AUTOMATIC RECOGNITION OF DECISIONS IN THE MATTER OF THE STATUS OF PERSONS AND OF FAMILY LAW : TWO YEARS' EXPERIENCE OF THE APPLICATION OF THE NEW ITALIAN ACT ON PRIVATE INTERNATIONAL LAW

BY GUIDO RAIMONDI

MAGISTRAT AU PARQUET GENERAL, SUPREME COURT OF CASSATION, ITALY

1. *The Italian Act No. 218 of 31 May 1995, which was passed after a very long period of gestation, deals with matters relating to applicable law (questions of* private international law *in the strict sense) and, at the same time, with matters which fall to be determined by the competent court and the effectiveness in Italy of foreign judgments or acts (questions which, though forming part of private international law in the broad sense, are generally dealt with under the heading of* international civil procedure*). This was a choice, an innovation compared with the previous system, that demonstrates, as has already been observed, that the Italian legislature wished to attach importance to the link between the two aspects of the matter*[1].

The part of the Act which more directly concerns us, regarding the automatic recognition of decisions relative to the civil status of persons and family law, that is to say Sections 64 to 71 (Chapter IV) on the effectiveness of foreign judgments and acts, entered into force somewhat later than the rest of the Act, namely on 1 January 1997[2]*. And that is why, even though the Act dates back to 1995, we can speak about the experience of the* first two years *of its application.*

Of course, two years is not really a long enough period to make a proper assessment, with a minimum of credibility. This is because, although the subject has been dealt with to some extent by Italian legal writers[3]*, there is still very little case-law on the subject and – on the specific point which interests us – no stand has been taken by the Court of Cassation.*

[1] *SAGGIO,* Efficacia di sentenze ed atti stranieri *(artt. 64-71), il* Corriere giuridico*, 1995, p. 1259.*

[2] *Decree No. 542 of 23 October 1996, transformed into Act No. 649 of 23 December 1996.*

[3] *In addition to the above-mentioned contribution of SAGGIO, see the authors listed in footnote 3 to the French text.*

On the other hand, and here I am anticipating a basic theme of my report, the fact that the new Act provides for the automatic recognition of decisions in general (with a few exceptions), and of decisions regarding the status of persons and family law in particular, has placed civil servants responsible for transcribing foreign decisions into civil status registers, that is to say civil status officials, in the front line, so to speak. This has led to the development of a fairly extensive practice which is reflected in the copious correspondence between civil status officials, the offices of the Public Prosecutors, who, in Italy, are responsible for ensuring that civil status registers are properly kept, and the Ministry of Justice. Thanks to the courteousy of that Ministry[1], I have been able to look at a large part of this correspondence, which throws some light on the difficulties encountered during the first months of the application of the new Act.

So I can say that, despite the rather short period we are speaking about, an account of what has occurred in my country during these two first years of application of the new Act can present a certain interest.

2. *First of all, I would like to recall briefly the basic structure of the new system which, as I said, has profoundly modified the previous one. In the former system, established by the 1942 Code of Civil Procedure which is still in force, Italy was almost completely closed towards other countries, in the sense that the effectiveness in the Italian legal order of foreign judgments depended in each case on an examination of such judgments by the Court of Appeal. After verifying that the conditions provided for by law were satisfied (Article 797 of the Code of Civil Procedure), the Court of Appeal would give the indispensable* exequatur. *Today Section 64 of the new Act, which is based on the Brussels Convention of 9 October 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[2], provides that whenever the conditions set out in that Section are satisfied, the foreign decision shall be recognised in Italy without there being a need for any kind of proceedings.*

[1] *My special thanks are due to Mr Nino Rettura, Director of the first Department of the Directorate of Civil Affairs of the Ministry of Justice, and to Mrs Luisa Bianchi, of the same Directorate.*

[2] *See SAGGIO,* Efficacia, etc., op. cit., *1260 ; see also CASTELLARO,* op. cit., *364, on the differences between the approaches of the Italian Act and of the Brussels Convention.*

These conditions, which are basically the same as those appearing in the former Article 797 of the Code of Civil Procedure, include the competence of the foreign court according to the Italian rules on jurisdictional competence, the regularity of the trial in the place where it was held, respect for the rights of the defence, the definitive nature of the decision to be recognised, compliance withe Italian public policy and observance of other rules. Later on I shall give you some more information about these conditions. Section 67 of the Act states that the person concerned can request the competent Court of Appeal to verify whether the conditions for recognition have been satisfied if it is necessary to proceed to a forced execution, if the judgment has not been complied with or if recognition of the foreign decision has been challenged.

Since I mentioned the 1968 Brussels Convention, I should also mention the Convention, drawn up on the basis of Article K3 of the Treaty of Maastricht, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, which was signed at Brussels on 28 May 1998 and is known as « Brussels II » .
Article 14 of this new instrument stipulates that decisions rendered in a member State on the subjects covered by the Convention shall be automatically recognised in the other member States (para. 1) ; in particular, it provides that, generally speaking, no proceedings are necessary in order to update the relevant entries in the civil status registers of a member State following a decision of divorce, separation or annulment of marriage pronounced in another member State, provided that no appeal against that decision is possible under the law of that State. Besides, the interested parties have means at their disposal to obtain a ruling as to whether the decision should or should not be recognised (para. 3 and sections 2 and 3 of the Convention).

One point must be made clear. Section 65 of the new Act provides that foreign decisions concerning situations which, on account of renvoi under the rules of private international law, fall to be regulated under the legal order in which the decisions were rendered have « direct effect » and thus do not need to be recognised. This is not an innovation as compared with the previous system, in which it was already accepted that decisions of this kind did not require any domestic recognition measures[1].

3. *That being said, the fundamental question is whether or not the decisions which concern us, relating to the status of persons and family law, require the procedure mentioned in Section 67 of the Act, namely verification by the Court of Appeal.*

On this point, the first commentators on the new Act, albeit with many doubts, concluded that such decisions would indeed require recognition by the Court of Appeal before they could be inscribed in the civil status registers[2]*. As has been pointed out*[3]*, this opinion reflects concerns that are entirely reasonable, since the idea of introducing into the domestic legal order, without any control by a court, a foreign decision affecting so delicate a matter as one linked to the status of persons may obviously be found worrying. However, we cannot really share this attitude, given the text of the Act.*

As I have already said, Section 67 of Act No. 218 confines the requirement of judicial recognition, apart from cases of non-compliance or challenge, to cases of forced execution. In other words, the argument that the Court of Appeal has to recognise decisions before they can be entered in the civil status registers presupposes that such

[1] *SAGGIO,* op. cit.*, 1261, also deals with the relevant case-law.*
[2] *See the authors cited by MANZO,* Sentenze straniere, etc., op. cit., *145.*
[3] Ibidem.

an entry is to be treated as a kind of forced execution. Yet it has been demonstrated quite convincingly[1] *that that approach would not be compatible with the system : in the first place, the expression « forced execution » has a precise technical meaning which is set out in the provisions either of the Civil Code (Article 2910) or of the Code of Civil Procedure (Article 474) and covers forced expropriation or execution « in specific form » ; and in the second place one cannot argue by analogy because the general system is based on a principle of automaticity, so that the cases where provision is made for recognition by a court constitute an exception.*

The delay in the entry into force of the part of the 1995 Act which concerns us can be explained, at least in part, by the Government's concern, in the face of a situation which was not entirely clear, to avoid divergent interpretations by civil status registrars. In fact, the Government had in the meantime submitted a Bill[2] *to amend Section 67 even before it entered into force, in order to make recognition of foreign decisions by the Court of Appeal obligatory whenever there was a question of « transcription, inscription or annotation » in public registers*[3]*. However, the Bill was overtaken by events, because Chapter IV of the 1995 Act actually entered into force, as I said, on 1 January 1997, without the Bill's ever having been examined by Parliament.*

I will say a few words in a moment about the practical arrangements which were adopted in this situation, but I would like to tell you first that an intervention by the legislature in this matter is still advocated by legal writers, in order to dispel any grey areas which may remain[4]*.*

The legislature has, moreover, just intervened in the field of international adoption. Act No. 476 of 31 December 1998, whilst reaffirming the principle flowing from Sections 64 et seq. *of the 1995 Act and providing in consequence that a foreign adoption decision produces effects in Italy without the need for any proceedings, also stipulates that the intervention of a court, and notably the Juvenile Court (*Tribunale per i minorenni*), is required before that decision can be transcribed in the civil status registers.*

4. *In these circumstances, the Ministry of Justice decided to issue a circular addressed to civil status registrars. The circular*[5] *contains instructions to guide and standardise the practice of these officials when they receive foreign decisions in their offices. According to this circular, it is for the registrars to verify whether the conditions laid down in the Act for the recognition of the decisions in question have been satisfied.*

If the registrar considers that this is not the case, he must (pursuant to the general rule, set out in Article 13 of the Basic Law on Civil Status, Royal Decree No. 1236 of 9 July 1939) refer the matter to the Public Prosecutor and await his decision. If the Public Prosecutor's opinion as to the possibility of recognition is unfavourable, the registrar will inform the applicant who, if he insists on recognition, will have to request the Court of Appeal to grant it in accordance with the system laid down by Section 67 of the 1995 Act.

By acting in this way, the Ministry of Justice therefore proceeded on the basis that implementation of a foreign decision that takes the form of its entry in the civil status registers cannot be assimilated to forced execution.

[1] *MANZO,* Sentenze straniere, etc., op. cit., *146.*
[2] *2404/S in the XIIth legislature, presented again in the XIIIth under number 2200/C.*
[3] *The Bill also contained procedural rules, and provided that « the Court of Appeal shall decide by means of a judgment adopted* in camera, *after hearing the parties ».*
[4] *MANZO,* Sentenze straniere, etc., op. cit., *148.*
[5] *Circular of 7 January 1997, ref. 1/50/FG/29/96/1227.*

The Ministry then used the existing framework, which places civil status registrars under the control of the Public Prosecutor, to give the latter the possibility of resolving, if necessary, cases where the registrar may have doubts.

As has been observed, this is a system which broadly corresponds to the one which obtains in France. Some legal writers expressed concern about the compatibility of these instructions, which seem to be addressed not only to civil status officals but also to offices of Public Prosecutors, with the status of the Public Prosecutor in Italy under the Constitution of 1948, which status rules out any kind of subordination of the Public Prosecutor to the Government and notably to the Ministry of Justice[1]*. However, I do not see this as a fundamental issue, because the circular can easily be regarded as forming part of the normal collaboration between State authorities.*

5. *How has this system worked in practice ?*

Perusal of the copious correspondence of the Italian Ministry of Justice over these two years of application of the new system shows that many problems, large and small, have arisen. I would like to touch on some of these points – those, of course, which are in my opinion the most important. These points are : (a) criticism levelled at the Ministerial circular by the Administration itself and the related question of the means whereby civil status registrars can verify whether the conditions for recognition set out in Section 64 of the 1995 Act have been satisfied ; (b) the question of ecclesiastical decisions ; (c) the role of Consulates ; (d) Section 72 of the 1995 Act and the question of the application ratione temporis *of the new system.*

5.1. *On the first point, the most important, it is interesting to note that the Presidency of the Council of Ministers, and notably its Department for Italians Abroad (*Dipartimento per gli Italiani nel mondo*), criticised the circular of the Ministry of Justice, emphasising the excessive complexity of the procedure envisaged and the difficulties with which the persons concerned would have to contend. Indeed, as the Presidency pointed out shortly after the circular was issued, it could easily be predicted that civil status officials, either to avoid taking responsibility or on account of the legal difficulty of the verifications they had to effect, would systematically turn to the Public Prosecutor for an opinion. This would entail longer delays which would perhaps lead interested parties to regret the former system, under which, at least, access to the Court of Appeal was immediate.*

It must be said that as regards the fear that an enormous number of civil status officials would resort to consultation of the Public Prosecutor, the prophesy of the Presidency was quite correct. If one reads the comments of the various Public Prosecutors in the context of the monitoring of the operation of the Act and the circular, one can see that the Public Prosecutors are almost unanimous in reporting that they have been consulted by registrars in practically all cases.

In order to deal with this situation, which in objective terms does pose problems for the registrars, who have to check whether the conditions set out in Section 64 of the Act are satisfied, the Ministry of Justice tried to issue clear and simple instructions to ensure that this task could be carried out quickly and without difficulties.

[1] *MANZO,* Sentenze straniere, etc., op. cit., *147.*

The conditions in question are listed in Section 64, letters (a) to (g), as follows :

(a) the existence of competence on the part of the foreign court in accordance with the principles of jurisdiction under the Italian system ;
(b) the regularity of the trial in the place where it was held, in that the document initiating proceedings must have been duly notified to the defendant in accordance with the law of that place and that the rights of the defence must have been respected ;
(c) entry of an appearance by the parties or a lawful declaration of contumacy ;
(d) the acquisition by the decision to be recognised of the status of res judicata*, according to the* lex fori *;*
(e) the decision must not conflict with any other Italian decision which has become res judicata *;*
(f) there must be no other proceedings pending in Italy on the same subject and between the same parties, that were initiated before the foreign proceedings ;
(g) compliance with Italian public policy.

The Ministry of Justice specified that :

- *condition (a) will be satisfied if the decision was given abroad by a judicial body, save in particular cases (other bodies with judicial decision-making powers) ;*
- *conditions (b), (c) and (d) are formal in nature and compliance therewith can appear from the actual text of the decision or from supplementary documentation ;*
- *compliance with conditions (e) and (f) can be established by a declaration by the interested party himself (Act No. 15 of 4 January 1968,* autocertificazione*) ;*
- *compliance with condition (g) must be assessed in the light of the fundamental principles of the Italian legal order.*

If I may make a personal remark, I would say that the Ministry's approach, which clearly aims at streamlining procedures, is undoubtedly to be approved, especially as it is likely to overcome inevitable bureaucratic resistance on the part of civil status officials. Of course, one could not totally approve the rather far-reaching simplification concerning the condition at letter (a) of Section 64, because the Ministry makes do with verification of the judicial nature of the foreign body which issued the decision to be recognised, whereas the Act seems to require verification of the « international jurisdiction » of that body, that is to say verification of whether it would have jurisdiction in accordance with the rules (reversed, of course) of the Italian system.

In fact, it must not be forgotten that there is another side to the coin, in that there may be some persons who have an interest in the foreign decision's not being entered in the Italian registers (and I will say a few words at the end of my presentation about the remedies which they have at their disposal). Therefore, to urge registrars to oversimplify might have negative effects. I fully acknowledge that it is difficult to strike a balance in this respect.

5.2. *As regards ecclesiastical decisions, Italy has a special regime, derived from the 1929 Concordat, which, together with the Treaty signed at the same time, as well as its amendments, is quoted in Article 7 of the Republican Constitution of 1948. Under Article 34 of the Concordat there was a mechanism in Italy for recognition of ecclesiastical decisions through the Courts of Appeal, which was much simpler than the normal procedure. Article 8, paragraph 2, of the agreement of 18 February 1984, which amended the Concordat, rendered this special procedure more complicated.*

When Act No. 218 came into force, the Ministry of Justice asked itself whether the agreements with the Holy See on this subject had been modified by the new Act and therefore whether ecclesiastical decisions could be treated in the same way as other foreign decisions. It should be said that the Holy See itself had very cautiously asked the same question and that there were some civil status officials who had transcribed ecclesiastical decisions on the basis of the January 1997 circular (this appears in the Brescia Public Prosecutor's report of September 1997). But the Ministry of Justice answered this question quickly, in the negative. This was because Section 2 of Act No. 218 states explicitly that the new Act is without prejudice to international treaties in force in Italy. Consequently the regime for transcribing ecclesiastical decisions had not been amended and, if there were a wish that this be done for the future, the agreements with the Holy See would have to be renegotiated. This is a solution which should be fully approved.

5.3. *An important aspect is the role of Consulates, which are often approached by people who live abroad and wish to have decisions on civil status matters transcribed in Italy. Speaking generally, it has to be said that in the application of the new Act Italian Consulates have played a very positive role in the interests of citizens living abroad, by taking active steps to overcome resistance, often unwarranted, on the part of civil status officials.*

As regards the powers of Consulates, it was quickly established that they are fully competent to receive foreign instruments that may qualify for transcription in the civil status registers in Italy and to receive declarations by interested parties in the context of the verification of the conditions laid down by Section 64 of Act No. 218. However, they cannot take the place of a civil status registrar as regards that verification, this task being reserved to the latter. The practice has thus become settled, in that the Consulate receives instruments, assists citizens in the preparation of the documentation destined for the competent registrar and then transmits the file to him. Once the file is transmitted, the Consulate does not lose interest in the subsequent proceedings because, in case of refusal, it can insist if it does not find the reasons put forward by the registrar to be convincing. Although one might have doubts about the powers of Consulates at this later stage, it should be pointed out that their role has been beneficial. I can give the example of a case of refusal on the ground of the absence of the date when the decision in issue had become res judicata *: on this point the Consulate General in Paris submitted, quite rightly, that the Act requires that the decision to be transcribed should have become* res judicata *but does not require an indication of the date when that occurred.*

5.4. *Lastly in this context, I will deal with a question which arose in respect of Section 72 of the 1995 Act and the application* ratione temporis *of the new system.*

Section 72 states that the new Act applies to proceedings commenced after the date of its entry into force, with the exception of situations that are « esaurite », that is to say definitively settled before that date, for which the former private international law rules apply.

Some registrars and, it must be said, even some Public Prosecutors interpreted this provision as referring also to foreign proceedings and thus as preventing the automatic recognition of foreign decisions which had become res judicata *before the entry into force of the new Act. This was a totally absurd interpretation, because the automatic recognition system that interests us has nothing to do with the rules of private international law, which concern the applicable law in* Italian *proceedings. The Ministry of Justice put this right very quickly, in the very first months of application of the new system.*

6. *Lastly, I will say a few words about the means of recourse available to persons who have an interest in the foreign decision's not being transcribed. It is, of course, impossible in this presentation to deal with this subject exhaustively. I will therefore confine myself to saying that the general view of legal writers is that, for reasons of consistency and coherence, a person who finds a foreign decision inscribed in the civil status registers which is not in his interest must refer the matter to the Court of Appeal ; if a mistake has been made by the registrar, the Court of Appeal can order an appropriate rectification of the registers*[1].

[1] *MANZO,* Ibidem.

A different view has been advanced on this point. On the strength of Articles 165 et seq. *of the Basic Law on Civil Status (Royal Decree No. 1238 of 9 July 1939), which establish a specific procedure for rectifying civil status documents (in the shape of an application to a first-instance court, which decides* in camera*), it has been suggested that this possibility should be utilised, on the ground that the disappearance of any examination procedure brought about by the new Act implies that the general rules are to apply throughout*[1]*. It must be said that this proposition goes beyond the specific framework of the problem I have dealt with, because it suggests that a first-instance court is competent in all circumstances, and even in the converse case where it is the person having an interest in the transcription who must apply to a court if the registrar refuses. In this last example it is clear that the proposition is completely incompatible with the wording of Section 67 of Act No. 218, which provides unambiguously that it is the Court of Appeal which is competent*[2]*. But even in the case which concerns us it seems to me that the reasons of consistency and coherence I have just mentioned should prevail and that one should conclude that the Court of Appeal is competent.*

* * *

With this last point, which does not exhaust all the questions remaining open (for example, the question of the applicable procedure in the Court of Appeal, on which the Act is silent), I can arrive at the following conclusions. Firstly, the result of the first two years of application of the new Act can be regarded as no more than relatively satisfactory ; and secondly, in view of the difficulties I have tried to outline, further intervention on the part of the legislature should not be ruled out. Having regard to what has been done in the field of international adoption, it is difficult to imagine that a future legislature will wish to retain the totally automatic system established by the 1995 Act. Of course, if that were the legislature's choice, the entry into force of the « Brussels II » Convention, which is based on an automatic system, would end by creating a dual regime, depending on whether the decision to be recognised comes from within or from outside the Community.

[1] *MASSETANI,* op. cit., *82.*

[2] *See, to this effect, CASTELLARO,* op. cit., *369 ; Rome First-Instance Court, 18 September 1998,* Foro Italiano, *1998, I, 3654* et seq.