

THE ACQUISITION OF IMMOVABLE PROPERTY BY ALIENS IN ITALY

Silvia MARINO^{(*)(**)}

Introduction

The matter of the acquisition of immovable property by aliens in Italy, currently debated by doctrine and tribunals, implies several aspects that are going to be analysed in this paper. One of the most peculiar characteristic of the topic is that it concerns both the branches of public and private law; on one side, the range of the notion of alien in Italian law must be defined; on the other, the different – and multiple – rights *in rem* known in Italian legal system, as the regulation on the *status* and the capacity to conclude acts of private law of aliens must be described. In particular, not only the problems related to natural persons are to be examined; even though the dispositions on their condition is far more complicated and some more personal considerations are going to have place, the capacity of foreign legal persons to invest in Italy has, of course, an enormous economical relevance.

For each of the problem considered we are going to briefly describe the legislation in force; then special attention will be paid to case law¹ and the considerations of the most eminent Italian Authors on the topic. Especially

* This Article is written under the supervision of Prof. Dr. Nuray EKSI, Marmara University School of Law, Director of Private International Law Department. The author attended Prof. Dr. EKSI lectures on Private International Law during Summer Courses at the Hague Academy in 2006. The author gratefully acknowledges the invaluable assistance she received from Prof. Dr. EKSI.

** PhD student in European Union law, University of Trieste, Italy.

¹ Italian legal system does not include the principle of *stare decisis*, but the decision of one tribunal can always be used as an example of good application of the law by another jurisdictional authority. The Corte di Cassazione, the highest Civil Court, has the function of legality control (Article 360, Code of Civil Procedure lists the possible grounds of appeal to the Court). Its decisions have not got *erga omnes* effects, but the rule of law there expressed has compulsory legal force for the judge that will decide the same case in the merit.

for the central point of this paper – which is the *status* of foreign natural persons in Italy – the contribution of the opinion of the doctrine will be a useful support in our discussion.

First of all, we will be concerned with some preliminary questions, as the requirements imposed by the law for the attribution of Italian citizenship. The analysis of the relevant provisions can not be detailed, but we are going to try to describe the principles that base Italian regulation (par. 2). Then, we will briefly discuss the regime of *rights in rem*. Special attention will be given to the basic discipline of Italian Civil Code, which contains the fundamental provisions relating to the different types of goods, the ownership and all the other rights on immovable goods (par. 3). The central paragraph is dedicated to the capacity of foreign natural persons according to Italian law, with a part reserved to the problem of the acquisition of property in border zones (par. 4). Different considerations will be made concerning legal persons (par. 5). Our concluding remarks tend to be some more extended as to the strict topic of acquisition of immovable property by aliens: as it will be underlined in this paper, this subject is only a small part of a bigger problem of the capacity of civil law of alien, and some general considerations must be offered.

1. Who is an Italian Citizen?

Preliminarily, it is necessary to examine Italian legislation on the attribution of citizenship. Indeed, the regulation on the acquisition of immovable property we are going to analyze in next paragraphs applies only to aliens, in another word, those who have not Italian citizenship².

The criteria for the acquisition of the Italian citizenship are detailed in the Law No. 91/1992³, which substitutes the previous regulation, dating back to the beginning of 20th century⁴. By the new law Italian legislator has tried to

² Actually stateless persons and refugees could be considered as aliens, not having Italian citizenship, but their *status* is not equivalent to the conditions of aliens. Thanks to many international conventions ratified by Italy they enjoy a special *status*, that tends to be more favourable (see New York Convention of 25th September 1954, ratified by Law 1st February 1962, n. 306, in *GU* 7th June 1962, n. 142, and Geneva Convention of 28th July 1951, ratified by Law 24th July 1954, n. 722 in *GU* 7th August 1954, n. 196).

³ Law 5th February 1992, n. 91, in *GU* 15th February 1992, n. 38, “*New rules on citizenship*”. For a comment on a reform proposal of that law: NASCIMBENE B., *Proposte di riforma delle norme sulla cittadinanza*, in *Rivista di diritto internazionale privato e procesuale*, 2004, p. 555.

⁴ Law 13th June 1912, n. 555, in *GU* 30th June 1912, n. 153.

overcome some problematic aspects of the previous regime⁵ and to modernize it.

First of all, a person can be a national since his birth, *iure sanguinis*, or *iure soli*. For the first condition to be respected, it suffices that one of the parents is Italian, while it's not requested to prove the nationality of both of them. Concerning the second condition, a person is an Italian national by birth on Italian territory⁶, if both the parents are not known, or stateless, or if the child does not acquire the citizenship of the parents according to their law. Then, so as to avoid situations of statelessness, by Italian law the child of unknown persons is always considered Italian, if the possession of another citizenship is not proved⁷.

⁵ It is remarkable to note that the former law already tried to avoid the *status* of statelessness, even if in practice, especially after the Second World War, it was found to be unsuccessful. On the other hand, it did not recognise an equal *status* to men and women. For comments on the previous legislation: DI FABIO M., *L'acquisto immobiliare dello straniero*, Assisi, 1967, p. 60; NASCIBENE B., *Cittadinanza e condizione giuridica dello straniero*, in *Comunicazioni e studi*, XVI, 1980, p. 755. For a more exhaustive study on the regulation of citizenship in Italy, see: BALLARINO T., NASCIBENE B., BAREL B. (eds.), *Commentario alla legge 5 febbraio 1992 n. 91*, in *Nuove Leggi Civili Commentate*, 1993, p. 1; GROSSO E., *Una nuova disciplina della cittadinanza italiana*, in *Giurisprudenza italiana*, 1992, IV, 320; CLERICI R., *La cittadinanza nell'ordinamento giuridico italiano*, Padova, 1993; CALÒ E., *Il principio di reciprocità*, Milano, 1994, p. 80; BARIATTI S., *La disciplina giuridica della cittadinanza italiana*, II, Milano, 1996. For considerations relating to the development of the legislation in Italy, see: CUNIBERTI M., *La cittadinanza: libertà dell'uomo e libertà del cittadino nella Costituzione italiana*, 1997, Padova. For a practical perspective: DI MAIO L., PROTO M., LONGARZIA M.C., *Manuale di legislazione sugli stranieri*, Roma, 2004.

⁶ The problem is to identify which is the "territory of the State". Article 4 of Italian Criminal Code states that: "for the application of criminal law, the territory of the State is the territory of the Republic (...) and every other place under Italian sovereignty. The Italian ships and the aircrafts are considered as Italian territory, wherever they are, except if they are subject to foreign territorial law, according to international law" (the author's translation). Above the fact that this rule applies only with reference to criminal law (but, for an extension to civil law, see: DI FABIO M., *op. cit.* p. 135), the definition is tautological, since it delimitates the territory of the State in the place where Italy has sovereignty. The exceptions relating to parts different to dry land also aren't perfectly clear, since they demand the individuation of Italian territory to international law. For Italian studies on the concept of territory: LEANZA U., *Territorio dello Stato (dir. int.)*, in *Novissimo Digesto italiano*, XVIV, Torino, 1973; ID., *Spazio aereo*, *ivi*, XVII, 1970; CONFORTI B., *Mare territoriale*, in *Enciclopedia del diritto*, XXV, Milano, 1973; BACK IMPALLOMENI E., *Spazio aereo extra-atmosferico*, in *Enciclopedia del diritto*, XLIII, Milano, 1990; BISCARETTI DI RUFFIA P., *Territorio dello Stato*, *ivi*, XLIV, 1992.

⁷ The Law specifies that the recognition of the child determines his citizenship according to the same Law, if he is underage (that means, under 18; Article 2, Civil

Other provisions of the law determine the acquisition of the citizenship by means other than birth. Article 3 provides special rules for adopted persons. As for child underage, if he or she is adopted by an Italian citizen, he or she acquires the citizenship⁸. If the adoption is withdrawn because of fault of the person adopted, he or she loses Italian citizenship, only if he or she has or reacquires the one of another State; in all the other cases he or she keeps Italian citizenship. If the withdrawal happens when the interested person is already adult, he or she can release the Italian citizenship, only if he or she has another citizenship⁹.

Naturalization is possible by marriage, under condition that the alien has legal domicile in Italy since at least six months, or after three years marriage, if dissolution or an annulment of the marriage, a separation or a divorce has not incurred in the meantime¹⁰.

Code); if the person concerned is an adult, he keeps its citizenship after his recognition (or the judgment that declares his maternity or paternity), but within a year from it he or she can choose the nationality determined *iure sanguinis*. The stateless person legally domiciled in Italy is subject to Italian law regarding civil rights and military service. The Constitutional Court (judgment 18th May 1999, n. 172) has affirmed that the military duty is not incompatible with the *status* of stateless person, since he decides to strengthen his contact with Italian community, accepting its rules, rights and duties. As consequence it can't be said that the stateless person hasn't enough strong relationship with Italian legal system as so to avoid military service (which was compulsory at the time of the judgment).

- ⁸ This solution is consistent with the way of acquisition by birth *iure sanguinis*, since the Italian citizenship of only one parent has to be ascertained as so to transmit the citizenship to the son. The same rule must apply to adopted persons, since they acquire the *status* of legitimate children under Italian law (Article 27, Law 4th May 1983, n. 184, "Right of underage to a family", in *GU* 17th May 1983, n. 133).
- ⁹ Article 4 of the law includes some others conditions for the acquisition of the citizenship by aliens or stateless persons, which show to have a present and lasting link with Italian Republic (as having done the military service), if one of the parents or grandparents have been Italian nationals by birth.
- ¹⁰ The acquisition is precluded if the interested person has been condemned for some serious crimes against the State, specified in Article 6, or for a non-faulty crimes for which the law provides a sanction of over three years detention, or if there are proved reasons of national security. Even though the evaluation of this last obstacle is discretionary, and it's not necessary to prove specifically the completion of facts that attempts the security of the State, it's not enough to prove that there are criminal proceedings pending against the interested persons; moreover, the Ministry can't refuse the concession if the alien has been persecuted for criminal matters, but has been acquitted of the charge for the reason that he didn't do the fact for which it has been proceeded. The administrative authority is in this case bound by the statement of the criminal judge (TAR Lazio Latina, 22 February 2005, n. 259, in *Foro amm. TAR*, 2005, 2, 440). It's not a reason of national security the fact that the marriage had as only aim to make acquire the citizenship to the foreign spouse (Council of State, 22 May 2002, opinion n. 1225/02, in *Foro it.*, 2004, III, 155).

A quite common ground of acquisition of citizenship is contained in Article 9¹¹: the alien must be legally domiciled for at least ten years in the territory of the Republic¹². In this case the citizenship can be granted after request by decree of the President of the Republic, given the opinion of the Council of State¹³ and on proposal of the Ministry of Internal Affairs. If the person interested is a citizen of an EU Member State, the domicile's period requested goes down to four years¹⁴. The decree of denial can be opposed by the interested with a claim to the Regional Administrative Tribunal (TAR). The case law states constantly that the alien residing in Italy for the required period of time does not obtain a right to the acquisition of the citizenship. First of all, the administration has to verify the fulfilment of some conditions: the economical situation of the person interested must be checked, the absence of criminal conviction, during the staying in Italy, and of pending criminal proceedings must be verified. Then, the grant of citizenship is highly discretionary. As consequence the judge can only verify that the administrative decree of denial is not based on false factual element, and that it's correctly and substantially reasoned. This means that the rule does not attribute a substantive right to naturalisation, after a period of staying in the territory of the Republic, even if all the preliminary requirements listed above are satisfied. The administration must consider the interests of the general community. Its remarks can comprehend also the level of the integration reached by the alien in Italy and the common interest to the introduction of this person in the community¹⁵. No relevance has to be given to the mere private interest of the alien requiring the citizenship. Following this, the TAR Lombardia Brescia has found legitimate the denial of concession of citizenship to an alien, which had been in the past accused for several crimes, even if all the pending proceedings had been dismissed because of lack of evidence against the interested person. The denial was justified – also according to the judicial decision - by the fact that the final

¹¹ For a critical comment see: SCOPELLITI S., *Il procedimento per la concessione della cittadinanza italiana allo straniero extracomunitario ed i limiti del potere di diniego da parte della pubblica amministrazione: discrezionalità o mero arbitrio?*, in *Gli stranieri. Rassegna di studi, giurisprudenza e legislazione*, 2005, p. 220.

¹² In recent times there have been political discussions so as to reduce that period of time, with the aim to facilitate the integration of aliens in Italy. Any official proposal has never gone further.

¹³ It's the highest Italian Court, which has jurisdiction on cases relating to administrative law. It has also a consultative function, which can be either facultative, either compulsory, but not binding.

¹⁴ Citizens of other EU Member States has a special *status* related to the particular rights recognised by EU law. As we will see below, even the acquisition of immovable property has special rules concerning these citizens (*infra*, par. 4.1).

¹⁵ TAR Piemonte, 11th May 2004, n. 813, in *Foro it.* 2004, III, 365.

criminal judgments had only stated that there was not proof of guilty, but they had not explicitly excluded¹⁶ his responsibility. So, the administration had discretion in the weighing of these element and, according to Court, there have been no factual mistake or abuse in the administrative decision¹⁷. It follows that the mere criminal conviction, even for a crime not to be considered harsh under Italian law, may constitute a reason for denial of naturalisation¹⁸. If the interested person does not seem to be perfectly integrated in Italian society, the Ministry can deny the grant of Italian citizenship.

It seems that the behaviour of the alien during his staying in Italy before addressing the request must be faultless, since every suspect in the direction that he or she has infringed the law can mean that the person is not well integrated in the community and that he or she does not deserve the grant of citizenship. No particular relevance seems to have the gravity of the fault committed. The only way to be successful and to be granted the citizenship is that the interested person is acquitted of the charge with a declaration of complete non-criminal responsibility, as, for example, with the formula that he or she has not committed the fact¹⁹.

The importance given to the element of the will of the alien to be subject to Italian system appears also in Article 10 l. 91/1992, that states that the decree of concession has no effect if in six months the interested person does not swear loyalty to the Republic and to respect the Constitution and the laws of the State.

The reasons for loosing citizenship are very few (Article 12) and their *ratio* is that the citizen has lost every interest in being bound with Italian legal system.

¹⁶ Nor affirmed, actually.

¹⁷ TAR Lombardia Brescia, 2nd February 2006, n. 113, in *Foro amm. TAR*, 2006, 2, 487.

¹⁸ TAR Trentino Alto Adige, 13th September 2005, n. 27, in *Foro amm. TAR*, 2005, 9, 2746. The case was related to a criminal conviction for driving in state of drunkenness.

¹⁹ It's doubtful if the formula "the fact isn't a crime" is enough to prove the absence of any liability of the alien. Indeed, it excludes every criminal consequences, but it doesn't mean that the fact is legal: it could amount to a civil (tort) or administrative liability.

2. Rights in Rem

2.1 Which are the Rights in Rem?

Since Italian Private International Law²⁰ provides that rights *in rem* and possession on immovable and movable goods are regulated by the law of the State where the goods are located (Article 51), it follows that Italian law is applicable with reference of immovable goods situated in Italy²¹. Not all the aspects of immovable property must be regulated by the law so identified: indeed, the rule concerns only the definition, the concept, the content and the method of transmission of these rights. Following, we are going to examine briefly this subject matter.

Italian Civil Code is formed by six *Libri* (books), on the model of the French Code Napoleon. The third *Libro* is entitled *Della proprietà* (Ownership), which contains all the basic provisions which describe and define the various kind of rights *in rem* existing in Italy.

The first provision of the third *Libro* gives a definition of *goods*²²; then a preliminary distinction between immovable and movable goods is traced out. By immovable goods are intended the land, the subsoil, the sources and the water streams, the trees, the buildings, the others constructions, even if tied up to the soil for temporary use, and, generally, everything which is incorporated in the soil naturally or artificially. The mills, the baths and the others floating buildings, if firmly fastened to the shore or to the riverbed, and destined there permanently for their utilisation, are also considered immovable property. All the other things are movable goods. Generally, the Corte di Cassazione states that a construction – and consequently an immovable good – is every piece of work having the characteristic of stability and immobility²³. Italian Civil Code envisages also movable goods subject to registration, but there is no definition, for Article 815 simply states that they are subject to specific regime provided by the law. Examples of these goods are cars and ships²⁴.

Not every good is subject to private property. Article 822 Civil Code indicates as pertaining to the public domain the seashore, the roadstead and the

²⁰ Law 31st May 1995, n. 218, in *GU* 3rd May 1995, n. 128.

²¹ If the goods are in transit, the applicable law is the one of the State of destination (Article 52).

²² Considered as everything that can be object of rights (Article 810 Civil Code).

²³ *Ex multis*: Corte di Cassazione, II sez., 28th May 1984, n. 3264, in *Giust. Civ. Mass.*, fasc. 5.

²⁴ The *universitas* of movable goods is, instead, a plurality of object pertaining all to a single person and destined to the same service. Examples are the herd (*universitas facti*) and the establishment (*universitas juri*).

harbours, the rivers, the stream, the lakes and all the waters if defined as public by the law, and the work destined to national defence. Also the streets, the motorways, the railways, the aerodrome, the aqueducts, the immovable goods considered of particular historical, archaeological or artistic interest, the collections of museums, of libraries, of archives, of picture-galleries are also considered public domain, if they are State property²⁵. These goods can not be sold or be object of a right in favour of third parties, if not in the forms and in the limits provided by special legislation. So, the right to use goods qualified as public domain is always given through a concession²⁶.

Another kind of public property is the patrimony of the State, or of the local public authorities. This category is composed of every good owned by these public subjects, if they are not considered as demesne. Article 826 lists the different goods which is not possible to dispose of²⁷. The immovable goods whose owned by no one form part of the patrimony of the State. Civil Code states that some of the goods, although been part of public patrimony, can be disposed of: as a general rule, except special provisions, the regime of these goods is determined by the Civil Code²⁸. If the good is part of the patrimony, which is not possible to dispose of, it can be removed from its public purpose, only accordingly to specific legislative provisions.

Property right is the widest right on goods known by Italian law. It means that a person can enjoy and dispose of the good in an exclusive manner with only some limitations indicated by the law²⁹. Article 840 precises that land

²⁵ Other goods are contemplated in next articles of the Civil Code, which considers also the domain of local public authorities different from the State.

²⁶ The permission is always to be considered a concession, whatever is its formal name and even if it contains other different and eventual provisions. Corte di Cassazione, III sez., 11th February 2005, n. 2852, in *Corriere giuridico*, 2005, fasc. 5, p. 615; Corte di Cassazione, SS. UU., 26th June 2003, n. 10157, in *Diritto e giustizia*, 2003, fasc. 28, p. 105.

²⁷ From this catalogue we can remind mines, quarries and peat bogs, things of archaeological or historical interest, barracks.

²⁸ The provisions contained in Civil Code are very poor. Reference must be made to special legislation regarding the transmission of State patrimony, as Law 16th February 1996, n. 104, in *GU* 2nd March 1996, n. 52, "*Divestment of immovable patrimony of public social security institutions*"; Law 13th December 1996, n. 662, in *GU* 28th December 1996, n. 303, "*Financial Act 1997*"; Law 23rd December 2000, n. 288, in *GU* 18th October 2000, n. 244, "*Financial Act 2002*"; Law 27th February 2002, n. 289, in *GU* 31st December 2002, n. 305, "*Financial Act 2003*".

²⁹ Some of these are described in the following articles, such as the public interest which justifies the *espropriazione* (expropriation for public interest), or, remaining inside civil law relationships, the abuse. Accordingly to the case law, a behaviour is abusive when it doesn't give any advantage to the owner and it has as unique objective to cause nuisance to the others (Corte di Cassazione, II sez., 27th June 2005, n. 13732, in *Giust. Civ. Mass.*, 2005, fasc. 6).

property extends not only to the estate, but also to the subsoil, with everything it contains, and the space over the land. Anyway, the owner of property right can not oppose activities done by third parties in the subsoil or in open sky, if he has no any interest in excluding them. Following, property right is absolute and who enjoys it can exclude every third from disturbing the exercise of the right, even if the nuisance has not caused any damage; it also extends over and above the land, but in this case a specific interest must be demonstrated so as to stop third's activities³⁰.

The Civil Code makes also reference to the *proprietà edilizia* (property on buildings), but the regime on edification are actually left to the *Piani regolatori*, specific regulations taken by local public authorities relating to the utilisation of the land for purpose of buildings³¹.

Property is not the only right on immovable goods recognised by Italian law:

- Article 952 Civil Code defines the *diritto di superficie* (right of surface), which is the right to build or to own a building on a land which is owned by a different person. This kind of right permits a separation between the property of the building and the one of the land.
- The right of emphyteusis is very close to property, but the beneficiary has the duty to improve the conditions of the land and must pay a rent to the owner; this can consist in money, or in a fixed amount of natural products.
- Artt. 978 ffl. regulate *usufrutto*, a real right of limited duration on the property of another person. It consists in the freedom to use the goods in respect of their economical destination³². Civil Code describes the relationships between the owner and the beneficiary, with particular reference to all the additions, the discoveries, every improvement brought

³⁰ An important limitation to the right of property on the land is the *divieto di immissioni* (prohibition of discharge; Article 844 Civil Code): the proprietor of a land must tolerate the discharges coming from a near estate, if these can be considered normal, having regard to the condition of the places. This disposition tries to reconcile the rights of two land tenants, the first of which wants to engage in an activity that can disturb its neighbourhood, the second who want to enjoy without prejudice his land. Accordingly to Article 844, particular attention must be paid, if one estate is destined for productivity use.

³¹ In following provisions the Civil Code determines specific rules for the construction of buildings on the land, as, for example, the rules on the distance between the buildings on different estate.

³² The evaluation of the destination of the goods must be made *in concreto*. It's not enough to demonstrate the theoretical suitability of the thing in being used for certain purposes, but the specific destination to which the goods were assigned can't be changed (this interpretation of the rule is given already in: Corte di Cassazione, II sez., 19th June 1962, n. 1550, in *Foro it.*, 1962, I, 1946).

on the land by the beneficiary. Generally the person granted with *usufrutto* can also rent the immovable property on which he exercises his right, but a provision limits the opposability of the rent contract to the owner of the estate³³: if the contract has duration even after the ceasing of the *usufrutto*, the owner must respect the right of the leaseholder, if it is proved by a written document certainly signed before the end of the *usufrutto*³⁴, but not over five years from the end of it.

- The right of use is very similar to the *usufrutto*, but more limited, since it consists in the mere use of a thing. The beneficiary can use the eventual revenue of the goods, but in the limits of his or her needs and the ones of his or her family.
- The right of dwelling consist in the right to live in a house, within the limits of his or her and the family's needs (Article 1022 Civil Code)³⁵.
- Another right *in rem* is the land easement, which consist in a burden imposed on a land for the benefit of another land, owned by a different person. It is to be qualified a right *in rem*, since the burden is on the estate and not on the owner: the right exists also after the transfer of the ownership of the servant tenement, because the *utilitas* is in favour of the land, and not of the owner³⁶.

³³ Rent is not considered right *in rem* under Italian law; this means that the leaseholder has a personal right against his counterpart and can't act against third parties, except from specific provision.

³⁴ Article 2704 Civil Code states when a private act can be considered having a sure date opposable to third parties not involved in the contract. This happens if the private document has been registered, or if one of the concerned parties deceased or got a physical impossibility to sign, or if the content of the document has been reproduced in a public document; other occurrence which can make sure that the document has been signed before one date can be proved.

³⁵ These last two right can't be transferred, if the parties didn't agree differently (Article 1024 Civil Code; in the sense that this limitation is not concerned with public policy exigencies and that the parties are free to derogate from it, see, already, Corte di Cassazione, 13th September 1963, n. 2502, in *Giustizia Civile*, 1963, I, 2292).

³⁶ Civil Code knows a number of typical servitudes. Given the principle of *numerus clauses* of rights *in rem* – that means that the private autonomy can't invent more and different real rights others than the one regulated by the law – it's not possible to create different servitudes. Anyway, the parties by contract can agree in a diminution of the rights enjoyed by one of the owners, in favour to the other. In these cases a personal right would be recognised. A typical example of this right is the *servitù di acquedotto* (aqueduct land easement), because the water so brought is used for the benefit of the estate. The typical negative example is the following: if the owner of a land has an access to the beach where he wants to open an establishment for tourists, and he wants the owner of the nearest estate to leave his clients park there the car, this is not anymore useful to the land, but to the owner. This contract can be concluded because of party's autonomy in determining the content of their juridical relationships, but it doesn't constitute a right *in rem*.

Italian Civil Code regulates also the joint ownership, the situation in which ownership or other rights *in rem* on one good is entitled to more than one person (Article 1100). Two special forms of joint venture are specifically regulated by the Civil Code, which are the *condominio negli edifici* (condominium: the owner of parts of the floor – generally, the flat – is also joint owner of the common parts of the building³⁷) and the *comunione ereditaria* (Article 713 ffl. Civil Code: before the division of the goods of the deceased, the heirs are joint owners of his or her whole patrimony).

The law accords judicial defence of these rights with civil actions having as aim the recognition of the right and the award of eventual damages caused. The actions can be tried even against third parties. This means that the beneficiary of a limited real right can act not only against the owner of property right, but also against a third person which hurdles with his behaviour the exercise of his or hers right³⁸; then, the owner of a limited right *in rem* does not need to comply with the owner of property right so as to see his right respected by third party, but he can take legal action immediately and directly.

Anyway Civil Code recognises not only these legal, but also *de facto* situations. Article 1140 defines the *possesso* (possession) as the power exercised on a thing which is manifested in an activity correspondent to the exercise of ownership or another right *in rem*. It's, then, a *de facto* ownership³⁹, independent to the real right that the ownership can allege⁴⁰.

³⁷ The *condominio* is then constituted by two aspects: the first, the sole ownership of a flat, the second, the joint ownership of the common parts of the building, as the stairs, the lift...

³⁸ These rights are usually known as *diritti di godimento* (enjoyment rights), but the legal system regulates also *diritti reali di garanzia* (guarantees rights *in rem*). These are the *pegno* (pawn), which can be constituted primarily on movable property (Article 2784 Civil Code); the *ipoteca* (mortgage), that has as object immovable property and rights, and must be registered in the *Conservatoria* (Article 2808 Civil Code; footnote 42); the *privilegio* (privilege), that bears automatically from the law because of the existence of a particular relationship between the parties – i.e. the hotelkeeper has a privilege on goods taken by his guests in the hotel until the payment of the entire amount of the price of the staying (Article 2745 Civil Code).

³⁹ The mere fact of the possession is of extreme importance concerning the circulation of movable property. Indeed, the purchaser becomes legally owner, in case of purchase by non-owner, if the thing in question has been delivered to the purchaser, which was in *bona fide* – i.e. didn't know that the other party was not legal owner – and has acquired thanks to a title only abstractly valid – as, for example, a contract of sell which contains all the necessary elements to be considered valid (Article 1153 Civil Code).

⁴⁰ The Corte di Cassazione affirms constantly that the possession is composed by an objective element – which is the use of the thing, even if only partly or not continuously – and a subjective factor – the *animus possidendi*, which is the will to keep the goods and to exercise the relative right (Corte di Cassazione, 20th April 2004,

Even this situation finds its legal protection in specific judicial action and so to claim the restitution of the goods⁴¹.

2.2 Instrument to Transfer Rights

After this brief description of the rights *in rem* recognised by Italian Civil Code, it is necessary to see the different instrument to transfer rights⁴². A preliminary difference to trace is between original acquisition – that means independently from the title of acquisition of the former owner – and a derivative transfer – which, at opposite, depends on the title of the former owner, which can not transfer a real right which he did not have⁴³.

In the first group we find the *occupazione* (occupancy), which applies for abandoned movable goods (Article 923 Civil Code), the *invenzione* (invention), in relation to movable thing which are found by third parties⁴⁴ (Article 927 Civil Code), the *usucapione* (prescription), which applies either to movable and immovable goods, and consists in a transfer of the right due to the continued use of that right by a person which is not owner, to which

n. 7538, in *Giust. Civ. Mass.*, 2004, fasc. 4; Corte di Cassazione, 27th May 2003, n. 8422, in *Giust. Civ. Mass.*, 2003, fasc. 5; Corte di Cassazione, 20th August 1999, n. 8799, in *Giust. Civ. Mass.*, 1999, 1822).

- ⁴¹ This action can be claimed also by the owner of property right, when he has been deprived of these goods. Indeed, it's much easier to prove possession than ownership, which depends always on the validity of the title of acquisition of the right.
- ⁴² Article 2643 provides that some contracts and acts concerning rights on immovable property must be rendered public through registration in an apposite office called *Conservatoria*. It has no other legal effect than publicity. As general principle, only the acts transcribed are opposable to third parties. In the Italian territories which were subject to Austro-Hungarian Empires domination the system is different: the transcription is an effect condition of the act. It follows that the sale has no legal effect, if not registered. Also the public office competent for the transcription has a different name, which is *Ufficio Tavolare*. On the special law for this territory: GABRIELLI G., TOMMASEO F., *Commentario alla legge tavolare*, Milano, 1999. For example, acts subject to transcriptions – in both regimes – are: contracts transferring property on immovable property; contracts constituting, transferring or modifying right of usufruct or the rights of the grantor or of the beneficiary of emphyteusis; contracts constituting a common property of the rights already mentioned, mortgages on immovable property.
- ⁴³ This means, for example, that the owner of a *usufrutto* can't sell the full property of the thing. The purchaser wouldn't acquire anything.
- ⁴⁴ In this case the acquisition is not automatic, since the founder must consign the goods to the proper office of the municipality, which gives public announcement of the finding; only if within one year the legal owner doesn't demand the restitution, the founder becomes owner.

corresponds the inaction of the legal owner⁴⁵ (Article 1158 Civil Code). Regarding specifically immovable goods, every construction build on a land becomes property of the owner of that land (*accessione* - accession), if the parties do not specify otherwise; if anyone builds a thing with the materials of another person, the first one becomes owner of the materials, after having paid a sum to the first owner⁴⁶ (*specificazione*); if goods owned by different persons are united so as to form one sole object, every owner maintains the property of his thing, except if the different part of the new object can not be separated anymore: in this case, a joint ownership rises (*unione* - union); if one of those mixed things have a special value in comparison to the others, the owner of this thing becomes owner of the whole, after having paid an equal sum (*commistione* - confusion). Other provisions determine the transfer of ownership due to unexpected and casual events, such as flooding, or the change of the riverbed (Article 941 ffl. Civil Code).

Concerning derivative acquisitions the first title of transmission to remind is the contract. This is defined by Civil Code as an agreement between two or more parties having as aim the constitution, the modification or the extinction of juridical relations between them⁴⁷ (Article 1321 Civil Code).

⁴⁵ The time required for completing prescription could be very long, even amounting to 20 years, if the goods are immovable and the user wasn't in *bona fide* in the moment when he begun to make use of the right.

⁴⁶ The rule is opposite if the materials have more worth more than the work.

⁴⁷ The law applicable to the contract is determined by Article 57 l. 218/95, which provides that 1980 Rome Convention is *anyway* applicable. The Convention has been signed by Member States of EC and has as specific object the determination of the law applicable to contractual relationships (Rome Convention of 1980 on the law applicable to contractual obligation, consolidated version, in *GUCE* n. C 334 del 30th December 2005, p. 1). The extension brought by stating that it is *anyway* applicable means that the scope of the Convention is enlarged to that type of contracts that are excluded by Article 1.2 from its natural objective scope. The Convention leaves the choice of the law by the parties; if there isn't any, the applicable law is the one of the State which has the closest connection to the contract. Then, the Convention determines rebuttable presumptions which can guide the judge in choosing the applicable law. For a general bibliography to problems related to the Convention, see: COLLINS L., *Contractual obligations - The EEC preliminary draft Convention on private international law*, in *International and Comparative Law Quarterly*, 1976, p. 35; FLETCHER I., *Conflict of laws and European Community Law*, Amsterdam, New York, Oxford, 1982; CORRAO M. E., *I rapporti di lavoro nella Convenzione europea sulla legge applicabile alle obbligazioni contrattuali*, in *Rivista di diritto internazionale privato e processuale*, 1984, p. 79; PICCHIO FORLATI L., *La Convenzione di Roma del 1980 sulla legge applicabile ai contratti nell'ordinamento italiano*, in *Giurisprudenza e legge applicabile ai contratti nella CEE*, Jayme E., Picchio Forlati L. (eds.), 1990, Padova, p. 109; BARATTA R., *Il collegamento più stretto nel diritto internazionale privato dei contratti*, 1991, Milano; DUTOIT B., *The Rome Convention on the Choice of Law for Contracts*, in *European Private International Law*, von Hoffman B. (eds.),

The Code regulates some nominated contract, but the parties' autonomy can invent new forms and new contents of the contract, in the way that so satisfy all their exigencies⁴⁸ (Article 1322). The principle contract for the transfer of property is, of course, the purchase (Article 1470 ffl. Civil Code). In contracts having as object the transfer of property right, or the constitution or the transfer of another right *in rem*, or the transmission of another right, the rights are transmitted or acquired by the sole legitimate consent of the parties concerned: neither the payment nor the consign are required (Article 1376 Civil Code).

Other events can be considered a title of derivative acquisition, as succession on death⁴⁹, the settlement of financial and patrimonial relation between spouses⁵⁰, the relationships between parents and children⁵¹, donations⁵².

1998, Nijmegen, p. 39; CARELLA G., *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, 1999, Bari; BARATTA R., *Convenzione di Roma sulla legge applicabile alle obbligazioni contrattuali*, in *Il diritto privato dell'Unione europea*, tomo II, Tizzano A. (eds.), 2000, Torino; CELLE P., *I contatti di assicurazione grandi rischi nel diritto internazionale privato*, 2000, Padova; PINNA A. (eds.), *The protection of the European Consumer: some Aspects of Private International Law*, in *Tilbury foreign law review*, 2002, p. 325; BOSCHIERO N., *Verso il rinnovamento e la trasformazione della Convenzione di Roma: problemi generali*, in *Diritto internazionale privato e diritto comunitario*, Picone P. (eds.), Padova, 2004, p. 319.

⁴⁸ Limits are imposed concerning the aim of the contract, its content, its economical function, which must be always legal.

⁴⁹ Article 46 of Law n. 218/95 states that the succession because of death is regulated by the law of the citizenship of the *de cuius*, except the case in which he has chosen the law of the place of domicile. The same law regulates the division of the patrimony. The capacity of providing with testament, to change and to revoke it is regulated by the national law of the person concerned at the moment of the act; there is a special provision regarding the form of the testament, as so to assure its validity: indeed, it is considered to be valid if it's so by the law either of the State where the interested person has disposed, either of the State of citizenship, either of the State of domicile.

⁵⁰ The patrimonial relationship between spouses are regulated by the law applicable to their personal relationship, that means the common nationality's law, or, if any, the law of the place where their matrimonial life is mostly placed. Concerning patrimonial relationships, the spouses can choose the law of the State of which at least one of them has citizenship, or the law of the place of domicile (Article 30 l. 218/95).

⁵¹ After the entry into force of the 1995s law the relevant connection has completely changed in favour of the children. Indeed, in the Preliminary Provision of the Civil Code the applicable law was determined by the father's citizenship, now all relationships between children and parents are regulated by the national law of the interested son (Article 36 l. 218/95).

⁵² These are regulated by the national law of the donor, but this can choose to apply the law of the State of domicile. Regarding the form of the act, the donation is considered to be valid if it's so for the law applying to the content of the act, or for the law of the State where it is done (Article 56 l. 218/95).

3. Italian Law on the Condition of Aliens in Italy

3.1 The Applicability of Reciprocity Condition

After this preliminary view on Italian legislation over rights *in rem* and their acquisition, in this paragraph we will analyse the conditions under which an alien can acquire ownership on immovable property in Italy.

As a preliminary remark, a distinction between EU and non EU citizen must be drawn⁵³. Indeed, thanks to the free movement of goods and capitals provided by the EC Treaty, Member States can not impose restriction to investments and acquisition of goods done by EU citizens in their territory. All the discriminations, either in law or in fact, for the acquisition of immovable property by an EU citizen are prohibited. This means that the law can not impose any condition or restriction other or different from those imposed to citizens; at the same time it must be guaranteed that the conditions required by the law are not *in facto* discriminatory, in the sense that they constitute a factual obstacle to the free movement, which can discourage the acquisition of immovable property by EU citizens. Restrictions can be imposed only in the specific cases provided by the Treaty, which are the necessity to respect the fiscal legislation, the need to avoid frauds or abuses, and reasons of public policy or public security; Member States can also regulate procedures to prescribe declarations on the movement of capitals having as aim the administrative or statistical information (Article 58 ECT). The restrictions must in any case be proportionate to the aim preserved. As example of a non discriminatory measure considered inconsistent with EC law, we can remind the requirement of an administrative authorisation to buy a second house in a specific part of the territory of a Member State. The regime was not discriminatory, since it was imposed both to citizens and aliens. The ECJ

⁵³ By Article 17 of EC Treaty an EU citizen is a person who has the citizenship of one Member State. The rules for conferring national citizenship are left to the States (European Court of Justice – following: ECJ -, 7th July 1992, case C-369/90, *Micheletti*, ECR, I-4239), but from this attribution stems automatically also the EU citizenship. The related rights are described in artt. 18 ff. of the Treaty; between them, the most important is the right to move freely in the territory of all Member States, even if the person concerned is not implied in a commercial activity (ECJ, 12th May 998, case C-85/96, *Martinez Sala*, ECR, I-2691; ECJ, 23rd November 2000, case C-135/99, *Elsen*, ECR, I-10375; ECJ 20th February 2001, C-192/99, *Kaur*, ECR, I-1237; ECJ, 20th September 2001, case C-184/99, *Grzelczyk*, ECR, I-6193; ECJ, 7th February 2002, case C-28/00, *Kauer*, ECR, I-1343; ECJ, 11th July 2002, case C-224/98, *D'Hoop*, ECR, I-6191; ECJ, 17th September 2002, case C-413/99, *Baumbast*, ECR, I-7091; ECJ, 2nd October 2003, case C-148/02, *Garcia Avello*, ECR. I-11613; ECJ, 19th October 2004, case C-200/02, ECR, I-9925).

stated anyway that it restricted free movement of capitals between Member States, because it discouraged foreign investments⁵⁴.

It follows that the only interesting question concerns non-EU citizens wishing to acquire immovable property in Italy⁵⁵.

The regulation is actually not very clear. We can start by reminding the relevant provisions. Article 16 of Preliminary Dispositions of Civil Code provides that "*The alien is admitted to enjoy civil rights granted to the citizen under condition of reciprocity, and save the provisions contained in special laws*"⁵⁶.

⁵⁴ ECJ, 5th March 2002, cases C-515, from C-519 to C-524 and from C-526 to C-540/99, *Reisch e a.*, ECR, I-2157; ECJ, 15th May 2003, case C-300/01, *Salzmann*, ECR, I-4899. The Austrian legislation imposed a preliminary declaration and a following administrative authorisation for the acquisition of immovable property and buildings in the Land of Salisbury, where the buyers could fix a secondary domicile. The requirement of authorisation constitutes an obstacle to free movement: a mere declaration of the acquisition is, according to the opinion of the ECJ, an adequate measure to control the properties regime in tourist zones.

⁵⁵ New York Convention on *Status of Stateless Persons* (see footnote 2) provides that the States must grant to stateless persons the most favourable treatment, and, in any case, not worse to the one accorded to the alien in the same factual situations, regarding the acquisition of movable and immovable property (Article 13). So, the legislation we are going to describe further is also applicable to a stateless person who legally resides in a State different from Italy. Indeed, according to Article 19 l. 218/95, the *status* of the stateless person is regulated by the law of the State in which he has domicile or resides. Consequently, if a stateless person resides in Italy, he or she will be subject to Italian law as if he or she was Italian citizen.

⁵⁶ (The author's translation). This is not the right place where to analyse the practice concerning reciprocity condition. Briefly, we underline some doctrinal debates. First of all it's important to remark that the reciprocity clause has as object capacity to have rights (*capacità giuridica*), meant as the aptitude to be subject to rights and duties, and not the capacity to exercise rights (*capacità d'agire*) (BISCOTTINI G., *Il principio di reciprocità nell'ordinamento italiano*, in *Rivista di diritto internazionale*, 1967, p. 51; DI FABIO M., *op. cit.*, p. 86; RESCIGNO P., *Gli acquisti immobiliari in Italia dello straniero*, in *Rivista di diritto commerciale*, 1983, I, p. 176; FOCARELLI C., *La reciprocità nel trattamento degli stranieri in Italia come forma di ritorsione o di rappresaglia*, in *Rivista di diritto internazionale*, 1989, p. 834; CALÒ E., *Il principio di reciprocità*, *op.cit.*, p. 59; ID., *La nuova disciplina della condizione dello straniero*, Quaderni del Notariato, Milano, 2000; CORSI C., *Lo Stato e lo straniero*, Padova, 2001, p. 325). It can be reminded here that capacity to have rights is regulated by the national law of the person concerned; also special capacities required by the law are regulated by the same law (artt. 20 and 23 l. 218/95). If the natural person has more than one citizenship, the applicable law is the one having the most closest connection with the person; if one of these citizenship is Italian, it prevails (Article 19 l. 218/95; Corte d'Appello di Milano, 31st August 2005, in *Rivista di diritto internazionale private e processuale*, 2006, p. 176). Political rights are excluded from condition of reciprocity and the alien can't enjoy them. Some authors have tried to demonstrate

Further provisions on the condition of aliens in Italy are contained in Law No. 40/1998⁵⁷, which has been subsequent incorporated in the decree No.

that the condition of reciprocity has been abolished by Article 10, par. 2, of the Constitution, which provides: "The juridical condition of the alien is regulated by the law according to international dispositions and treaties" (the author's translation), but finally this provision (subsequent to Article 16 Preliminary Dispositions) can't be considered incompatible with reciprocity condition (NASCIMBENE B., *Cittadinanza e condizione giuridica dello straniero*, op. cit., p. 811; RESCIGNO P., op. cit., p. 174; TONDO S., *Acquisto immobiliare dello straniero e reciprocità*, in *Foro it.*, 1983, V, 239; FOCARELLI C., op. cit., p. 842; CALÒ E., *Il principio di reciprocità*, op. cit., p. 23; MENGOZZI P., *La condizione di reciprocità e il diritto internazionale privato*, in *Rivista di diritto internazionale privato e processuale*, 1994, p. 487; LAURINI G., *Il principio di reciprocità e la riforma del diritto internazionale privato*, in *Rivista italiana di diritto internazionale privato e processuale*, 1997, p. 80; LEANZA U., *Considerazioni critiche sulla portata e l'efficacia dell'Article 16 delle disposizioni preliminari al codice civile*, in *Rivista italiana di diritto internazionale privato e processuale*, 1997, p. 87; BARALIS G., *La condizione di reciprocità*, in *La condizione di reciprocità, la riforma del sistema italiano di diritto internazionale privato: aspetti di interesse notarile*, Ieva M. (eds.), Milano, 2001, p. 63; CORSI C., op. cit., p. 107 and 323; in case law: Tribunale Vicenza, 27th April 2000, in *Rivista di diritto internazionale privato e processuale*, 2001, p. 130). Debates were born also on how to apply the condition of reciprocity: the doctrine pointed out primarily how it could be either a juridical, either a factual verification (for in the first case being it enough that the law grants the same rights to Italian citizens abroad as to the ones required by the alien in Italy, in second case wishing that the Italians abroad can effectively enjoy the rights, independently from the contents of the legislation); secondly, the condition of reciprocity could be verified in a general way (being it enough that similar rights are granted to Italians abroad) or specifically (where it's to be verified that the Italian abroad enjoys a right perfectly corresponding to the right granted in Italy, also with regards to its scope, its judiciary protection and its limits) (in favour of an ascertain of the generic existence of the right granted to the Italian citizen abroad, see: Corte di Cassazione, sez. I, 22nd October 1981, n. 5525, in *Rivista di diritto internazionale privato e processuale*, 1982, 812; Corte di Cassazione, sez. III, 10th February 1993, n. 1681, in *Foro it.*, 1993, I, 3067; for the debate, see: DI FABIO M., op. cit., p. 90; NASCIMBENE B., *Cittadinanza e condizione giuridica dello straniero*, op. cit., p. 804; RESCIGNO P., op. cit., p. 175; TONDO S., op. cit., 241; FOCARELLI C., op. cit., p. 837; CALÒ E., *Reciprocità: un misleading case?*, in *Giurisprudenza italiana*, 1990, I, sez. II, 734; ID., *Il principio di reciprocità*, op. cit., pp. 67, 128; MENGOZZI P., op. cit., p. 494; LEANZA U., *Considerazioni critiche*, op. cit., p. 89; BARALIS G., *La verità sta nel mezzo; a proposito di due modi «estremi» di intendere la reciprocità*, in *Rivista del notariato*, 1999, p. 865; NOVARIO E., *Acquisto immobiliare in Italia del cittadino elvetico; problemi di «reciprocità»*, in *Rivista del notariato*, 1999, p. 840; BARALIS G., *La condizione di reciprocità*, op. cit., p. 26). For a complete analysis, see: GIARDINA A., *Commentario al codice civile Scialoja - Branca, Applicazione della legge in generale, Article 16*, Roma - Bologna, 1978, p. 1.

⁵⁷ Law 3rd March 1998, n. 40 (in *GU* 12th March 1998, n. 59). On the evolution of Italian regulation on the aliens condition and the necessity of the adoption of a *Testo Unico*: BONETTI P., *I profili generali della normativa italiana sugli stranieri dal 1998*, in *Diritto degli stranieri*, Nascimbene B. (eds.), Padova, 2004, p. 3.

286/1998⁵⁸. It concerns any subject matter relating to aliens in Italy, such as the ways of entering the territory of the Republic, the general rights and duties of aliens, the various permissions to stay that can be required, the reasons and the proceeding for the expulsion, the family rejoining. After the *Testo unico* there have been many other novelties on the regulation of the aliens' condition in Italy⁵⁹.

It's important to notice that Article 1 *Testo unico* precises that the law applies to aliens who are non-EU citizen and to stateless persons.

There are not specific provisions on the acquisition of immovable property: reference must be made to the general rule of Article 2⁶⁰. Its first part provides: "*the alien present at the borders or inside the territory is granted the fundamental human rights as recognised by internal regulation, by international conventions in force and by general principles of international law*"⁶¹. Its second part is the most interesting for our purposes; it provides: "*the alien regularly residing in the territory of the State enjoys the civil rights recognised to the citizen, if international conventions in force in Italy or the same Testo unico do not provide differently. When the Testo unico or international conventions requires reciprocity condition, its fulfilment is*

⁵⁸ Legislative Decree (d. lgs.) 25th July 1998, n. 286, concerning the regulation of immigration and the rules on the condition of the alien (in *GU* 18th August 1998, n. 191). The decree has been adopted as so to coordinate all the provisions relating to immigration and condition of the aliens in one only legislative act (indeed its name is *Testo unico*, which means an act that doesn't introduce a novelty, but contains the complete regulation of a specific subject). It follows that the main innovations had been introduced with the Law n. 40/1998. On the reform see: MARRA A. M., *Diritti e doveri degli immigrati: procedure, documenti e prassi*, Napoli, 1999; CALÒ E., *La nuova disciplina della condizione dello straniero*, op. cit., 2000; MARTELLONE B., *Immigrazione. Ingresso e soggiorno dei cittadini stranieri in Italia*, Bergamo, 2000.

⁵⁹ The most important has been adopted by Law 30th July 2002, n. 189, "*Modification to regulation concerning immigration and asylum*" (in *GU* 26th August 2002, n. 199). For a complete comment see: MUSACCHIO V., *Manuale pratico di diritto dell'immigrazione*, Padova, 2003; SCEVI P., *Manuale di diritto delle migrazioni. La condizione giuridica dello straniero dopo la riforma*, Piacenza, 2003; AA.VV., *Diritto degli stranieri*, op. cit.; there, also for the incidence of EC law on Member States immigration policy (spec. p. XLIV); DI MAIO L., PROTO M., LONGARZIA M.C., op. cit.; TERRACCIANO U., *Stranieri: le nuove disposizioni in materia di immigrazione*, Forlì, 2005. The last amendment to the regulation on the *status* of aliens has been adopted by Legislative Decree 8th January 2007, n. 5 (in *GU* 31st January 2007, n. 25), that complies EC Council Directive 86/2003, of 22nd September 2003 on the right to family reunification, in *Official Journal* n. L 251, 3rd October 2003, p. 12. The novels apported by this law don't interest our subject.

⁶⁰ The rule is common in Law n. 40/1998 and in the *Testo unico*; reference can be made either to the first, either to the second, without any substantial legislative difference.

⁶¹ The author's translation.

verified in the ways prescribed by a regulation of actuation"⁶². This regulation has been approved only in 1999⁶³; it provides that it is not necessary to ascertain reciprocity for aliens legally residing in Italy thanks to some of the leave to stay indicated by the law, which are a residence permit⁶⁴, or a permit limited to work, or to the conduct of an individual enterprise, or to study, or for family or humanitarian reasons (Article 1, par. 2). In all the other cases, the Ministry of Foreign Affairs is required to communicate to notaries and persons responsible of administrative proceedings the information relating to the grant of the same civil rights by Italians in foreign States⁶⁵.

Neither Law No. 40/1998, nor the following laws, have expressly abolished Article 16 of Preliminary Rules. The first question to answer to is if the general reciprocity clause has been implicitly abolished⁶⁶. Indeed, the laws adopted from 1998 has as specific object the condition of the alien in Italy, and seems to regulate its *status* in a new, most liberal way, which appears inconsistent with the traditional reciprocity condition: Article 2 *Testo unico* states the general principle that all the aliens regularly present enjoy full civil rights, save exceptions. Some Authors and some case-law⁶⁷ expressed the view of a tacit abolition; but it's not the main interpretation at the

⁶² The author's translation.

⁶³ Decree of the President of the Republic 31st August 1999, n. 394, containing rules of actuation of the general law concerning the regulation on immigration and on condition of aliens (in *GU* 3rd November 1999, n. 258).

⁶⁴ Article 9 d. lgs. 286/98.

⁶⁵ As for legal persons, see par. 5.

⁶⁶ According to Article 15 Preliminary Dispositions: "Laws are abolished only by successive laws for express declaration of the legislator, or because of inconsistency between the new regulation and the preceding, or because the new law regulates the entire subject matter of the previous law" (the author's translation).

⁶⁷ NASCIMBENE B., *La condizione giuridica dello straniero, Diritto vigente e prospettive di riforma*, Padova, 1997; MEMMO D., *Disciplina dell'immigrazione e norme sulla condizione dello straniero: prime riflessioni sui diritti civili della persona tra normative speciali e legge 6 marzo 1998, n. 40*, in *Contratto e impresa*, 1998, p. 949; NASCIMBENE B., *Lavoro autonomo, reciprocità e diritti civili: i problemi non risolti dalla nuova legge sull'immigrazione*, in *Gazzetta Giuridica*, 1998, n. 8, p. 1; CAMPIGLIO C., *Abrogazione dell'Article 16 delle preleggi per nuova disciplina?*, in *Rivista di diritto internazionale privato e processuale*, 2001, 45; COSCIA G., *Condizione di reciprocità e diritto internazionale privato*, in *Rivista di diritto internazionale privato e processuale*, 2001, 560; Tribunale Torino, decree 24th March 1999, in *Rivista del notariato*, 1999, p. 988; Corte d'Appello Milano, 22nd June 1999, in *Rivista di diritto internazionale privato e processuale*, 2000, p. 1093; Corte d'Appello Milano, 18th December 2001, in *Rivista di diritto internazionale privato e processuale*, 2002, p. 1094.

moment⁶⁸. The last opinion, which would save Article 16 Preliminary Rules – even if with a more limited scope -, seems supported by a communication published by the Ministry of Foreign Affairs on its web site⁶⁹, relating to the application of reciprocity clause and the content of international convention⁷⁰. The site reminds that for the alien legally resident for the reasons indicated in Article 1, par. 2 d.p.r. 394/1999 there's no need to verify reciprocity. Then, there are not, at the moment, international conventions that provide for the aliens less favourable conditions in comparison to the rights recognised to citizens⁷¹. The communication continues indicating that, if the alien does not own one of the listed permits, then the international convention concluded with that State has to be applied⁷², or, if there are not any, the Service of Diplomatic Cases and Treaties gives its opinion. This last sentence is not very clear, but it seems that the opinion concerns the fulfilment of reciprocity condition. Indeed if the alien is legally present for reasons different from the ones considered in Article 1, par. 2, d.p.r. n. 394/1999 and there's no international convention, there is not any other regulation concerning civil rights not considered in the *Testo Unico*, as the possibility to acquire immovable property. In that case, only reciprocity could apply, recognised as the general regulation relating the *status* of aliens. As interpreted by the information given by the Ministry, the new rules do not seem to abolish reciprocity condition, but only to reduce its scope and to provide special exception for those in possess of a specific leave to stay. Indeed Article 16 Preliminary Dispositions would apply to aliens illegally present and to all the other aliens with a permit to stay different from those

⁶⁸ For recent application of reciprocity condition in case law: Tribunale Vicenza, 27th April 2000, cit.; Corte di Cassazione, sez. I, 15th June 2000, n. 8171, in *Foro it.*, 2000, I, 3525; Tribunale Bergamo, 4th December 2002, in *Rivista di diritto internazionale privato e processuale*, 2003, p. 986; Corte d'Appello Torino 10th December 2004, in *Rivista di diritto internazionale privato e processuale*, 2005, p. 777. For a complete analysis in doctrine: NOVARIO E., *op. cit.*, p. 836.

⁶⁹ www.esteri.it.

⁷⁰ It must be reminded that the prevalence of international law constitutes a general principle. International conventions must be applied even if national law in force is inconsistent because of the speciality principle. Now, also a constitutional provision attributes to international conventions particular standing in the sources hierarchy. Article 117 provides that the legislation, either national, either regional, must be consistent with the Constitution and with duties arising from EC legal system and obligation of international law. This means that national legislation can't abolish international obligations in force for Italy.

⁷¹ A list of the existing conventions is available on the same web site.

⁷² On the web site there is the list of the State with which Italy has concluded international agreements.

indicated in Article 1, par. 2 d.p.r. 394/1999, if there are not international conventions in force⁷³.

Before the entry into force of d.p.r. 394/1999, Article 2 Law No. 40/1998 has given rise to a long debate concerning its interpretation: most of the cited doctrine pointed out how the regulation was in itself contradictory⁷⁴. Indeed an international convention could provide conditions stricter than reciprocity, and those would have to be applied, even if between Italy and that State there were diplomatic relationships. On the opposite, the citizen of a State, with which there is not any treaty, could enjoy civil rights entirely, even if its State of origin discriminates arbitrarily against Italian citizens and even if there are not friendly international relationships. A regulation like this would not be reasonable⁷⁵. So, first of all the doctrine has interpreted the rule in the sense that only if the provisions contained in international conventions are most favourable to the alien, then this regulation applies. Anyway the prior contradiction survives for less favourable treaties. Authors tried to resolve it interpreting the provision as a sort of invitation from Italian legislator to renew international conventions which limit the grant of civil rights, or to conclude treaties with the States with which there are not specific international agreements. In this way civil rights could be granted to every alien legally present, because it could be possible that more States would like to lessen through international treaty the conditions and the limits imposed, so that their citizens can enjoy them completely⁷⁶.

⁷³ In the communications on the website the Ministry seems to have forgotten that an alien could have a temporary permit to stay, as the ones granted for seasonal works (Article 24 *Testo unico*), or for medical care (Article 36 *Testo unico*). These persons must be considered legally present in Italy, but are not considered by Article 1, par. 2, d.p.r. 394/1999. According to the Communication of Ministry cited in the text, it seems that, if there aren't international treaties in force, reciprocity condition must be verified. This consequence would mean to treat in the same way aliens temporarily present in the territory of the State, but legally, and aliens illegally present. Indeed, the *Testo unico* doesn't regulate the civil condition of the alien illegally entered in Italy, which means that the general rule, Article 16 Preliminary Dispositions, applies. The consequence of equalizing these two groups of aliens is contradictory, because persons with a temporary permit are any case legally present. We can remind here that some specific provisions of the *Testo unico* establishes equal treatment of aliens legally present and Italian citizens. See, for example, the access to work and general treatment of the worker, for which Article 2, par. 3.

⁷⁴ See, also: CALÒ E., *Il lento (e auspicato) tramonto della reciprocità*, in *Notariato*, 1998, 287.

⁷⁵ Tribunale Torino, decree 24th March 1999, in *Rivista del notariato*, 1999, p. 988.

⁷⁶ BARALIS G., *La verità sta nel mezzo*; *op. cit.*, p. 863; ID., *La condizione di reciprocità*, *op. cit.*, p. 3; CORSI C., *op. cit.*, p. 328.

In our view, after the entry into force of d.p.r. 394/1999, this interpretation can not be accepted anymore: Article 2 *Testo unico* has a more practical content. The alien present in Italy for one of the reasons there indicated is granted with civil rights recognised to Italian citizens, and it is not necessary to verify the condition of reciprocity, even if there are international conventions in force concluded with its State of citizenship. In this way it is possible to grant a favourable treatment to the alien domiciled in Italy possessing one of the specified permits to stay⁷⁷: he or she can enjoy full civil rights without conditions. On the other side, the *status* of the alien illegally present on the territory of the Republic is subject to reciprocity⁷⁸. As consequence the scope of reciprocity condition has been sensibly reduced. In our opinion the d.p.r. has continued a choice of politics done in 1998, with the general grant of civil rights to every alien legally and almost permanently present in Italian territory⁷⁹.

3.2 Which are the *Civil Rights*?

Article 2 Law No. 40/1998 can pose another interpretative problem. Indeed it makes a distinction between *fundamental human rights* – which are granted to everybody present at the borders or in the territory of the State – and *civil rights*. It's important to distinguish between the two, for the regime being very different. Even before the entry into force of the new provisions there was no doubt that fundamental human rights were granted to aliens, since many constitutional provisions refer to the human being in general, not only to the citizen⁸⁰. Article 2 Constitution provides that the Republic recognises and grants inviolable human rights. This means that these must

⁷⁷ We'd like to remind the doubts as to the alien legally resident but for different reason, whose condition seems to be equivalent to the one of the alien illegally present. See *supra*, footnote 73.

⁷⁸ CAMPIGLIO C., *Reciprocity in the treatment of aliens in Italy: good reasons for its abolition*, in *The Italian Yearbook of International Law*, 2001, p. 130; SCEVI P., *op. cit.*, p. 18; MUSACCHIO V., *op. cit.*, p. 4.

⁷⁹ For these purposes, we remind that the alien must show a leave to stay (*carta di soggiorno*), granted if the alien regularly resides in Italy for at least six years, in force of temporary permit to stay for reasons that could justify a number of indeterminate renewals and has enough incomes; or a permit to work as employee or as self-employed (*permesso di soggiorno per motivi di lavoro subordinato o di lavoro autonomo*, regulated by artt. 22 and 37 d. lgs. 286/99); or for the exercise of an individual enterprise; or for family reasons (*permesso di lavoro per motivi di famiglia*; regulated by Article 30 d. lgs. 286/99), for humanitarian reasons or reasons related to study.

⁸⁰ You can see, for example, Article 17 of the Constitution, which provides that "*Citizens have right to assemble in a pacific way and without weapons*" (the author's translation).

be enjoyed by everybody present in the territory of the State, alien or citizen. In any event the fundamental human rights are expressly recognised to everybody, independently from citizenship. From the case law of the Constitutional Court we can infer that these fundamental rights are: asylum (Article 10), personal freedom (Article 13), inviolability of domicile (Article 14), secrecy of correspondence (Article 15), freedom to profess their religious faith (Article 19), the personality of criminal liability (Article 27), the possibility to take a judiciary action (Article 24), the medical assistance for the necessary treatments (Article 32)⁸¹.

Ownership is not considered to be a fundamental human right which could be naturally granted to everybody. Article 42 Constitution states that ownership can be public or private; in this case, the law determines the ways

⁸¹ NASCIMBENE B., *Cittadinanza e condizione giuridica dello straniero*, op. cit., p. 825; RESCIGNO P., op. cit., p. 181; CONETTI G., *Reciprocità e diritti fondamentali del lavoratore straniero*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 1989, II, 134; D'ORAZIO G., *Straniero (condizione giuridica dello)*, in *Enciclopedia giuridica Treccani*, Roma, 1990; FOCARELLI C., op. cit., p. 844; CALÒ E., *Il principio di reciprocità*, op. cit., p. 23; MENGOZZI P., op. cit., p. 489; LEANZA U., *Considerazioni critiche*, op. cit., p. 88; MIELE R., *Gli stranieri. Rassegna di studi, giurisprudenza e legislazione*, 1999, Viterbo; CORSI C., op. cit., p. 115; BONETTI P., *I principi, i diritti e doveri. Le politiche migratorie*, in *Diritto degli stranieri*, op. cit., p. 85 and p. 100; NASCIMBENE B., *Il "diritto degli stranieri". Le norme nazionali nel quadro delle norme di diritto internazionale e comunitario*, in *Diritto degli stranieri*, op. cit., p. XXXVII; BELLAGAMBA G., CARITI G., *La disciplina dell'immigrazione*, Milano, 2005, p. 9. For case law, the most significant decision is in our opinion: Corte di Cassazione, 1681/1993, cit., which distinguishes between right to act and substantial right required. The right to take a judiciary action is not subject to reciprocity, since it constitutes a fundamental right granted to everybody. This is different from the existence of the right required, which could be subject to reciprocity and consequently could not be recognised by Italian law to an alien (NASCIMBENE B., *Cittadinanza e condizione giuridica dello straniero*, op. cit., p. 812; FOCARELLI C., op. cit., p. 835 and case law and doctrine cited there for the debate on the qualification of the right to access to justice). On this point, Article 2, par. 5, d.lgs. 286/1998 provides that the aliens are granted equal treatment regarding access to justice. Recently, on the right to health and medical care, see: Corte d'Appello Milano, 22 giugno 1999, cit.; Tribunale Catania, 13th June 2005, in *Rivista di diritto internazionale privato e processuale*, 2006, p. 815; Corte di Cassazione, sez. I, 27th January 2005, n. 1690, in *Giust. civ. Mass.*, 2005, 1; Corte Costituzionale, n. 252/2001, in *Diritto, immigrazione e cittadinanza*, 2001, p. 113. Gives rise to debate the decision of Tribunale Vicenza, 27th April 2000, cit. (see: CAMPIGLIO C., *Abrogazione dell'Article 16 delle preleggi per nuova disciplina?*, op.cit.). Outside the scope of Article 2, even if Article 3 of the Constitution prohibits any kind of discrimination, it's to be reminded that it's not forbidden to provide a different regulation for alien, if reasonable. And reciprocity clause is meant to be so. It follows that the enjoy of some rights, even if recognised by the Constitution, can be limited against aliens according to reciprocity.

of acquisition, transmission and enjoyment of ownership⁸², comprehending its limits so as to grant its social function and to make it accessible to everybody. It is clear that the literal formulation of this disposition is very different from the other Constitutional provisions granting a universal right⁸³. Article 42 is not then inserted in the part of the Constitution dedicated to civil rights, but under the Title *Rapporti economici* (Economical Relationships): this different qualification of the right in question lets the interpreter understand that the scope of this provision is different from the ones relating to *pure* civil rights.

It follows that there is no doubt that the alien can not enjoy ownership as a right granted to everybody according to the Constitution and Article 2, par. 1, l. 40/1998 and *Testo unico*⁸⁴. There is no uncertainty in case law and in doctrine as to the fact that the acquisition of immovable property by aliens, not being a fundamental right, is subject to conditions prescribed by the law (i.e.: the reciprocity clause of Article 16 Preliminary Dispositions up to 1998, and, after, the new regulation described above⁸⁵).

Already in 1989 the Rome Tribunal has declared the nullity of a contract preliminary to the sale of the property of an immovable, concluded with Iranian citizens, because a right to ownership was not recognised in Iran in favour of Italians⁸⁶. The application of this regulation to problems related to the acquisition of immovable property is confirmed by a communication published on the website of the Ministry of Foreign Affairs, which declares that the regulation of the acquisition of immovable property, of the incorporation and of the participation in Italian companies by aliens is contained in the *Testo unico* and in d.p.r. 394/1999. We can refer, here, to the dispositions already quoted above and the opinions there expressed⁸⁷.

Then, the Opinion of 15th January 1999⁸⁸, given by the Ministry of Justice

⁸² See *supra*, par. 3.

⁸³ See, for example, Article 13, which states that: "*Personal freedom is inviolable*" (the author's translation).

⁸⁴ DI FABIO M., *op. cit.* p. 87; RESCIGNO P., *op. cit.*, p. 182; TONDO S., *op. cit.*, 235; D'ORAZIO G., *op. cit.*; FOCARELLI C., *op. cit.*, p. 834; NASCIMBENE B., *Straniero (condizione giuridica dello) Diritto internazionale*, in *Enciclopedia giuridica Treccani*, Roma, 1990; RUBINO-SAMMARTINO M., DANOVÌ R., *Acquisition of immovable property by aliens in Italy*, *Comparative Law Yearbook*, Vol. 11, 1992, p. 55; LAURINI G., *op. cit.*, p. 75; BARALIS G., *La condizione di reciprocità*, *op. cit.*, p. 52; CORSI C., *op. cit.*, p. 326; COSCIA G., *op. cit.*, p. 557.

⁸⁵ See par. 4.1.

⁸⁶ Rome Tribunal, 30th August 1989, in *Giurisprudenza italiana*, 1990, I, 2, 734.

⁸⁷ See par. 4.1.

⁸⁸ Reported in *Diritto, immigrazione e cittadinanza*, 1999, 2, p. 239. Please note that this opinion has been delivered before the entry into force of d.p.r. 394/1999.

must be reminded. It had been required for an opinion relating on the validity of act of acquisition of a flat by aliens possessing a leave to stay, but for which no reciprocity existed. The Ministry affirmed that the Law No. 40/1998 is able to change the scope of Article 16 Preliminary Dispositions, in the sense that the alien regularly present in Italy is admitted to enjoy all the civil rights granted to Italian citizens and relating to family matters, inheritance, ownership, obligations and commercial law, even if no reciprocity is ascertained⁸⁹.

If reciprocity condition is not satisfied, the act of transmission of immovable property is null and void⁹⁰, since it has been concluded by a non-capable person, without any possibility to ratify it (Article 1424 Civil Code), even if reciprocity is fulfilled after the conclusion of the act. Article 2652, n. 6, Civil Code provides a disposition in favour of third parties, in the sense that judicial claims having as object the ascertain of the nullity of the contract must be transcribed in *Conservatoria*; anyway, the judgment that declares the nullity does not affect rights acquired in any way by third parties, if they are in good faith and five years from the transcription have passed.

3.3 The Acquisition of Immovable Property in Security Zones

One last problem that could deserve some attention concerns the limitations on the right of acquisition of immovable property in zone considered of military importance, as border zones. Also for this subject there have been many changes to the original legislation.

First of all Law No. 886/1931⁹¹ provides limitation as to the construction of immovable property, also of public interest in zones determined as important for military reasons on the borders of the State. These parts of the territory of the State are specifically indicated in a schedule enclosed in the law. As for the kind of limitations, Article 1 submits to a prior authorisation of military authority⁹², for example, the constructions of railways and mining, maritime, hydraulic and electrical work, as the construction of buildings and

⁸⁹ The Notary Counsel of Brescia has deliberated that the reciprocity condition doesn't need to be ascertained if: - the alien non-EU citizen has a regular permit to stay and has residence in Italy; - if he or she has a regular work; - if he or she wants to acquire the *prima casa*, the first home of property where to live in. This deliberation has not a juridical effect, being it emanated by a Counsel without legislative power. Anyway it can be considered to be an important guideline for the professionals that have to ascertain the fulfilment of reciprocity clause. The deliberation is partly published in *Diritto, immigrazione e cittadinanza*, 1999, 2, p. 238.

⁹⁰ CALÒ E., *Il principio di reciprocità*, *op.cit.*, p. 176.

⁹¹ Law 1st June 1931, n. 886, in *GU* 18th July 1931, n. 164.

⁹² The proceeding is regulated by Article 3 l. 886/1931.

road in a measure exceeding the limits established by the law⁹³. Article 5 provides that the military authority must exercise a continuous surveillance on the immovable goods indicated in previous articles; for this aim it must be informed of all the acts of transmission concerning these goods, and of all the acts that constitute a right *in rem* on them. These provisions do not concern specifically aliens, since it has general scope, applying also to Italian citizens.

Law No. 1095/1935⁹⁴, entitled “*Rules on the transmission of property on immovable goods located in borders zones*” complements Law No. 886/1931⁹⁵. Accordingly, before the conclusion of the act of transmission an authorisation of the *Prefetto della Provincia*⁹⁶ was necessary: without it, the acts had no legal effect, even if the transmission was only partial. The *Prefetto* had to require the opinion of the military authority, and he could not decide inconsistently; the authorisation had to be granted in 6 months from the date of the request⁹⁷. This regime was applicable to Italian citizens and aliens.

Another amendment has been introduced by Law No. 898/1976⁹⁸, as then modified in 1990 and 2000⁹⁹. The law establishes a renewed system for the zones of military importance. According to Article 18, par. 1, the proceeding regulated by Law No. 1095/1935 also applies to zones of military importance, and not only to immovable goods located in border zones. Then a discrimination based on citizenship has been introduced: Article 18, par. 2 provided that the authorisation was not necessary if the immovable property was acquired by an Italian citizen; after the amendment in 1990, also State administrations, comprehending locals authorities, and Italian legal persons, were exempted¹⁰⁰. This article had to be modified once more after

⁹³ For the complete list see Article 2 l. 886/1931.

⁹⁴ Law 3rd June 1935, n. 1095, in *GU* 4rd July 1935, n. 154.

⁹⁵ The law has been modified by Law 22nd December 1939, n. 2207, in *GU* 2nd March 1940, n. 53.

⁹⁶ The *Prefetto* is an authority nominated by the national central government and sent in any administrative Italian division (the *Provincia*) as referent for the government.

⁹⁷ The law didn't provide any consequence in case of violation of this time limit.

⁹⁸ Law 24th December 1976, n. 898, in *GU* 11th January 1977, n. 8.

⁹⁹ Law 2nd May 1990, n. 104, in *GU* 8th May 1990, n. 105; Law 29th December 2000, n. 422, in *GU* 20th January 2001, n. 16.

¹⁰⁰ The authorisation is required even if the transmission is an effect of a jurisdictional decision, either it would be possible to circumvent the regulation. On the other hand, the authorisation isn't necessary for acts constituting guarantee rights *in rem* because of their different object, and for inheritance, since it doesn't require an act of transmission. See: PADOVINI F., *Modifiche e integrazioni della legge 24 dicembre 1976, n. 898, concernente nuova regolamentazione delle servitù militari*, in *Nuove leggi civili commentate*, 1991, p. 976.

the ECJ decision in case *Albore*¹⁰¹, where it was stated that the free movement of capitals granted by Article 56 EC Treaty “precludes national legislation of a Member State which, on grounds relating to the requirements of defence of the national territory, exempts the nationals of that Member State, and only them, from the obligation to apply for an administrative authorisation for any purchase of real estate situated within an area of the national territory designated as being of military importance”. The law has been amended in the sense that also EU citizens and legal persons having seat in a Member State are exempted from the request of authorisation¹⁰². For all the other cases, Article 18, parr. 3 ffl., as modified in 1990, regulates the proceeding to obtain the authorisation. It is always necessary to require the authorisation of the *Prefetto*, which must consult the military authority. The authorisation must be delivered in 60 days, in which are also included 45 days attributed to the military authority to express its opinion. If this authority does not give it in time, the silence has the same effects of a positive opinion. The authorisation of the *Prefetto* loses its validity if the acquisition is not concluded within 6 months from the date when it has been granted. The denial of authorisation must be reasoned – while Article 1 l. 1095/1935 excluded expressly the need of a reasoning¹⁰³.

Presumably for reasons of certainty the proceeding contemplated in the Law No. 1095/1935 has been abolished in year 2000¹⁰⁴. It follows that the acquisition of immovable property by aliens in border zones and the ones of military interest, is now to be considered as regulated exclusively by the Law No. 898/1976.

¹⁰¹ ECJ, 13th July 2000, case C-423/98, *Albore*, in *Racc.* I-5965. It's interesting to note that the Tribunale di Napoli, 27th May 1998, in *Notariato*, 1999, p. 571, has stated that correctly the *Conservatore*, the public officer responsible for the transcription in the *Conservatoria* (see footnote 42), has refused transcription of a sale in favour of German citizens lacking authorisation. In the opinion of the Tribunale, the requirement of a permission doesn't infringe EC law, not being inconsistent with freedom of establishment. The conclusions reached there are exactly the opposite to the considerations made by ECJ in case *Albore*.

¹⁰² Law n. 422/2000 has provided for the necessary amendment.

¹⁰³ See, for a complete comment: PADOVINI F., *op. cit.*, p. 977; CALÒ E., *Il principio di reciprocità*, *op.cit.*, p. 187.

¹⁰⁴ Law 24th November 2000, n. 340, in *GU* 29th February 2000, n. 49. After the abolition, the new regime doesn't regulate the juridical effects of the act of acquisition done without the necessary authorisation. In our opinion the act has no juridical effect at all, and can't be transcribed in the registers of the *Conservatoria*. Different is the problem of the disciplinary liability of the notary and of the officers that has eventually accepted to inscribe the acquisition.

4. The *Status* of Legal Persons

The actual regulation of the *status* of legal persons does not seem to pose particular interpretative questions. The same topic under examination – the grant of civil rights, and, in particular, the right to acquire an immovable – does not seem so dramatic, since we are not anymore concerned with the problem of the necessity to assure a right to a natural person, but to permit to a legal person to exercise freely its own economic choices (such as to invest in Italy, to constitute here a branch or a subsidiary, to open a bureau, and so on).

Article 16, II par., Preliminary Dispositions of Civil Code provides that reciprocity condition is applicable also to foreign legal persons¹⁰⁵. The laws already mentioned on the *status* of aliens in Italy do not provide any specific provisions on legal persons. The communication of the Ministry of Foreign Affairs cited above¹⁰⁶ associates the positions of natural persons not having a permit as the one indicated in Article 1, par. 2, d.p.r. 394/1999 and foreign legal persons in general. This means that, if there is an international convention, this is applicable as ratified in Italy; if there is not any special treaty, reciprocity condition must be satisfied¹⁰⁷. As we can see, the regulation is much more simple and easier to apply: except the case of an existing international convention, the condition of reciprocity must always be verified¹⁰⁸. On the web site of the Ministry of Foreign Affairs it is possible to find a complete catalogue of the international treaties in force¹⁰⁹.

There is still one important limitation as to the acquisition of immovable property, which applies both to Italian and foreign legal persons. Article 473 Civil Code provides that the acceptance of inheritance must be done with *beneficio d'inventario*, that means with reservation; the legal person called to inheritance must catalogue and value all the goods of the deceased's

¹⁰⁵ For the way to apply the condition of reciprocity see *supra*, footnote 56.

¹⁰⁶ See par. 4.1.

¹⁰⁷ BARALIS G., *La condizione di reciprocità*, *op. cit.*, p. 8; CORSI C., *op. cit.*, p. 327; BONETTI P., *I principi, i diritti e doveri. Le politiche migratorie*, *op. cit.*, p. 145. See par. 4.1.

¹⁰⁸ For the application of Article 16 Preliminary Dispositions, see: Tribunale Napoli, decree 12th January 1995, in *Rivista di diritto internazionale privato e processuale*, 1996, p. 580; Tribunale Verona, decree 11th April 1995, *ivi*; Tribunale Genova, ord. 21st December 1996, in *Rivista di diritto internazionale privato e processuale*, 1997, p. 172.

¹⁰⁹ Until 1997 the acquisition of immovable property was limited, subject to prior governmental authorisation (Article 17 Civil Code). This rule applied to all legal persons, Italian and foreign, and wasn't so discriminatory. It has been abolished by Law 15th May 1997, n. 127, in *GU* 4th July 1997, n. 154, as modified by Law 22nd June 2000, n. 192, in *GU* 25th October 2000, n. 250.

patrimony, before becoming heir and consequently owner. This provision does not apply to companies¹¹⁰.

The only remaining question is to ascertain who is a *foreign legal person* according to Italian law¹¹¹. Article 25 l. 218/95, entitled *legal persons*, provides that companies, associations, foundations and any other body, public or private, even if not having a corporative character, are regulated by the law of the State where the incorporation has been concluded; if the place of administration or the principle object of its activity has place in Italy, Italian law is applicable¹¹². A legal person is to be considered foreign if the incorporation has been done abroad, except in the two last cases mentioned, if the place of the seat or of the principle object of the activity is situated in Italy. This interpretation is confirmed by Article 2509 Civil Code, with calls *foreign companies* all the *companies incorporated abroad*. It is necessary to remind that, according to Article 2508 Civil Code, a foreign society having branches in Italy is subject to some duties relating to the publication of social acts, so as to make them known to anyone that would enter in affaires with these companies or branches.

Even if the acquisition of immovable property by foreign legal persons can be strictly limited, practically the regulation is easier and clearer than that regarding natural persons and better responds to the State exigency to control the movement of foreign capitals in Italy.

Concluding Remarks

The regulation on the acquisition of immovable property by aliens in Italy is now quite complicated and increases the difficulties of the notaries and legal advisors, when they hand a contract involving one or more alien parties. As we have seen, concerning the *status* of natural persons, there are inconsistencies even in case law. The interpretation of the relevant provisions is not easy outside the clear cut case of a person established in Italy according to Article 1, par. 2 d.p.r. 394/1999. In this paper we tried to give a logical interpretation of the relevant provisions, but we are aware that not all the problems are resolved and that contradictions still remain¹¹³.

¹¹⁰ Article 473 Civil Code has been modified by the Law n. 192/2000, as so to coordinate it with the abolition of Article 17 Civil Code.

¹¹¹ DI FABIO M., *op. cit.* p. 68.

¹¹² The following paragraph determines a list of subject matters regulated by the law indicated by the rules of connection cited in the text. Confirming the nationality of legal persons must be determined according to Article 25 l. 218/95: Corte di Cassazione, sez. trib., 22nd November 2002, n. 15301, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 259.

¹¹³ See footnote 73.

The present legislation causes legal uncertainty. This is one of the reasons why almost all the recent doctrine cited encourages the abolition of the reciprocity clause. It would be a political option of civilisation of Italian legal system, becoming during the last decades a place of immigration and no more of emigration. Undoubtedly a choice like this would demonstrate the political openness towards aliens. Actually, in our opinion a difference of treatment can still be in some limits justified. Following the interpretation we have given to the relevant provisions and the different notes stemming of the Ministry, we can conclude that only the alien not legally residing in Italy and foreign legal persons are subject to reciprocity¹¹⁴; those who are legally present in Italy enjoy full civil rights, and even if there are specific provisions prescribing reciprocity, in many cases¹¹⁵ this has not to be verified. A difference is so outlined only between persons legally domiciled and illegally present in Italy, a difference which could be justified by the legitimate interest of the State to control the presence of immigrated persons and to grant rights only to aliens that have regularly declared their presence on the territory of the State¹¹⁶.

After and above this consideration of politics, we agree in underlining that the *status* of aliens must be clarified; it is necessary to regulate with precision and clearness which rights are granted to these persons and which are the eventual limits.

Drawing on the concluding remarks of two Authors¹¹⁷, we can observe that especially thanks to the case law of ECJ, legal certainty has become a *fundamental* right. It could be qualified as a new right of the third generation, and be described as the right to know the duties imposed and the rights granted by the law in a precise and correct way. This right to certainty does not seem to be granted by the actual Italian legislation on the *status* of aliens.

Considering this, we can only join the chorus of the predominant doctrine, wishing for a clearer and ready reform of this topic of central importance for many people living in Italy.

¹¹⁴ In case this person is granted with fundamental rights, which are recognised to everybody. See: Corte di Cassazione, n. 1690/2005, *cit.*

¹¹⁵ Those listed in Article 1 d.p.r. 394/1999.

¹¹⁶ For a complete analysis of the differences known in Italian legislation concerning the grant of rights to aliens, in relation to the reasons why they are present on the territory of the State, see: BONETTI P., *I principi, i diritti e doveri. Le politiche migratorie*, *op. cit.*, p. 84.

¹¹⁷ MENGOZZI P., *op. cit.*, p. 498; CAMPIGLIO C., *Abrogazione dell'Article 16 delle preleggi per nuova disciplina?*, *op.cit.*, p. 56.