza (note 81), at 365; Di Blase (note 131), at 953; Brogini (note 6), at 845.

<sup>181</sup> Maresca (note 170), at 1472.

Court of Cassation has not to date been called upon to explore this crucial issue any further so far<sup>182</sup>.

*b) Other requirements*

The defendant shall have been duly served with the document instituting the proceedings according to the law of the foreign country, and the fundamental rights of defense shall have been complied with (Art. 64, lit. b). A foreign decision was deemed to fail to comply with the first<sup>183</sup> requirement because the service of process had been made by publication on the press due to an allegedly unknown residence of the defendant, whereas it was subsequently revealed that the plaintiff actually knew where the defendant resided and could have served the defendant there<sup>184</sup>. As to compliance with fundamental rights of defense, this new, comprehensive requirement essentially results in the "procedural public policy" test<sup>185</sup> and, as such, it is often assessed by adjudicators under Art. 64 lit. g). A further precondition is that each of the litigants shall have entered appearance in the proceedings, or their default shall have been declared, in accordance with the foreign law (Art. 64, lit. c). Whereas this does not appear to have triggered any particular case-law, the next requirement has raised some practical difficulties. The judgment should be final according to the law in force in the place where it was rendered (Art. 64, lit. d). A recent ruling by the Court of cassation criticized the lower court for having resorted to the domestic concept of finality, instead of inferring it from foreign law<sup>186</sup>. This test – it ruled – should be interpreted as requiring that the foreign decision be "not subject to review or modification by the same judge that has rendered it or any other judge of the same legal order"<sup>187</sup>. According to another ruling,

<sup>182</sup> The most interesting decisions where compliance with Art. 64 lit a) has been discussed, appear to be Court of Cassation, 14 January 2003 (note 46), at 201 et seq., and Court of Cassation, 28 May 2004, n. 10378, RDI 2005, 209 et seq.

<sup>183</sup> On the duality of requirements set forth by Art. 64 b), see Carlevaris, *L'accertamento giudiziale dei requisiti per il riconoscimento delle sentenze straniere*, RDIPP 2001, 71, who blames the Court of Appeal of Bari, 11 May 2000, RDIPP 2001, 135, for not having distinguished between the two.

<sup>184</sup> See Court of Appeal of Bari, mentioned in the previous note.

<sup>185</sup> Cf. Luzzatto (note 170), at 218: the case-law appears to have familiarity with the notion of "procedural public policy": see references in Civinini (note 164), at 45, note 45.

<sup>186</sup> Court of Cassation, 9 January 2004, n. 115, RDIPP 2004, 1377, cf. Consolo (note 137), at 44 et seq.

<sup>187</sup> Court of Cassation, 9 January 2004 (note 186). This appears to be in line with the proposals of the scholars: see, e.g. Maresca (note 170), at 1475; Attardi (note 30), at 774.



the passage of time or the inscription of the *formule exécutoire* have no significance in this respect<sup>188</sup>. Finally, in order to ensure the harmony of the domestic legal order<sup>189</sup>, the judgment should not conflict with any other final judgment rendered by an Italian court or authority<sup>190</sup> (Art. 64, lit. e) and no proceedings between the same parties and on the same issues initiated before the foreign proceedings should be pending before an Italian court (Art. 64, lit. f)<sup>191</sup>.

### c) Public policy test

The most often advocated ground for challenging recognition in practice is arguably the compatibility with Italian public policy (Art. 64, lit. g). Rulings thus far have mostly tended towards exclusion of this incompatibility<sup>192</sup>. Adjudicators agree that, although the fundamental right to sue and defend is essential to Italian public policy, the specific ways in which this right is regulated or accommodated by Italian law are not<sup>193</sup>. Indeed, as an author noted, the notion of procedural public policy is increasingly influenced by the relevant international instruments and case-law<sup>194</sup>. The absence of a preliminary phase in proceedings for judicial declaration of paternity such as provided by Italian law to avoid the *strepitus fori* does not contradict public policy, nor does the fact that the foreign court waived a request for oral evidence by means of letters rogatory or a request for a judicial expert, or even that different rules respecting burden of proof are laid down by foreign procedural law<sup>195</sup>. Although

<sup>188</sup> Court of Appeal of Milan, 27 February 1998, RDIPP 1999, 563, refused recognition of an Egyptian money judgment because the interested party had proved the *force exécutoire* of the judgment but not its finality according to Egyptian law.

<sup>189</sup> So Mosconi (note 17), at 217.

<sup>190</sup> On the notion of conflict of judgments, see the exhaustive analysis of Attardi (note 30), at 765 et seq. The Court of Appeal of Milan, 28 December 1999, RDIPP 2000, 1081, ruled that the conflict of judgments, in the absence of any restrictive elements in the wording of art. 64, lit. e), "must be interpreted extensively so as to cover various situations of incompatible or contradictory effects that will flow from recognition".

<sup>191</sup> On this requirement see particularly Consolo (note 137), at 49 et seq.; Civinini (note 156), at 53-55.

<sup>192</sup> See rulings mentioned below, in footnotes 193-197.

<sup>193</sup> Court of Cassation, 14 January 2003 (note 46), at 210; particularly insightful is Court of Cassation, 13 December 1999, n. 13928, RDIPP 2000, 1065, esp. at 1068 et seq.

<sup>194</sup> Nascimbene (note 36).

<sup>195</sup> Court of Cassation, 28 May 2004, n. 10378, RDI 2005, 209; Court of Cassation, 22 March 2000, n. 3365, RDIPP 2001, 389.

the principle that grounds for decisions should be made clear by courts is set forth in the Constitution, failure to comply with this principle is not irreconcilable with public policy<sup>196</sup>, unless it prevents verification that the substance of the decision is not itself contrary to public policy, e.g. because it awards punitive damages<sup>197</sup>. As regards divorce, a lower court ruled that a divorce decree between two Italian nationals does not pass the public policy test if it has been rendered based on grounds which are unknown to Italian law<sup>198</sup>. More authoritatively, the Court of Cassation ruled that incompatibility with public policy with respect to foreign divorce decrees exists only when the foreign authority has failed to ascertain that the marriage is irreversibly disrupted. The fact that notarized deeds produced before the foreign court have proved to be falsified does not violate public policy because this "involves the actual effects of the foreign decision rather than the procedural activity that has led to it"<sup>199</sup>.

Review of the substance of the case in the event of a default judgment has been abolished<sup>200</sup>. Default judgment was the only circumstance in which this type of review was allowed. Though conceived as exceptional, courts had too frequent recourse to this<sup>201</sup>. Nor does the Act contemplate a choice-of-law test. This was already the case under the old rules. As a French author has pointed out, however, the objective for which this test existed had on occasion been achieved in the past through the public policy exception if forum law had been disregarded<sup>202</sup>. It would appear that this still occurs under the new rules. In a recent insightful decision of the Court of Cassation with respect to judicial declaration of paternity, the Court said that the foreign judge was allowed to apply its national law also on the basis of the Italian conflicts rule in force at the time of the decision<sup>203</sup>. In a harshly criticized ruling, the Court of Appeal of Milan

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<sup>196</sup> Court of Cassation 22 March 2000, n. 3365, RDIPP 2001, 389; Court of Cassation, 25 June 2002, n. 9247, RDIPP 2003, 491.

<sup>197</sup> Court of Appeal of Venice, 15 October 2001, n. 1359, RDIPP 2002, 1021, with a commentary by Crespi Reghizzi, *Sulla contrarietà all'ordine pubblico di una sentenza straniera di condanna a punitive damages*, RDIPP, 2002, 977.

<sup>198</sup> Court of Appeal of Milan, 27 March 1998, RDIPP 1999, 961.

<sup>199</sup> Court of Appeal, 28 December 1999, RDIPP, 2000, 1081.

<sup>200</sup> See e.g. Brogginì (note 6), at 851, Luzzatto (note 170), at 217.

<sup>201</sup> Brogginì (note 6), at 851.

<sup>202</sup> Ancel, *Les règles de droit international privé et la reconnaissance des décisions étrangères*, RDIPP 1992, 201, at 207.

<sup>203</sup> Court of Cassation, 14 January 2003 (note 46), at 209-211.

refused recognition because the foreign judge had failed to apply Italian law to a divorce between two Italian nationals<sup>204</sup>.

Some authors contend that some sort of proviso preventing fraud would have been appropriate<sup>205</sup>. Other recent legislations, such as the Belgian one, have adopted such a requirement<sup>206</sup>. The above-mentioned ruling by the Court of Appeal of Milan suggests that at least the most spectacular cases of fraud may be attacked by means of the public policy exception.

### 3. The Interrelation Among Art. 64, 65 and 66

After having set out the conditions for recognition of foreign decisions generally, the Act devotes two specific rules for recognition, on the one hand, of foreign measures concerning capacity of persons, family status (typically in the case of a divorce)<sup>207</sup> and rights of personality (Art. 65 of the Act), and, on the other, of foreign measures issued as a result of non-contentious proceedings, on the other (Art. 66 of the Act). As regards the first ones, recognition is automatically granted if the measure has been either rendered or otherwise has effect in the country whose law is designated as applicable by the Act. Is this the case, only two additional requirements must expressly be fulfilled: compatibility with public policy and respect of the fundamental rights of defense. This rule is evidently inspired by the practice, developed under the old regime<sup>208</sup>, of using the conflicts rule to recognize legal relationships resulting from judicial proceedings of the country whose law was designated<sup>209</sup>. Nonetheless, it would seem that, to the extent that this distinction may matter, recognition of the legal relationship now takes place directly, through recognition rules, rather than indirectly, through conflicts rules<sup>210</sup>.

<sup>204</sup> 27 March 1998, RDIPP 1999, 961; criticism has been expressed by Picone, *L'art. 65 della legge italiana di riforma del diritto internazionale privato e il riconoscimento delle sentenze straniere di divorzio*, RDIPP 2000, 381, and Mosconi (note 17), at 219.

<sup>205</sup> Luzzatto (note 5), at 169 et seq.; contra Brogginì (note 10), at 854 et seq.

<sup>206</sup> Article 25 (1), n. 3 of the Belgian Code of Private International Law entered into force on 1 October 2004.

<sup>207</sup> Court of Appeal of Milan, 27 March 1998, n. 894, RDIPP 1999, 961.

<sup>208</sup> Ballarino (note 5), 165 et seq.; Picone, *Sentenze straniere e norme italiane di conflitto*, in *La riforma italiana del diritto internazionale privato*, Padua 1998, 477, at 479 et seq.; Consolo (note 137), at 52; Bariatti (note 165), at 38.

<sup>209</sup> The potential of the conflict rules in the recognition process is thoroughly examined by Ancel (note 201), at 201.

<sup>210</sup> Picone (note 203), at 483.

As the Court of Cassation recently held, this provision regrettably “does not stand out by its clarity”<sup>211</sup>. Its wording triggers some difficulties, to which a great deal of scholarly efforts have been devoted. First: is compliance with all other conditions of Art. 64 which are not reproduced in Art. 65 effectively no longer required?<sup>212</sup> This does not appear to be the case with respect to the absence of conflict with any other domestic decision and to *lis alibi pendens*. It would seem that only the jurisdictional requirement may undisputedly be dispensed with. Second: does this provision also cover non-contentious proceedings concerning the matters in question or are these exclusively covered by Art. 66, notwithstanding the fact that they relate to the matters addressed under Art. 65? To date, the case law does not seem to have provided any significant indications. Third: does Art. 65 prevent recourse to the technique of recognition of legal relationship incorporated in a foreign decision rendered by the courts of the country whose law is designated in any matters other than those expressly mentioned? The question arises particularly with respect to real property, which – surprisingly, for some – has been ignored by Art. 65<sup>213</sup>. Scholars tend to think that the recognition through conflicts rules continue to be permissible<sup>214</sup>. Fourth, and perhaps most important: can a decision which does not qualify for recognition under Art. 65 still be recognized if it successfully passes the recognition test under Art. 64? In other words, should Art. 65 be understood as exclusive of Art. 64 or merely as an alternative to it? This has quickly become a “classic question”<sup>215</sup>. Scholars disagree on this point<sup>216</sup>. A ruling from one Court of Appeal seems to have opted for exclusivity<sup>217</sup>. In a recent decision, however, the Court of Cassation unhesitatingly ruled that Art. 65 merely aims at establishing a “simplified and more expedi-

<sup>211</sup> Court of Cassation, 28 May 2004, n. 10378, RDI 2005, at 209 et seq. (also in RDIPP 2005, at 129 et seq). Picone (note 208), at 479, regards Art. 65 as “one of the worst drafted provisions” of the whole Act.

<sup>212</sup> On this issue, see Consolo (note 137), at 54; Civinini (note 156), at 59; Attardi (note 30), 775-776.

<sup>213</sup> Luzzatto (note 2), at 167.

<sup>214</sup> Picone (note 207), at 511; Bariatti (note 164), at 40 et seq.

<sup>215</sup> Consolo (note 137) at 51.

<sup>216</sup> For the exclusive character of Art. 65, Bariatti (note 164), at 41 et seq., Boschiero (note 2), at 166; Maresca (note 170), at 1465; Civinini (note 156), at 64; for the alternative character, Picone (note 203), at 490 et seq.; Ballarino (note 4), at 173; Di Stefano, *Il matrimonio nel nuovo diritto internazionale privato italiano*, RDI, 1998, 369.

<sup>217</sup> Court of Appeal of Milan, 27 March 1998 (note 207).

tious procedure" for a number of matters, and cannot but be alternative to Art. 64, under which recognition may still be sought if the requirements under Art. 65 are not fulfilled<sup>218</sup>.

Article 66 deals with recognition of foreign measures rendered in non-contentious proceedings. This provision, which is generally considered to be exclusive of Art. 64 and 65<sup>219</sup>, also exudes *favor recognitionis*. Recognition is granted if either the measure has been rendered by, or otherwise has effect in, the country whose law is applicable under the Act, or if the foreign adjudicator, whatever its nature, has asserted jurisdiction based on a ground admitted in Italy. Arguably, the most interesting practical question is what is meant by non-contentious proceedings. Traditionally, this characterization should be made in accordance with the *lex fori*<sup>220</sup>. In this vein, it has been held that only such measures that would in Italy be rendered by a judicial authority in a non-contentious context are covered by the rule. Such is the case, for example, of a request for divorce by mutual consent entered into before a Philippine notary public<sup>221</sup>. By the same token, a measure which, although characterized as non-contentious in the foreign legal order, would in Italy be rendered by an administrative authority or as a result of judicial proceedings<sup>222</sup>, should be denied recognition under Art. 66<sup>223</sup>.

#### 4. *Exequatur* proceedings

To the extent that recognition of the foreign decision or measure is challenged, or whenever it is necessary to enforce it, *exequatur* proceed-

<sup>218</sup> Court of Cassation, 28 May 2004 (note 211).

<sup>219</sup> Bariatti (note 164), at 35 et seq.; Venturi, Considerazioni sulla qualificazione dei provvedimenti stranieri di giurisdizione volontaria, RDIPP 2003, 883, at 899-900.

<sup>220</sup> See e.g. Salerno (note 28), at 883.

<sup>221</sup> Court of Appeal of Milan, 27 March 1998, n. 898, RDIPP 1998, at 589.

<sup>222</sup> Tribunal of Rome, 18 September 1998, RDIPP 1999, at 323.

<sup>223</sup> By the same token, the nature of non-contentious proceedings has been denied to divorce proceedings by mutual consent before a Russian administrative authority on the ground that the activity carried out by the authority could not be qualified as "judicial" under Italian law (Court of Appeal of Florence, 18 April 1999, Foro it., 2000, at 622-623). Nonetheless, characterization according to *lex fori*, whatever its meaning, is increasingly perceived as unsatisfactory. A more flexible approach, drawing simultaneously on both *lex fori* and *lex causae*, has been recently advocated in order to safeguard the primary objective of Art. 66, which is ultimately to promote reception of foreign measures to the maximum extent possible: see Venturi (note 218), at 903 et seq.

ings may no longer be avoided (Art. 67(1) of the Act). A request for *exequatur* must be filed with the Court of Appeal of the place where the decision or measure is to be enforced. In the event the decision or measure must be registered in the civil status registry, the place of enforcement is where the registration is to take place<sup>224</sup>. *Exequatur* may be requested by whoever "has an interest". Whatever the precise definition of this term may be<sup>225</sup>, it would appear that a request for negative declaratory relief is also permissible<sup>226</sup>. The burden of proof of the existence of the conditions for recognition rests with the interested party<sup>227</sup>. *Exequatur* proceedings are purely declaratory<sup>228</sup> and, as such, at least according to what would seem to be the prevailing view, they are no longer subject to time-barring<sup>229</sup>. Absent any contrary indication in the Act, the procedure is the ordinary one<sup>230</sup>, to be commenced by a summons to be first served on the defendant (*atto di citazione*), and not by a "recourse" to be directly filed with the court (*ricorso*)<sup>231</sup>. In the event that the question settled by the foreign decision is prejudicial to the matter in dispute before it, the domestic court having jurisdiction over the main question has the power to determine whether the foreign decision is to be recognized in Italy, though the preclusive effects in this case are limited to the specific proceedings (*incidental exequatur*) (Art. 67(3) of the Act)<sup>232</sup>.

Considerable uncertainty was initially caused by the question of whether the officials of the civil registry have themselves to assess the fulfillment of the conditions for recognition<sup>233</sup>. The entry into force of this

<sup>224</sup> So e.g. Court of Appeal of Rome, 12 April 2000, RDIPP 2001, 126.

<sup>225</sup> See for a detailed discussion on this, Carlevaris (note 166), at 1007 et seq.

<sup>226</sup> Court of Cassation, 28 May 2004, n. 10378, RDI 2005, 209; Court of Appeal of Venice, 27 May 1997, Foro padano, 1998, 197 (quoted by Carlevaris, note 223, at 1015); see in the doctrine Mosconi (note 17), at 223; Luzzatto (note 170), at 223.

<sup>227</sup> Consolo (note 137), at 21.

<sup>228</sup> See among others Consolo (note 137), at 58; Luzzatto (note 170), at 218; Carlevaris (note 166), at 1009.

<sup>229</sup> Court of Appeal of Milan, 27 July 1999, RDIPP 2000, 763; see in the scholarship, Consolo (note 137), at 59; Lopes Pegna, Il riconoscimento delle sentenze straniere nella transizione dal codice alla legge di riforma, RDIPP 1997, 919, esp. at 929 et seq.

<sup>230</sup> Court of Appeal of Venice, 26 November 1997, Court of Appeal of Naples, 21 April 1999, Court of Appeal of Ancona, 21 July 1999, all of which quoted by Mosconi (note 17), at 224; Carlevaris (note 166), at 1007.

<sup>231</sup> Court of Appeal of Perugia, 10 January 2002, RDIPP 2003, 218 et seq. See, in the scholarship, Carlevaris (note 166), at 1044.

<sup>232</sup> See Consolo (note 137), at 64 et seq.

<sup>233</sup> On this question, see inter alia Marongiu Buonaiuti, Il riconoscimento delle sentenze

part of the Act was purposefully delayed to allow the legislature to take an express position on this issue<sup>234</sup>. A draft proposal<sup>235</sup> required a judicial *exequatur*. This proposal was not approved and the rules on recognition and enforcement entered into force with no indication of the proper solution in this regard. A directive of the Ministry of Justice subsequently filled this legislative void<sup>236</sup>. According to the directive, if the officials of the office of civil status are satisfied that the decision does qualify for the recognition, they will proceed with the necessary inscriptions or annotations on the registry. Otherwise, they must pass the file onto the public prosecutor (in his or her capacity as the supervising authority). Now, after the recent enactment of the new legislation concerning the civil status, this person is the representative of the government in the "province" (*prefetto*)<sup>237</sup>. If the *prefetto* confirms the negative assessment, the interested party may institute proper *exequatur* proceedings before the Court of Appeal. No practical difficulties in the application of the directive have been reported so far<sup>238</sup>.

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e la circolare ministeriale agli uffici di Stato civile, RDIPP 1998, at 375 et seq.; Civinini (note 156), at 65 et seq.

<sup>234</sup> See among others Ballarino (note 5), 167-168; Mosconi (note 17), at 225-226; Salerno, La circolare "esplicativa" sull'iscrizione delle sentenze straniere nei registri dello stato civile, RDI 1997, at 178 et seq.

<sup>235</sup> Draft Legislation n. 2404, of 2 January 1996, which was largely reproduced by Draft Legislation n. 2200, of 11 September 1996: see Mosconi (note 17), at 226.

<sup>236</sup> Ministero di grazia e giustizia, Istruzioni per gli uffici dello Stato civile, Roma, 7 gennaio n.1/50/FG/29 (96) 1227 di protocollo, RDIPP 1997, 224.

<sup>237</sup> See Cafari Panico, Divorzi stranieri tra riconoscimento e trascrizione, RDIPP 2002, 5, at 8 et seq.

<sup>238</sup> Ballarino (note 33), at 87; Cafari Panico (note 228) at 13; see for an application of this control by the civil status official, Tribunal of Rome, 18 September 1998, Foro it. 1998, I, 3654.