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The Reform of the Italian System of Private International Law with Particular Regard to Domestic Relations Issues

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The Reform of the Italian System of Private International Law with Particular Regard to Domestic Relations Issues

By Andrea Russo and Robert E. Rains

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I. Introduction

National boundaries no longer limit family law to the domestic arena where matters are neatly governed by one clearly applicable law and heard under a single jurisdictional competence. The refinement of the concepts of domicile and nationality at the end of the nineteenth century mainly drove the recent developments in family law. The twentieth century witnessed a steadily increasing emphasis on the best interests of the child, which shifted the legal focus from parental authority to a concern for child protection, in some cases even removing a child from its own parents.

New legislation governing private international law has been introduced in Italy by virtue of the amended Italian International Private Statute of May 31, 1995, no. 218, which took effect on August 29, 1995. It is comprised of over seventy articles under five main headings, ranging from applicable law to the effects of foreign judgments. The statute marks a dramatic change in the rules governing the law in cases involving family relationships and provides wide-reaching implications for the previously more rigid Italian system.

This article begins by focusing on the reform of this Statute ("the Statute"), as well as recent changes in Italian domestic law. The article then addresses the impact on Italian family law of the Hague Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

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2 See id. at 633-37.
3 See Law no. 218, Italian International Private Statute (1995) [hereinafter Law No. 218]. A translation of the Statute follows this article as an appendix.
4 See id.
5 See infra notes 7-164 and accompanying text. It is important, however, to stress that the new legislation also contains provisions that govern donations and contractual and non-contractual obligations, as well as protection and support for the disabled.
6 See infra notes 163-273 and accompanying text.
II. Italian International Private Statute

A. Jurisdiction

Article 3 of the Statute governs the scope of Italian jurisdiction and provides that an Italian judge has jurisdiction in all cases in which the defendant resides or is domiciled in Italy. In addition, the court has jurisdiction in those cases regulated by Sections 2, 3, and 4 of Subtitle II of the Brussels Convention, September 27, 1968, concerning jurisdictional competence and the execution of declarations in civil and commercial matters. The Brussels Convention came into force in Italy by decree in 1971 and by successive revisions already in force. Jurisdiction under the statute also extends to cases in which the defendant has a designated agent to represent him at trial in Italy by virtue of Article 77 of the Italian Civil Procedure Code.

Finally, Article 3 addresses those cases in which the defendant is not domiciled in Italy and when the Brussels Convention cannot be applied. In such a situation, Italy may claim jurisdiction under the provision concerning territorial competence, which in certain cases, such as separation and divorce proceedings, allows the court to look to the place of domicile of the plaintiff.

In addition to the situations covered by Article 3, the Statute provides in Article 32 that, in cases concerning nullity, annulment, separation, and dissolution of marriages, Italian jurisdiction exists where one of the spouses is an Italian citizen or where the marriage has taken place in Italy. This provision substantially broadens the jurisdiction of the Italian courts in such matters.

Furthermore, Article 4 of the Statute allows the court to entertain consent jurisdiction and to voluntarily defer to a foreign

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7 See Law No. 218 art. 3.
9 Italian Decree No. 804, June 21, 1971.
11 See Law. No. 218 art. 3.
12 See id.
13 See id. art. 32.
14 See id. art. 4.
jurisdiction. A defendant can consent to jurisdiction when it cannot be established on the basis of Article 3, but such consent must be evidenced in writing or the defendant must appear not to have objected to Italian jurisdiction.\textsuperscript{15}

**B. Applicable Law**

1. General Principles

The new Italian legislation establishes various categories of personal family relations and specifically provides for many factual contexts.\textsuperscript{16} For example, Article 27 states that at the time of marriage, the capacity to marry rests with the countries in which each party resides.\textsuperscript{17} In contrast, under Article 26, the national law common to the couple governs the promise to marry.\textsuperscript{18} Absent a common national law, Italian law will control.\textsuperscript{19}

Heading III–Applicable Law, and particularly Article 13 address the key principle of renvoi. Renvoi is choice of law principle where by applying foreign choice of law rules, the forum state ultimately employs its own law.\textsuperscript{20} Application of the principle is, however, subject to certain exclusions.\textsuperscript{21} The Article further provides for the effects of relevant International Conventions on the renvoi principle.\textsuperscript{22}

Under Article 14, the court has discretion to determine the foreign law to be applied in a case in which Italian law is not applicable.\textsuperscript{23} In doing so, the court can consider relevant international conventions, information acquired through the Ministry of Justice, and consultation with experts or specialist institutions.\textsuperscript{24} In the event that the applicable foreign law does not

\textsuperscript{15} See id. art. 4(1).

\textsuperscript{16} See id. art. 26-37.

\textsuperscript{17} See id. art. 27.

\textsuperscript{18} See id. art. 26.

\textsuperscript{19} See id.

\textsuperscript{20} See id. art. 13.

\textsuperscript{21} See id. art. 13(2)(a)-(c).

\textsuperscript{22} See id. art. 13(4).

\textsuperscript{23} See id. art. 14.

\textsuperscript{24} See id.
address the issue, the court must draw parallels with similar matters covered under the foreign law, or otherwise apply Italian law.25

2. Personal Relations Between Spouses

According to Article 29 of the Statute, national law common to both spouses governs their personal relations. In the case of different nationalities or multiple citizenships, however, the judge must apply the law of the country in which their married life is predominantly taking place.26 This differs from the previous legislation in which, absent a common nationality between the spouses, the national law of either one determined the applicable law.

3. Financial Relations Between Spouses

The financial relations between the spouses, formerly governed by the national law of the husband at the time of marriage, are now subject to the same law that applies to personal relations.27 Under Article 30, however, the couple may agree in writing that either one of their respective national laws or the law of their country of residence will govern their economic relationship.28 Such an election is valid only if considered so by the chosen system of law or by the system of law governing the marriage agreement.29 By using a written agreement, foreign couples can avoid having their financial relations regulated by Italian law.30

The election of a foreign law may also be applied against a third party if the party knows or should know of its applicability.31 For example, in the case of a real estate matter, a choice of foreign law must be made public through a notarial act and recorded in the corresponding registry, thereby allowing third parties access to the

25 See id. art. 14(2).
26 See id. art. 29.
27 See id. art. 30(1).
28 See id.
29 See id. art. 30(2)(a)-(b).
30 See id.
31 See id. art. 30(3).
Failure by a third party to properly inquire about choice-of-law issues or actual knowledge of such clauses in the marriage agreement waives that party's right to apply Italian law.

4. Separation and Divorce

Article 31 of the Statute provides that personal separation and dissolution of the marriage are regulated by the common national law of the spouses at the moment of the request for separation or dissolution.\textsuperscript{32} When there is no common national law, the applicable law is that of the state in which the married life predominantly took place.\textsuperscript{33} It is important to emphasize that personal separation and dissolution of the marriage, when not subject to the application of a foreign law, are regulated by the law of Italy.\textsuperscript{34} There is never an opportunity for the spouses to elect a law applicable to their personal relations.\textsuperscript{35}

C. Recognition of Foreign Legislation and Judgments

Article 64 establishes the following criteria for a foreign judgment to be recognized in Italy without requiring recourse to any other procedure:

(a) the judge who declared the judgment is empowered to recognize the judgment according to the principles of jurisdictional competence contained in Italian legislation;

(b) the introductory case is brought to the attention of the defendant in such a way as foreseen by the law of the state in which the case is heard and when none of the fundamental rights essential to a defense have been violated; the parties were brought to trial according to the law of the place of trial or a default was declared in conformity with such law;

(c) the judgment is no longer appealable according to the law of the country where judgment is pronounced; the sentence is not contrary to another unappealable sentence decided by an Italian judge in court;

(d) no other trial, which would have begun before the foreign

\textsuperscript{32} See id. art. 31(1).
\textsuperscript{33} See id.
\textsuperscript{34} See id. art. 31(2).
\textsuperscript{35} See id. art. 31(1)-(2).
trial, is pending before an Italian judge concerning the same matter and parties;

(e) the judgment does not produce effects that are contrary to public policy.\textsuperscript{36}

When a party challenges a foreign judgment, Article 67 of the Statute allows that party to petition the Court of Appeals of the place in which a foreign judgment was executed to determine the conditions for implementation of the recognized provisions.\textsuperscript{37}

One of the areas in which the Statute most frequently applies concerns the service of summons in Italy to appear before a foreign authority. Article 71, Notification of Authoritative Foreign Acts, addresses this issue.\textsuperscript{38} The Public Ministry of the jurisdiction in which the action is to take place must authorize the summons.\textsuperscript{39} Since the summons must be executed in accordance with Italian law, the method prescribed by the foreign court must be assessed for its compatibility with the Italian system.\textsuperscript{40}

Article 69 of the Statute allows the use of foreign evidentiary methods such as examination of witnesses. A party seeking to employ foreign methods must seek a decree from the Court of Appeal in the place where the provisions must be evidenced.\textsuperscript{41}

\textbf{D. The Italian System–Marriage}

Italian law regulates the issue of rights and duties arising out of marriage under Articles 143, 147, and 148 of the Civil Code.\textsuperscript{42} Furthermore, Article 45 of the Statute expressly addresses obligations of support within the family\textsuperscript{43} and calls for the application of the Hague Convention of October 5, 1961, concerning the competencies of authorities and the applicable law in cases of support.\textsuperscript{44}

\textsuperscript{36} Id., art. 64.
\textsuperscript{37} See id., art. 67.
\textsuperscript{38} See id., art. 71.
\textsuperscript{39} See id., art. 71(1).
\textsuperscript{40} See id., art. 71(3).
\textsuperscript{41} See id., art. 69.
\textsuperscript{42} Code Civil [C.c.] arts. 143, 147, 148 (It.).
\textsuperscript{43} See Law No. 218 art. 45.
\textsuperscript{44} See Hague Convention Concerning the Competencies of Authorities and the
1. Status of the Child and Duty of Support

Article 33 of the Statute deals with filiation, legitimation, and other matters concerning the relationships between parents and children. The national law of the child determines a child's status at the time of birth. In cases concerning filiation, the Statute provides for Italian jurisdiction if the situation falls within the general provisions that stipulate Italian jurisdiction, or when one of the parents or the child is an Italian citizen or resident.

A child is considered legitimate under the Statute if so considered by the law of the country where one of the parents holds citizenship at the time of the birth. Legitimation attributes the status of a legitimate, natural child to persons born out of wedlock. Article 34 subdivides the question of legitimation into two categories: where the parents of the child have subsequently married, and all other cases. In the former instance, legitimation of the child is regulated by the law of the country of nationality of the child at the moment of birth or by the law of the country of nationality of one parent at that time. In all other cases, legitimation is regulated by the law of the country of nationality of whichever parent requests legitimation.

In Italy, the Italian Civil Code provides the primary applicable law in cases concerning children, outlining where the law recognizes the legitimate status, filiation, and legitimation of a child, and determining natural paternity and maternity. Article 231 of the Civil Code states, "[t]he husband is the father of a child conceived during the marriage." A disclaimer of paternity, however, is permitted under certain conditions stipulated in Article

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45 See Law No. 218 art. 33.
46 See id. art. 33(1).
47 See id. art. 39.
48 See id. art. 33(2).
49 See id. art. 34.
50 See id. art. 34(1).
51 See id. art. 34(2).
52 See C.c. Title VII.
53 See id. art. 231.
235, such as when the wife committed adultery and concealed the pregnancy and birth during a specific period.\textsuperscript{54}

Under Italian law, legitimate filiation can be proven by a birth certificate inscribed in the register of vital statistics.\textsuperscript{55} Otherwise, continued possession of the status of a legitimate child is sufficient. The existence of a "possession of status" is governed by Article 237 of the Code, which states that the following facts must co-exist: (a) the person has always borne the surname of the father he claims to have; (b) the claimed father has treated him as his child and provided as such for his maintenance, education and settlement; (c) the person has constantly been regarded as such in social relations; and (d) the person has been recognized as such by the family.\textsuperscript{56}

Once the status of the child has been acknowledged or judicially determined, the law automatically imposes certain obligations and duties on the parents.\textsuperscript{57} This article will address the existence of these obligations within two main headings: those existing within marriage\textsuperscript{58} and those continuing or arising in the event of separation or divorce.\textsuperscript{59}

The Italian legal system goes beyond establishing a parental duty of financial provision for the child and requires that a parent give consideration to the child's "ability, natural inclination and aspirations."\textsuperscript{60} Specifically, Article 147 of the Civil Code imposes on spouses, by virtue of their marriage, the obligation to maintain, educate, and instruct their children.\textsuperscript{61}

Article 148 addresses the manner of furnishing the support mandated by Article 147.\textsuperscript{62} Such support must be provided in proportion to the respective means of the parents in accordance

\textsuperscript{54} See id. art. 235.
\textsuperscript{55} See id. art. 236.
\textsuperscript{56} Id. art. 237.
\textsuperscript{57} See id. arts. 147-148.
\textsuperscript{58} See infra notes 60-77 and accompanying text.
\textsuperscript{59} See infra notes 78-145 and accompanying text.
\textsuperscript{60} See C.c. art. 147.
\textsuperscript{61} See id.
\textsuperscript{62} See id. art. 148.
with their ability to work professionally or in the home.\textsuperscript{63} Furthermore, where the parents have insufficient means to satisfy their obligations, the legitimate or natural ascendants, in order of proximity, are bound to supply the additional means to the parents.\textsuperscript{64} In the event that a spouse fails to provide the necessary support without good cause, however, an interested party may bring the matter to the attention of the court.\textsuperscript{65} If appropriate, the court can then order by decree that a share of the income of the parent at fault be paid directly to those who sustained the expense of maintenance, education, and instruction of the child.\textsuperscript{66} The decree, however, may be opposed within twenty days of service, and the delinquent parent can, at any time, request that the order be revoked or amended.\textsuperscript{67}

Articles 147 and 148 of the Civil Code must be applied with reference to Article 36 of the Italian System of International Private Law.\textsuperscript{68} The Statute expressly provides that the law of the child’s country of nationality governs both personal and financial relations between parents and children.\textsuperscript{69}

2. Maintenance of Spouses and Financial Relations

Article 143 of the Civil Code provides that spouses owe mutual obligations of loyalty, cohabitation, co-operation in the interest of the family, and both moral and material support.\textsuperscript{70} The individual financial contribution to the family is based upon the ability of each spouse to work and the value of their personal assets.\textsuperscript{71}

Having examined the intricacies of jurisdiction and applicable law, it is necessary to look more specifically at how the Italian system addresses matrimonial issues. Article 159 of the Civil

\textsuperscript{63} See id.
\textsuperscript{64} See id.
\textsuperscript{65} See id.
\textsuperscript{66} See id.
\textsuperscript{67} See id.
\textsuperscript{68} See Law No. 218, art. 36.
\textsuperscript{69} See id.
\textsuperscript{70} See C.c. art. 143.
\textsuperscript{71} See id.
Code provides that common ownership of property is the general rule.\textsuperscript{72} Real and movable goods purchased jointly or individually by spouses during marriage fall under the category of common ownership.\textsuperscript{73} Article 179 provides an exception to this rule, and recognizes that property bought strictly for one spouse’s personal use is not owned in common.\textsuperscript{74}

Under Article 162, a spousal agreement may overcome the presumption of common ownership of property.\textsuperscript{75} Furthermore, a spouse may assure individual ownership after purchasing property with personal wealth subject to confirmation by the other spouse.\textsuperscript{76} If no agreement as to property distribution exists, common ownership of property ends when the parties separate, and each spouse becomes the owner of fifty percent of the family assets.\textsuperscript{77}

\textbf{E. The Italian System—Separation and Divorce}\textsuperscript{78}

1. Grounds for Divorce

Italian divorce requires a demonstration that the spiritual and material communion that once existed between the spouses has disappeared and can no longer be rebuilt.\textsuperscript{79} Either spouse may request a divorce if any of the following circumstances exist:

(a) One of the spouses has been condemned to life imprisonment or to a prison term exceeding fifteen years, whether by single or multiple sentences, even if the judgment concerns a crime committed before the marriage, or one or more intentional crimes, provided that the sentence is final and not related to crimes committed for political, moral, or social motives.\textsuperscript{80}

\textsuperscript{72} See id. art. 159.
\textsuperscript{73} See id. art. 177.
\textsuperscript{74} See id. art. 179.
\textsuperscript{75} See id. arts. 162, 215.
\textsuperscript{76} See id. art. 162.
\textsuperscript{77} See id. art. 191.
\textsuperscript{78} See generally Roberta Ceschini, International Marriage and Divorce Regulations and Recognition in Italy, 29 FAM. L.Q. 567 (1995).
\textsuperscript{79} See Law No. 898 of December 1, 1970, as modified by Law No. 436 of August 1, 1978 and by Law No. 74 of March 6, 1987 art. 1 [hereinafter Law No. 898].
\textsuperscript{80} See id. art. 3, para. 1(a).
(b) One of the spouses has been condemned for crimes against sexual liberty (a term used in the Italian Civil Code to refer to situations where a person’s freedom of choice with regard to sexual relations has been violated, such as rape) or for inducement or coercion to prostitution and/or participation in, or exploitation of, prostitution.\(^{81}\)

(c) One of the spouses has been found guilty and sentenced in any way for voluntary homicide of his or her child or for the attempted homicide of either the spouse or the child.\(^{82}\)

(d) In cases where criminal proceedings have been suspended due to the “extinction” of the crimes, such as by amnesty, pardon, or period of limitation, the court hearing the divorce case may grant the declaration of divorce if the judge feels that enough evidence exists to support the allegation that the offense was indeed committed.\(^{83}\)

(e) One of the spouses has been condemned for aggravated assault or the “circumvention of an incapable,” a term that means taking advantage of the lack of understanding or experience of a person in order to induce him or her to engage in actions which are self-damaging. This category also includes certain types of fraud. In order to obtain a divorce on this ground, the victim of the “circumvention” must be either the spouse or child.\(^{84}\)

(f) In any of the cases in (a) to (e), the petition for divorce may not be presented if the “applicant” spouse has been condemned for co-operation in the crime or if the spouses have resumed cohabitation.\(^{85}\)

(g) One of the spouses has been acquitted of a crime listed under (b), but the court establishes that he or she is unfit to resume the matrimonial relationship.\(^{86}\)

(h) A person has been cleared or acquitted of a charge of incest because of the absence of public knowledge or moral disapprobation, but the judge believes that this crime has

\(^{81}\) See id. art. 3, para. 1(b).

\(^{82}\) See id. art. 3, para. 1(c).

\(^{83}\) See id. art. 3, para. 1(d).

\(^{84}\) See id.

\(^{85}\) See id.

\(^{86}\) See id. art. 3, para. 2(a).
occurred.\textsuperscript{87}

Other grounds for divorce include: (1) the other spouse, a foreign citizen, has obtained an annulment or dissolution of the marriage or, notwithstanding the fact that such divorce or annulment has not been recognized in Italy, has married again;\textsuperscript{88} (2) the marriage has not been consummated;\textsuperscript{89} and (3) a declaration of change of sex has been issued and the period to appeal has expired.\textsuperscript{90}

\textbf{2. Divorce After Separation}

Separation in Italy is viewed as a temporary measure, which ultimately results in either reconciliation or divorce. The vast majority of petitions for divorce filed are founded on a three-year period of separation of the spouses following either judicial separation or a separation by mutual consent established between the spouses in front of the President of the Court.\textsuperscript{91}

The fact that a period of three years has passed from the date of separation leads to the presumption that the spiritual and material communion that once existed between the spouses has disappeared and can no longer be rebuilt.\textsuperscript{92} An informal separation, not recorded at the court, will not initiate the three-year period.\textsuperscript{93} Any interruption in the separation period, such as reconciliation, results in the “cancellation” of the separation time accrued.\textsuperscript{94} Therefore, should the parties decide to proceed with the divorce once the initial separation has been interrupted, they must wait three additional years.\textsuperscript{95} In such cases, the burden of proof regarding any interruption rests upon the party challenging the divorce.\textsuperscript{96}

\textsuperscript{87} See id. art. 3, para. 2(d).
\textsuperscript{88} See id. art. 3, para. 2(e).
\textsuperscript{89} See id. art. 3, para. 2(f).
\textsuperscript{90} See id. art. 3, para. 2(g).
\textsuperscript{91} See C.C. arts. 150-151, 158.
\textsuperscript{92} See Law No. 898, arts. 1, 3.
\textsuperscript{93} See C.C. art. 158.
\textsuperscript{94} See id. art. 154.
\textsuperscript{95} See Ceschini, supra note 78 at 570.
\textsuperscript{96} See Law No. 898, art. 3, para. 2(b).
The parties must appear in person at the first hearing to record or obtain a separation. Adversarial proceedings preserve the first appearance requirement but do not require further appearances by the parties absent cross examination of evidence or settlement between the parties. In exceptional cases, the court may accept that one of the spouses need not be present at the first hearing if he or she grants a special power of attorney to a third party, which can include that spouse's legal counsel.

3. Divorce Procedure

The petition for divorce can be rejected only if it can be proven that the legal requirements have not been met. For example, the court may reject the petition if it is proven that the three-year obligatory separation period between the parties has been interrupted following a reconciliation of the spouses. Where adequate grounds exist, however, it is not possible to oppose and successfully defend against a divorce petition.

When spouses appear before the President of the Court for either a separation or for a divorce, the court must attempt to reconcile the parties. Should the spouses insist on obtaining a divorce, the President of the Court must comply with their decision. In the absence of reconciliation, the court will issue a declaration of divorce. For other related issues, however, a regular adversarial procedure and trial must take place, during which the parties may support their claims with regard to support, child custody, and possession of the matrimonial home. Disagreement over children or financial issues will delay the final
In such cases, a temporary declaration of divorce can be issued while the trial regarding unsettled ancillary matters continues.\textsuperscript{107}

Joint petition by both spouses can accelerate the divorce process.\textsuperscript{108} In a joint application, the spouses must agree on the terms regarding any children (custody, visitation rights, etc.) and on the financial arrangements regarding the parties themselves and any children.\textsuperscript{110} If the court deems these arrangements acceptable, taking special care to preserve the well being of the children, the Public Prosecutor will immediately issue an opinion and the declaration of divorce.\textsuperscript{111} For this type of proceeding, the same lawyer may represent both parties.

If the conditions under a joint application are not acceptable to the court, or if the parties cannot agree, the “normal procedure” must be followed.\textsuperscript{112} The normal procedure requires several hearings.\textsuperscript{113} Initially, the parties must appear before the President of the Court, who pronounces temporary decisions on those issues which must be settled most urgently, such as the custody of the children, support, and assignment of the family home to one of the spouses.\textsuperscript{114} The case is then referred to a judge and the trial proceeds until the adversary phase is completed.\textsuperscript{115} Once this phase has been completed, a panel of three judges review the file and issue a final order.\textsuperscript{116} This multiphase procedure takes much longer to complete than a joint petition. Since divorce actions under the normal procedure proceed in the Court of Rome, they often last two to three years, much longer than the four- to eight-month accelerated process.\textsuperscript{117}

\textsuperscript{107} See id. art. 4, para. 9.
\textsuperscript{108} See id.
\textsuperscript{109} See id. art. 4, para. 13.
\textsuperscript{110} See id.
\textsuperscript{111} See id. art. 5.
\textsuperscript{112} See id. art. 4, para. 8.
\textsuperscript{113} See id. art. 4, paras. 8-9.
\textsuperscript{114} See id. art. 4, para. 8.
\textsuperscript{115} See id.
\textsuperscript{116} See id. art. 4, para. 9.
\textsuperscript{117} See Ceshini, supra note 78, at 571.
The declaration of divorce becomes effective on pronouncement either through the express approbation of the parties or within thirty days of notification if not appealed by either party.\textsuperscript{118} After becoming effective, the divorce may be registered directly on the certificate of marriage held at the civil status offices.\textsuperscript{119}

E. Rights and Obligations of Spouses and Parents - Maintenance of Spouses and Children in General

In examining obligations to support spouses and children, it is important to distinguish between two important terms—mantenimento and alimenti—which are often incorrectly used interchangeably when discussing economic provisions in Italy. Mantenimento refers to the reciprocal obligation of spouses to maintain the economically weaker partner at the standard of living to which he or she has become accustomed during the marriage.\textsuperscript{120} Alimenti refers to the obligation to provide the economically weaker partner with the means of basic sustenance by virtue of the familial relationship, without taking into consideration any circumstance, which might be used to refute the obligation, such as abandonment.\textsuperscript{121}

Separation and divorce have no influence whatsoever on the children’s rights to claim against the estate of either parent at a later date.\textsuperscript{122} The children remain the legitimate heirs but will be considered together with any other children that either spouse may have naturally from previous or future marriages.\textsuperscript{123}

A person who must furnish support in the form of basic sustenance can choose to do so by maintaining the person entitled to support in his or her home or by paying, in advance, a support allowance at intervals.\textsuperscript{124} The court, however, has the ultimate

\textsuperscript{118} See Law No. 898, art. 4, para. 9.
\textsuperscript{119} See id. art. 10.
\textsuperscript{120} See C.c. art. 156.
\textsuperscript{121} See id. art. 433.
\textsuperscript{122} See Law No. 898, art. 9, para. 4.
\textsuperscript{123} See id. art. 9, para. 3.
\textsuperscript{124} See C.C. art. 443.
power to determine the manner of support.125

1. Maintenance of Children

In divorce proceedings, the court must first, if necessary, determine the legitimacy of a child or children produced during the marriage, and arrange for the protection of the child’s moral and material interests.126

Both the law and the judicial system in Italy give the utmost care and attention to protecting the rights of children.127 The International Private Statute and the Italian Civil Code reflect the primacy of children’s rights.128 The court’s authority over separation and divorce proceedings extends to child custody and support issues.129 Decisions regarding these issues may only consider the best interest of the children regardless of parental intent or argument, which may be deemed prejudicial to the child.130 During an adversarial proceeding, the court may issue interim “urgent and temporary” provisions to protect children involved.131

Italian judges can grant custody of the children to one parent, determine the scope of visitation, be involved in significant choices regarding the children’s future, and determine the non-custodial parent’s obligation to provide financial support for the children.132 In making these decisions, the court must bear in mind the wishes of both parents and children, provided that the latter are deemed sufficiently mature.133 In any case, the court order must ensure the psychological and physical well being of the children.134

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125 See id. See also Law No. 898, art. 6.
126 See C.C. arts. 147-48.
127 See id.
128 See generally Law No. 218. See also C.C. titles 4-7.
129 See id. art. 6-2. See also C.C. art. 155.
130 Law No. 898 art. 4, para. 13; art. 6, para. 9. See also C.C. art. 155, para. 1.
131 See Law No. 898, art. 4, para. 8.
132 See id. art. 6, para. 3.
133 See id. art. 6, para. 9.
134 See id.
2. Maintenance of Spouses

There are no predetermined percentages regarding the calculation of alimony or, more precisely, mantenimento. Rather, the judge determines mantenimento on a case-by-case basis, according to criteria established by law.135 Even though no specific principles of “equity” apply as in Anglo-Saxon law, an Italian judge may use his or her discretion more freely in this field of the law than in others.

In the case of separation and divorce, the judge determines mantenimento by reference to the conditions of the spouses, the reasons for which the divorce is requested, the respective personal and economic contributions to the family, commonly and individually owned assets, and the respective incomes of each spouse.136 All of these elements must also be considered in light of the duration of the marriage.137

In determining the amount of mantenimento, the court focuses on enabling the economically weaker spouse to maintain approximately the same lifestyle he or she enjoyed before the separation or divorce.138 The court considers the respective income and assets of each spouse including any property derived from the separation of ownership.139 A judge may also examine the reasons underlying the limited financial means of the weaker spouse.140 If the spouse cannot provide for him or herself for objective reasons, such as inability to work due to handicap or old age, then mantenimento is adjusted accordingly.141 If, on the other hand, the spouse is able to support himself or herself but negligently or unwillingly does not, mantenimento may be reduced or even denied altogether.142

If an adversarial proceeding takes place, the judge may issue

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135 See C.c. art. 156.
136 See Law No. 898, art. 5. See also Vito Librando, The Reform of Family Law in Italy, in THE REFORM OF FAMILY LAW IN EUROPE 151, 176 (A.G. Chloros ed., 1978).
137 See Law No 898, art. 5.
138 See C.c. art. 156.
139 See C.c. art. 156.
140 See id.
141 See id.
142 See id.
orders of payment of financial support. Similarly, if a financial order is to be made by consent, both parties must be present during the hearing in order to sign the agreement before the judge. Otherwise, the parties may present the same requests during the course of the case so that the judgment they wish to receive will be issued. The final result is the same, but under this approach the parties are not obliged to appear in person at the hearing. Only in the case of divorce is there the possibility of having to pay a lump sum in place of mantenimento, provided both parties agree and the judge approves the amount of the payment.\footnote{See Law No. 898, art. 5.}

In the initial hearings for separation and divorce cases, the parties must present income statements and any other documentation relating to revenue and separately and commonly owned property.\footnote{See id.} If the evidence is disputed, the judge may order an investigation of income, assets, and lifestyle, and may turn the matter over to the Excise and Revenue Police.\footnote{See id.} If necessary, this division of the police also may investigate financial institutions and companies.

III. Legal Status of Children Born out of Wedlock

A. Historical Overview (Italy)

Italian law governing the status of children born out of wedlock has greatly evolved since the days of the Civil Code of 1865, which allowed an inquiry into legitimate paternity and maternity only in specific cases such as rape or abduction.\footnote{See Librando, supra note 136, at 161.} For example, the law failed to recognize instances where a child was born of an incestuous relationship. As one writer has summarized:

The doctrine recognized the pre-eminence of the legitimate family, which is united by blood and sealed by marriage. On the other hand it affirmed the need for an appropriate guardianship of the rights of children born of relations which, although reprehensible, could not and should not deprive the innocent victims of a family status and perpetuate for them conditions of
complete inferiority, both civil and social.\textsuperscript{147} The need to strike a balance between these opposing requirements led initially to new provisions of the Civil Code 1942 and, thereafter, to gradual changes in the law concerning the recognition of the illegitimate child in certain circumstances. However, the distinction between the illegitimate child conceived in adultery or incest and the illegitimate child conceived "simply and naturally" remained important.\textsuperscript{148}

Finally, more than thirty years later, Law No. 151 of May 19, 1975,\textsuperscript{149} established that a father or mother could recognize the natural infant even if married to other individuals at the moment of conception.\textsuperscript{150} The Italian Civil Code today incorporates the same rule.\textsuperscript{151} This provision serves to eliminate the previous legal distinction between the two categories of illegitimate children, and therefore dispenses with the more stringent procedures for recognition to which children born of more "morally reprehensible" relationships were subject.

Section IV of the Italian Private Statute, dealing with persons and the family, further supplements the Civil Code in this respect.\textsuperscript{152} While providing a distinction between legitimation\textsuperscript{153} and acknowledgment of offspring,\textsuperscript{154} it creates a mechanism for determining the applicable law in instances when more than one law may control.\textsuperscript{155} Article 35 of the Italian Private Statute, entitled "Acknowledgement of Natural Children," reflects the doctrine that the best interests of the child are paramount.\textsuperscript{156} Specifically, Article 35(1) provides that, "[t]he conditions for acknowledgment of natural children are regulated by the law of the country of nationality of the child at the moment of birth or, if

\textsuperscript{147} Id. at 162.
\textsuperscript{148} Id.
\textsuperscript{149} See Law No. 151 of May 19, 1975, arts. 102, 250.
\textsuperscript{150} See Librando, supra note 136, at 164.
\textsuperscript{151} See C.C. art. 250, para. 1.
\textsuperscript{152} See Law No. 218.
\textsuperscript{153} See id. art. 34.
\textsuperscript{154} See id. art. 35.
\textsuperscript{155} See id. arts. 34-35.
\textsuperscript{156} See id. art 35.
more favorable, by the law of the country of nationality of the person who is acknowledging the child." Should the applicable law be Italian, the regulating provisions are principally provided by the Civil Code, Chapter II, Title 7—"Natural Filiation and Legitimation," as dealt with earlier in the discussion of family relationships and the court system.158

B. The European Convention on the Legal Status of Children Born out of Wedlock

From an international perspective, the European Convention on the Legal Status of Children Born Out of Wedlock attempts to reduce the differences between the legal status of children born in and out of wedlock, thereby reducing any legal or social disadvantages incurred by the latter.159 The Convention establishes the basic rights of the child, primarily in terms of maintenance, succession, and parental authority.160

The Convention provides that parents of a child born outside of marriage shall have the same obligation to maintain the child as if it had been born within marriage.161 In the case of a child born out of wedlock, in order to impose an obligation of support, the court with jurisdictional competence in the matter must look to the relevant national provisions to determine the applicable law.162 If Italian law applies, the courts automatically refer first to the Statute and then to the provisions of the Civil Code concerning parental rights and duties imposed by marriage.163

The Convention specifically establishes that, just as the obligation of maintenance falls upon the family of a child born in wedlock, an equal obligation applies to the family of a child born outside of marriage.164 In Italy, Article 148 covers this obligation,

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157 Id. art. 35(1).
158 See supra notes 45-56 and accompanying text. See also C.c. arts. 231-90.
160 See id. arts. 1-10.
161 See id. art. 6, para. 1.
162 See id.
163 See Law No. 218, art. 36; C.c. arts. 147-48.
164 See Convention on Children, supra note 159, art. 6(30), 15 I.L.M. at 1046.
and states that the legitimate or natural ascendants of a child, in
order of proximity, are bound to provide the necessary means
when the parents are unable to fulfill their obligations.\textsuperscript{165}

\section*{IV. The Hague Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children}

Each Hague Convention reflects another development in the concept of international family law, culminating in today’s recognition of the child as a subject of rights as opposed to an object of other persons’ rights.

The Hague Convention of October 19, 1996,\textsuperscript{166} represents the culmination of a series of Hague Conventions regarding child welfare, including the Inter-country Adoption Convention of 1993,\textsuperscript{167} and the Child Abduction Convention of 1980.\textsuperscript{168} The 1996 Convention serves as a revision of the earlier Convention of October 5, 1961, which addressed the powers of authorities and the law applicable to the protection of minors.\textsuperscript{169} Comprising seven chapters, the 1996 Convention is intended to redefine and clarify the legal and practical aspects of child protection and parental responsibility.\textsuperscript{170} Although the 1996 Convention has not been ratified in Italy, it is nevertheless useful to discuss its effects at an international level.

\textsuperscript{165} See C.c. art. 148.


\textsuperscript{169} See Convention on Jurisdiction, \textit{supra} note 166, 19 I.L.M. at 1391.

\textsuperscript{170} See \textit{id}.
A. Scope of the 1996 Convention

The 1996 Convention addresses four essential areas. Specifically, it seeks to define: (1) when a judicial or administrative authority has jurisdiction in the protection of the person or property of the child; (2) the applicable law; (3) those circumstances in which a judicial or administrative authority should recognize and enforce foreign protection rulings; and (4) co-operation between the authorities of signatory states by virtue of appointed national Central Authorities.\textsuperscript{171}

The 1996 Convention applies to individuals under eighteen years of age,\textsuperscript{172} two years older than the limit provided by the earlier Convention on Child Abduction of 1980.\textsuperscript{173} In principle, the 1996 Convention applies to children under age eighteen even in the face of a conflicting national law. It does not, however, include within its scope the unborn child and, for this reason, the 1996 Convention expressly defines its applicability as beginning "from the moment of birth."\textsuperscript{174}

B. Categories of Protection Measures

In general, Article 3 provides three categories of protective measures for children and property.\textsuperscript{175} Those categories are: (1) private measures for the protection of the child, dealing with assertion and termination of parental rights; (2) public measures, such as foster care and public placement; and (3) measures controlling the management and disposal of the child's property.\textsuperscript{176}

The protection of children under the 1996 Convention is further enhanced by the concept of parental responsibility. Parental responsibility includes "parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal

\textsuperscript{171} See id. art. 1, 35 I.L.M. at 1396.

\textsuperscript{172} See id. art. 2, 35 I.L.M. at 1396.

\textsuperscript{173} See Convention on Child Abduction, supra note 168.

\textsuperscript{174} See Convention on Jurisdiction, supra note 166, art. 2, 35 I.L.M. at 1396.


\textsuperscript{176} See id.
representatives in relation to the person or the property of the child."  To protect the child's best interests, the definition deliberately encompasses a relatively wide range of individuals who may be obligated under the term "parental responsibility." This approach goes beyond the traditional view, which encompassed only natural parents, to include such persons or bodies as are invested with parental authority by law, agreement, or administrative procedures. The term "parental responsibility" extends also to parties who have control over the child's property and those authorized to enter into contracts on the child's behalf.

C. Jurisdiction of Judicial and Administrative Authorities

Articles 5 to 14 address the jurisdiction of judicial and administrative authority in the state in which measures for protection of a child or its property are sought. Jurisdiction is primarily based upon the concept of "habitual residence of the child." In the event that the habitual residence changes, so too must the relevant jurisdiction. Although the 1996 Convention does not specifically define the term, "habitual residence" has often been used in previous Hague Conventions, notably in the 1980 Convention concerning the Civil Aspects of International Child Abduction.

If the habitual residence of a child cannot be established, such as when the child is recognized as a refugee, the Convention limits jurisdiction to the state in which the child is located. This rule serves to protect those children who, for varying reasons, would otherwise remain without the protection afforded to children under the "habitual residence" concept.

Article 7 adheres to the provisions of the 1980 Convention for

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177 Convention on Jurisdiction, supra note 166, art. 1, para. 2, 35 I.L.M. at 1396.
178 Id.
179 See Nygh, supra note 175, at 346.
180 See id. at 347.
181 See id.
182 See id.
183 See id.
184 See Convention on Jurisdiction, supra note 166, art. 6, 35 I.L.M. at 1397.
jurisdiction in cases in which the child has been wrongfully retained or removed.\textsuperscript{185} In such cases, jurisdiction remains with the state in which the child was habitually resident prior to its removal, until a new habitual residence can be established.\textsuperscript{186} Such new residence occurs where either: (1) removal of the child has been approved by the person or body having custody rights; or (2) the child has resided in a new state for at least one year after the injured party has, or should have, discovered its whereabouts, no application for return remains pending, and the child is settled in its new environment.\textsuperscript{187}

Any measures taken for the protection of a child or a child’s property are effective until a new jurisdiction seeks to modify, replace, or terminate them.\textsuperscript{188} This holds true even if the basis for the original jurisdiction no longer exists.\textsuperscript{189} While a court of the state to which the child has been taken may take urgent measures for the child’s protection, the state of habitual residence may override any such emergency action.\textsuperscript{190}

Having outlined jurisdiction based on habitual residence, it is necessary to add that Articles 8 and 9 allow for the application of forum non conveniens, the principle by which jurisdiction may be assumed by another contracting state with the consent of the state of habitual residence.\textsuperscript{191} An assumption of jurisdiction must always be in the child’s best interests, and the state attempting to establish it must be: (1) the state where the child is a national; (2) the state where the child’s property is located; (3) the state in which there is an application for divorce, separation or annulment pertaining to the parents; or (4) the state with which the child has a substantial connection.\textsuperscript{192}

The third category establishes so-called “divorce-related jurisdiction,” one of the greatest areas of controversy in the 1996

\textsuperscript{185} See id. art. 7, 35 I.L.M. at 1397.
\textsuperscript{186} See id.
\textsuperscript{187} See Nygh, supra note 175, at 348.
\textsuperscript{188} See Convention on Jurisdiction, supra note 166, art. 14, 35 I.L.M. at 1398.
\textsuperscript{189} See id.
\textsuperscript{190} See id. art. 11, 35 I.L.M. at 1398.
\textsuperscript{191} See id. arts. 8-9, 35 I.L.M. at 1397-98.
\textsuperscript{192} See id.
While such jurisdiction would serve to simplify cases concerning matrimonial issues, opposition focuses on the possibility of permitting jurisdiction that bears no real reference to the situation of the child. Primarily dealt with in Article 10, the 1996 Convention attempts to strike a balance between the simplification of marital cases and the protection of the rights of the child.

Divorce-related jurisdiction may apply if all three of the following conditions apply: (1) either parent is habitually resident in a signatory state; (2) either parent has parental responsibility; and (3) both parents plus any other person with parental responsibility for the child consent to the divorce-related jurisdiction itself (rather than consenting necessarily to the precautionary measures taken under that jurisdiction). It is worth stressing that many consider such jurisdiction an unjustified departure from the established concept of jurisdiction based on habitual residence.

D. Applicable Law

The problem of applicable law is dealt with in Articles 15 to 22 of the 1996 Convention, which begins in Article 15(1) by providing that the concept of *lex fori* governs. This concept allows a court with jurisdiction to apply its own local law in order to protect a child or its property.

In most cases, the applicable law will coincide with jurisdiction, as determined by the child’s place of habitual residence. This is not always so, however, and Article 15(2) provides that the authority exercising jurisdiction may consider or even apply the law of another state should there exist a substantial connection with that state. Although the Convention fails to define “substantial connection,” habitual residence would

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193 See Nygh, supra note 175, at 350.
194 See id.
195 See id.
196 See id.
197 See Convention on Jurisdiction, supra note 166, art. 15(1), 35 I.L.M. at 1399.
198 See Nygh, supra note 175, at 352.
doubtless qualify.  

Article 16 provides that the specific issue of parental responsibility, as determined by law, agreement, or other act, must be subject to the applicable law of the habitual residence regardless of jurisdictional issues. This provision applies automatically without action by judicial or administrative authority. Areas of controversy may arise under Article 16 in cases where the habitual residence of the child changes. Nevertheless, parental responsibility may be granted under the new applicable law, but any pre-existing parental responsibility not provided for in the new applicable law remain effective regardless of a transfer of habitual residence.

Article 16(4), however, allows responsibility not established by the previous applicable law to be granted under the newly applicable law. The 1996 Convention reacts expansively to changes in the habitual residence of the child without permitting transfers to eliminate the parental responsibilities previously created. Furthermore, by virtue of Article 17, the law of the new residence subsequently governs any parental responsibility surviving from a previous habitual residence.

When the child has its habitual residence in a non-contracting state, the Convention still requires application of that law in member states. In a case in which habitual residence is in a non-contracting state, Article 21(1) allows application of renvoi where the law of another state (e.g. place of nationality) may apply. If this third state rejects renvoi, the applicable law will be that of the state of habitual residence under Article 21(2).

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200 See Nygh, supra note 175, at 352-53.
201 See Convention on Jurisdiction, supra note 166, art. 16(1), 35 I.L.M. at 1399.
202 See id.
203 See id. art. 16(3), 35 I.L.M. at 1399.
204 See id. art. 16(4), 35 I.L.M. at 1399.
205 See Nygh, supra note 175, at 353.
206 See id. at 353-54.
207 See id. at 354.
208 See id; see also supra notes 20-25 and accompanying text (discussing the renvoi principle).
209 See Nygh, supra note 175, at 354.
This chapter of the 1996 Convention allows the court to deviate from the law of the place of habitual residence if, consistent with the interests of the child, that law is contrary to public policy.\textsuperscript{210}

\textit{E. Recognition and Enforcement}

All provisions regarding the recognition and enforcement of protective measures of another state relate only to those measures taken after the Convention has entered into force in both states.\textsuperscript{211} This general principle is outlined in Article 23(1), which provides that measures taken by the judicial or administrative authorities of a contracting state must be recognized by all other contracting States.\textsuperscript{212} Article 23(2) then provides the following circumstances in which recognition may be refused: (1) if jurisdiction was exercised on a ground not provided for in Chapter II—Jurisdiction, of the 1996 Convention; (2) if measures were taken without the child being given the opportunity to be heard (except in cases of urgency) in judicial or administrative proceedings; (3) if a person with parental responsibility was not given the opportunity to be heard (except in cases of emergency); (4) if the measure is not compatible with a measure subsequently taken by the second State where there is habitual residence; or (5) if the measure regards placing the child in another country by virtue of Article 33, but the procedure provided for in the same was not followed.\textsuperscript{213}

Under Article 26, a member state must follow another member state’s enforcement procedures when enforcing measures issues by that state.\textsuperscript{214} Failure to follow such a procedure constitutes one of the few specific reasons for refusing to recognize a foreign judgment. This explains the principle behind Article 28, which provides that recognized measures should be enforceable “as if they had been taken by the authorities” of the second state.\textsuperscript{215} Article 24 grants to interested persons the ability to request from the second state a determination as to whether a measure must be

\textsuperscript{210} See Convention on Jurisdiction, supra note 166, art. 22, 35 I.L.M. at 1399.
\textsuperscript{211} See Nygh, supra note 175, at 355.
\textsuperscript{212} See Convention on Jurisdiction, supra note 166, art. 23(1), 35 I.L.M. at 1399.
\textsuperscript{213} See id. art. 23(2), 35 I.L.M. at 1399-1400.
\textsuperscript{214} See id. art. 26, 35 I.L.M. at 1400.
\textsuperscript{215} Id. art. 28, 35 I.L.M. at 1400.
recognized by it.\textsuperscript{216} Findings of fact relied upon in the assertion of jurisdiction in the original state which issued protective measures are binding upon the authorities of the second state through Article 25.\textsuperscript{217} Consequently, Article 27 states that the jurisdiction of the original state cannot be collaterally attacked.\textsuperscript{218}

Since the 1996 Convention resulted from the gradual progression of each session of the Hague Conference on Private International Law, the 1996 Convention retains provisions established in earlier conventions. This is particularly necessary considering that signatory states of the new 1996 Convention remain bound by their obligations to third party states under the earlier Conventions, even when these states are not signatories to the most recent Convention.\textsuperscript{219}

\textbf{F. Cooperation}

Articles 29 to 39 of the 1996 Convention deal with cooperation between states on the same basis as previous Conventions. These articles primarily employ Central Authorities to facilitate co-operation between signatory states, as in the Hague Convention of 1980.\textsuperscript{220} Such a network, also comprised of other judicial and administrative bodies, is considered absolutely fundamental to the effective functioning of the 1996 Convention.

The necessity of such a network arises in the application of \textit{forum non conveniens}, the principle discussed under Articles 8 and 9.\textsuperscript{221} The various functions performed by these cooperating authorities include:

(a) Informative functions—Article 30 requires the relevant authorities to provide information on the laws and services available in their states for protecting the interests of the child. Furthermore, Article 34 permits one authority to request from its counterpart in another member state, information in its possession

\textsuperscript{216} See id. art. 24, 35 I.L.M. at 1400.
\textsuperscript{217} See id. art. 25, 35 I.L.M. at 1400.
\textsuperscript{218} See id. art. 27, 35 I.L.M. at 1400.
\textsuperscript{219} See id. art. 50-52, 35 I.L.M. at 1402-03.
\textsuperscript{220} See Nygh, supra note 175, at 356.
\textsuperscript{221} See Convention on Jurisdiction, supra note 166, arts. 8-9, 35 I.L.M. at 1402-03.
relevant to protection the child.\textsuperscript{222}

(b) Mediation/conciliatory functions—Articles 31 and 32 require the relevant bodies to facilitate the process of reaching possible solutions for the protection of the child.\textsuperscript{223}

(c) Investigatory functions—Central Authorities may investigate a child’s whereabouts and report on his situation and protective needs.\textsuperscript{224}

(d) Protective functions—In protecting the rights of the child, Article 35 seeks to secure for those relevant individuals effective exercise of rights of access. This article is of particular importance in situations in which, for example, a parent is a resident of a state different than that of the child’s place of habitual residence.\textsuperscript{225}

Article 54 provides that, for communications between Central Authorities and similar bodies, the original language of the communicating state may be used, together with a translation into the official language of the receiver.\textsuperscript{226} Furthermore, the French and English languages may be used where such a translation would not otherwise be possible.\textsuperscript{227} It is interesting to note that Article 38 permits the imposition of reasonable charges for the services and assistance provided by the Central Authorities and other bodies.\textsuperscript{228}

The majority of states attending the Eighteenth Session of the Hague Convention on Private International Law received positively the 1996 Convention.\textsuperscript{229} Having been carefully drafted to address the shortcomings of earlier Conventions and to support the various provisions previously drafted, it serves as a culmination of the work performed at the previous seventeen sessions of the Hague Conference.

By way of illustration, the 1996 Convention exists in harmony

\textsuperscript{222} See id. arts. 30, 34, 35 I.L.M. at 1400-01.
\textsuperscript{223} See id. art. 31-32, 35 I.L.M. at 1400.
\textsuperscript{224} See id.
\textsuperscript{225} See id. art. 35, 35 I.L.M. at 1401; see also Nygh, supra note 175, at 357.
\textsuperscript{226} See Convention on Jurisdiction, supra note 166, art. 54(1), 35 I.L.M. at 1403.
\textsuperscript{227} See id. art. 54(2), 35 I.L.M. at 1403.
\textsuperscript{228} See id. art. 38, 35 I.L.M. at 1401.
\textsuperscript{229} See id.
with its predecessor, the 1980 Convention on Child Abduction, in
the sense that the latter takes priority over the former in matters
concerning the signatories of both. However, a person cannot
be precluded from invoking the new Child Protection Convention
in seeking the return of an unlawfully removed or detained
child.

V. Hague Convention on the Civil Aspects of International
Child Abduction 1980

This Convention was adopted by unanimous vote at the
Fourteenth Session of the Hague Conference on Private
International Law. It subsequently came into force in the
United States on July 1, 1988.

Italy incorporated the 1980 Convention into its law on January
15, 1994, by Statute No. 64 of 1994 (Ratifying Law), which came
into force in May 1995 following approval of the third ratification
instrument per Articles 37 and 38 of the 1980 Convention. The
1980 Convention was incorporated in full in Italy, without any
reservations.

The Ratifying Law provides that certain applications be made
to the Central Authority, which in Italy is the Juvenile Division of
the Ministry of Grace and Justice.

First, applications seeking the return and reunion of the child
with the legal custodian/responsible adult from whom the child
was abducted must be made to the Central Authority. In
addition, the Ratifying Law requires that applications made with a

\[\text{See id. art. 50, 35 I.L.M. at 1402.}\]
\[\text{See id.}\]
\[\text{See Convention on Child Abduction, supra note 168, 19 I.L.M. 1501.}\]
\[\text{The United States enacted implementing legislation in 1988, the International}
\text{11601-10, which rendered the Convention effective July 1, 1988. Linda Silberman,}
\text{Hague International Child Abduction Convention: A Progress Report, 57 LAW &}
\text{CONTEMP. PROB. 209 (1994).}\]
\[\text{See Law No. 64 of January 10, 1994 [hereinafter Law No. 64].}\]
\[\text{See id.}\]
\[\text{See id. art. 3(2).}\]
\[\text{See id. art. 7(1).}\]
view to re-establishing the important practice of visitation rights must also be made to the Central Authority.\footnote{238}

\textit{A. Role of the Central Authority.}

Articles 6 and 7 of the 1980 Convention (Article 7 of the Ratifying Law) require each signatory country to set up a “Central Authority” to which notifications of an abduction from another signatory country are sent by the equivalent Central Authority of the other country.\footnote{239} The Central Authority is granted wide powers by the Ratifying Law in order to carry out its work.\footnote{240} In particular, Article 3(2) of the Ratifying Law provides that the Central Authority can use the services, where necessary, of the Public Prosecutor and of the Juvenile Division of the Department for the Administration of Justice, for general assistance and for purposes of representation.\footnote{241} It can also ask for help from public administration bodies, as well as the state police and any other organization whose aims coincide with the objectives set by the 1980 Convention with regard to international child abduction.\footnote{242}

\textit{B. A Brief Summary of the Procedure}

\textit{1. Application to the Central Authority}

According to the Ratifying Law, a party with the right to legal custody, “the applicant,” must apply to the Central Authority when seeking return of an abducted child or to re-establish visiting rights.\footnote{243} The application can be deposited at the Central Authority of the country where the applicant was residing with the child.\footnote{244} This office will then forward it to the equivalent Central Authority in Italy.\footnote{245}

\begin{itemize}
\item \footnote{238} See id.
\item \footnote{239} Convention on Child Abduction, \textit{supra} note 168, arts. 6, 7, 19 I.L.M. at 1501-02.
\item \footnote{240} See Law No. 64 art. 3.
\item \footnote{241} See id. art. 3(2).
\item \footnote{242} See id.
\item \footnote{243} See id. art. 7(1).
\item \footnote{244} Convention on Child Abduction, \textit{supra} note 168, art. 8, 19 I.L.M. at 1502.
\item \footnote{245} See id. art. 9, 19 I.L.M. at 1502.
\end{itemize}
2. Locating the Child

Once the Central Authority has received the application, it will try to identify the child's location by enlisting the State Police and the Juvenile Division of the Department for the Administration of Justice. As explained above, it may also use the services of any other relevant Public Administration body that can be of assistance. According to Article 7 of the 1980 Convention, when the child has been found, these bodies then must attempt to persuade the abducting parent, in a non-confrontational way, to surrender the child without further delay.

3. Application to Relevant Juvenile Court

Once the child has been found, if dialogue has not succeeded in returning the child, the formal application and other relevant documents will be sent immediately to the Public Prosecutor at the relevant Juvenile Court. The Public Prosecutor will then make an urgent petition to the court, requesting an order of restitution, or the restoration of visitation rights.

At this point, the Juvenile Court protects the child's interest, considered to be reunification with the custodial parent. The Public Prosecutor essentially acts to safeguard the rights of the applicant's parent. The Public Prosecutor will act on the applicant's behalf and set in motion the procedure before the Juvenile Court.

4. Initial Examination by the Juvenile Court

The Chairman of the Juvenile Court will gather the relevant information pertaining to the case and fix a date for the hearing to

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246 See Law No. 64 art. 3(2).
247 See id.
249 See Law No. 64 art. 7(2).
250 See id.
251 See id.
252 See id.
253 See id. art. 7(2).
be held before him.\textsuperscript{254} The Chairman will then notify the Central Authority of the date of the hearing and the Central Authority will notify the Applicant.\textsuperscript{255} During this period, both the Juvenile Court and the Central Authority can enlist the help of the Juvenile Division of the Department for the Administration of Justice and of the State Police to examine all the circumstances of the case and to see whether purported defenses raised by the abducting parent are actually true.\textsuperscript{256}

5. \textit{Main Hearing at the Juvenile Court}

The Central Authority informs the applicant of the date of the hearing and the applicant can attend at his or her own expense.\textsuperscript{257} At the full hearing, the Juvenile Court will consider the submissions made by the abducting party and the Public Prosecutor and, if appropriate, the views of the child.\textsuperscript{258} It will decide the case within thirty days from the date of the application.\textsuperscript{259} Whenever the Central Authority considers it necessary, it can appoint State Attorneys to act on behalf of the applicant parent, to represent him or her before the court.

6. \textit{Judgment}

The Juvenile Court’s judgment has immediate effect and can be enforced.\textsuperscript{260} An appeal may be lodged at the Italian Court of Cassation, although such an appeal will not suspend the enforceability of the judgment.\textsuperscript{261}

7. \textit{Enforcement of Judgment}

The Public Ministry of the Juvenile Court is responsible for the enforcement of the judgment, and can enlist the help of the Juvenile Division of the Department for the Administration of

\begin{itemize}
\item \textsuperscript{254} See id. art. 7(3).
\item \textsuperscript{255} See id.
\item \textsuperscript{256} See id. art. 3(2).
\item \textsuperscript{257} See id. art. 7(3).
\item \textsuperscript{258} See id.
\item \textsuperscript{259} See id.
\item \textsuperscript{260} See id. art. 7(4).
\item \textsuperscript{261} See id.
\end{itemize}
The Public Ministry will also notify the Central Authority of the judgment.\textsuperscript{263}

C. Practical Issues

1. Duration of Procedure

The duration can vary enormously from case to case, depending on the complexity involved. Generally, when the Central Authority receives a formal application for the repatriation of a child from another signatory country, it notifies the police within twenty-four hours from the receipt of such application. Furthermore, the Central Authority will forward the application to the Public Prosecutor at the relevant district Juvenile Court within twenty-four hours of finding the child.

The Juvenile Court will generally commence legal proceedings quickly, and will fix a date for the hearing within thirty days of the application.\textsuperscript{264} The length of the proceedings at the Juvenile Court will depend on the complexity of the case and on the nature of the defense submitted by the abducting parent before the court.

2. Knowledge of the 1980 Convention and Ratifying Law

A rather delicate point concerns the degree to which Italian judges and lawyers are actually fully aware of, and up to date with, all of the provisions of the 1980 Convention and the Ratifying Law. When the 1980 Convention came into force in Italy in 1995, the Central Authority arranged for the text of both the 1980 Convention and the Ratifying Law to be sent to all Prosecutors and all Juvenile Courts in Italy. It advised the Chief Prosecutors and the Chairmen of the Courts to give it their maximum attention and become fully conversant with its provisions. Nevertheless, in this particular area of the law, it is not unusual for either the judges or the lawyers to have a rather limited knowledge of the relevant mechanisms of the 1980 Convention.

\textsuperscript{262} \textit{See id.} 7(5).

\textsuperscript{263} \textit{See id.}

\textsuperscript{264} \textit{See id.} art. 7(3).
3. Body of Case Law

To date, a very limited body of case law in Italy exists on the interpretation and use of the 1980 Convention.\textsuperscript{265} The courts' decisions and judgments are sometimes published in specialized family law magazines but, due to the relatively recent introduction of the 1980 Convention, there has not yet been any systematic or comprehensive compilation of the decisions.

As explained above, appeals are brought to the Court of Cassation rather than to the Court of Appeal, as in most other proceedings.\textsuperscript{266} The Supreme Court will therefore only examine questions regarding the legality of the decisions made in the Juvenile Court, and not questions regarding the merits of the cases themselves. In other words, it would only be possible to contest a decision in cases of incompetence, violation or false application of the law, omissions or inconsistent reasoning on a decisive point of the dispute, or other specific reasons provided by the law.

4. Costs and Legal Representation

One very important premise in relation to the efficacy of this procedure is that Italy provides the services of the Central Authority, the Public Prosecutor at the Juvenile Court, the Juvenile Division of the Department for the Administration of Justice, and any appointed State Attorney, to the applicant parent free of charge. In addition, the Ratifying Law exempts all legal documents relevant to the procedure from any requirement to pay stamp duty or registration fees.\textsuperscript{267} Similarly, it appears that the applicant is not obliged to appoint his own lawyer to carry out the proceedings, as he or she can rely on the support and procedures described above provided by the stated offices.\textsuperscript{268} As explained earlier, a private lawyer representing an applicant has full right of audience before the court and can submit his or her client's

\textsuperscript{265} As the 1980 Convention has been in force in the United States since 1988, there is a considerable body of American case law interpreting it. See n.6, supra. See also Richard E. Crouch, Resolving International Custody Disputes in the United States, 13 J. AM. ACAD. MATRIMONIAL LAW. 229 (1996).

\textsuperscript{266} See Law No. 64 art. 7(4).

\textsuperscript{267} See id. art. 3(3).

\textsuperscript{268} See id. art. 7.
Of course, the costs and expenses of using a lawyer have to be met by the client. It is important to note that, even though the Italian legal system offers a free service to applicants, in practice an applicant often will need to hire a private Italian lawyer because of language and communication problems, which can lead to extensive costs.

It is worth remembering, however, that Italian Legal Aid may also be available to foreign citizens, if the authorities of their own country certify that they satisfy the necessary financial criteria.

An abducting parent typically quotes Article 13 of the 1980 Convention in defense, and seeks to prove that: (1) the applicant parent did not have the right to legal custody of the child, or that the applicant had consented to the child being taken permanently; or (2) there is a serious risk that the child will be exposed to physical or mental danger, or in any event that the child will be put in an intolerable situation, if it is returned to the applicant; or (3) the child is sufficiently mature to make up its own mind, and has decided that it does not want to return to the applicant. The court may need to investigate the facts and seek verification of the defenses from the Juvenile Division of the Department for the Administration of Justice

D. Statistics

The following statistics show the use and effectiveness of the 1980 Convention from its introduction in 1995 to eighteen months subsequent to that date. From information provided by the Central Authority, it received approximately fifty-six applications for the repatriation of children and approximately thirteen access applications in 1995. Of these applications, it was possible to reach an amicable solution without the intervention of the Public Prosecutor in only five percent of cases, while all the others went before the court. Of these, sixty percent were accepted with an

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269 See id. art. 7(3).
270 See id.
271 Convention on Child Abduction supra note 168, art. 13(a), 19 I.L.M. at 1502.
272 See id. art. 13(b), 19 I.L.M. at 1502.
273 See id.
274 See Law No. 64 art. 3(2).
order for the child to be repatriated, whereas for various reasons, repatriation was not granted in all other cases. The Central Authority normally takes less than one week to review these applications to determine whether the cases will be accepted. On average, it takes the judges from one month to six weeks to make a decision following the Hague hearing or procedure. In one to five percent of cases, the abducting parent failed to deliver the child to the other country after being ordered to do so by the judge.

VI. Conclusion

As the 1980 Convention has only been in effect in Italy since May 1995, and due to the rather limited case law, it is difficult to draw detailed conclusions. It does appear, however, that the Juvenile Court has decided to respect the letter and spirit of the 1980 Convention. The court appears to be willing to order the repatriation of children in all cases where applications satisfy the relevant legal tests, and eschew the temptation to decide the case on emotional grounds.

The court has interpreted the defenses under Article 13 of the 1980 Convention in a restrictive manner, while still adhering to the spirit of the 1980 Convention. In other words, the court seeks to offer a quick reinstatement of the applicant parent’s rights to have legal custody of the child, rights that have been compromised by the illegal actions of the respondent parent, without making character judgments as to which of the two parents is the more suitable.

The court’s decision is generally upheld and enforced successfully. When a judgment favors the applicant, the child normally is returned without further complications. To this end, the Juvenile Court has the power to warn the abducting parent that he or she risks losing the right of parental power over the child, if he or she fails to comply with the judgment or creates obstacles preventing its execution. This clearly assists in creating a smooth repatriation procedure.

The international effort to have states return abducted children to their state of habitual residence without first considering the best interests of the child is generally critical to preserving the best interests of children by discouraging the odious practice of international child-snatching.
APPENDIX

Laws, decrees and presidential orders:
Decree number 218, May 31, 1995,

The Reform of the Italian System of International Private Law.
The House of Commons in Italy and the Senate of the Republic have approved the following legislation:

The President of the Republic enacts the new legislation.

Heading I: General provisions

Article 1 (The general purpose of the law)
1. The present law determines the scope of Italian jurisdiction, lays down criteria to determine the applicable law and controls the effect of foreign judgments and legislation.

Article 2 (International Conventions)
1. The provisions in the present law do not prejudice the applicability of international conventions which are in force in Italy.

2. The interpretation of such conventions must take into consideration their international nature and the need for uniformity in their application.

Heading II: Italian Jurisdiction

Article 3 (Scope of jurisdiction)
1. The Italian court has jurisdiction if the defendant is either
domiciled or resident in Italy or has a representative who is authorized by virtue of article 77 of the Civil Procedure Code to be brought to trial in Italy. There is also Italian jurisdiction in other cases in which the law thus provides.

2. Jurisdiction is also established with regard to the criteria established in sections 2, 3 and 4 of Part II of the Convention and protocol concerning jurisdictional competence and the execution of judgments in civil and commercial matters signed in Brussels on September 27, 1968, and enacted into Italian law by Decree number 804, June 21, 1971, and by successive revisions in force in Italy. There is also jurisdiction even if the defendant is not domiciled in the territory of a member state when the material dealt with is included in the general provisions for the application of the Convention. With reference to other material, jurisdiction is established under the criteria concerning territorial competence.\(^{275}\)

**Article 4 (Acceptance of and derogation from jurisdiction)**

1. When there is no jurisdiction on the basis of article 3, there is still jurisdiction when the parties have expressly accepted jurisdiction and the acceptance is evidenced in writing or the defendant appears in the procedure without having objected to jurisdiction in the primary instance.

2. Italian jurisdiction may usually be derogated from in favor of foreign jurisdiction or arbitration in cases there exists an express ceding power evidenced in writing and the case relates to rights which can be waived.

3. The derogation is ineffective if the foreign judge or arbiter declines such jurisdiction or the law of the court does not permit jurisdiction over such actions.

\(^{275}\) Decree number 804 of June 21, 1971, governs the ratification and execution of the Convention and protocol concerning Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters signed in Brussels on September 27, 1968.
Article 5 (Actions relating to immovable property situated abroad)
1. There is no Italian jurisdiction in real actions involving immovable property situated abroad.

Article 6 (Preliminary questions)
1. The Italian courts, as a matter of course, have the ability to decide questions which are outside of Italian jurisdiction when the solution of the questions is necessary for the decision of the central issue in question.

Article 7 (Foreign action pending)
1. If, in the course of an action, it is found that a previous action between the same parties pertaining to the same subject matter and based on the same grounds is pending before a foreign court and the decision of that court will be binding in Italy, then the action in the Italian courts should be suspended. If the foreign court declines jurisdiction or the foreign judgment is not recognized by Italian legislation then the Italian action will go ahead after a suitable petition by the interested parties.

4. The question of whether the case is pending before a foreign court is determined by the law of the country in which the case is to be heard.

5. During the pre-judicial stages of a case involving foreign law, the Italian judge is able to suspend the trial if he determines that the decision of the foreign court will have effect in Italy.

Article 8 (Point at which jurisdiction is determined)
1. Article 5 of the Italian Civil Procedural Code governs the determination of Italian jurisdiction. There is also Italian jurisdiction if facts and standards determining such jurisdiction are shown to pertain to the action.
Article 9 (Voluntary jurisdiction)
1. In addition to cases where the present legislation foresees jurisdiction and those cases where Italy has territorial jurisdiction, Italian jurisdiction is effective in the case of voluntary jurisdiction where the action concerns an Italian citizen or a person resident in Italy or when the case involves situations or relationships to which Italian law is applicable.

Article 10 (Sequestration)
1. When sequestration must be enforced in Italy and the judge has jurisdiction over the case, there is Italian jurisdiction.

Article 11 (Ability to establish lack of jurisdiction)
1. At any point in the action, lack of jurisdiction may only be established by a named defendant who has not expressly or tacitly accepted Italian jurisdiction. The judge can, on his own initiative, at any particular point of the action, declare the lack of jurisdiction when the defendant has defaulted, when the situation is of a type foreseen by article 5, or when Italian jurisdiction is excluded due to the effects of customary international law.

Article 12 (Procedural laws)
1. The Civil Law process in Italy is governed by Italian law.

Heading III: Applicable Law

Part I: General Principles.

Article 13 (Renvoi)
1. Whenever the application of foreign law is required, the effect of the renvoi procedure of foreign international private law on the law of another state must be taken into consideration if:
   a) that particular state’s law accepts the principle of renvoi, or
b) the situation involves renvoi to Italian law.

2. The application of part 1 above is nevertheless excluded:
   a) when the provisions of the present legislation result in the
      application of foreign law on the basis of a choice made by
      the interested parties to that effect;
   b) with regard to the substantial form of the acts;
   c) in relation to the legislation in Part XI of the present
      heading.

3. Renvoi is only applicable in the case of Articles 33, 34 and
   35 if it brings into force a law agreeing to the
   establishment of filiation.

4. When the present law declares an international convention
   to be applicable, the law of renvoi is governed by that same
   convention.

Article 14 (Determination of applicable foreign law)
1. The judge's own initiative determines the foreign law to be
   applied. In addition to the measures indicated by an
   international convention, the judge may make use of
   information acquired through the Ministry of Justice or
   consult experts or specialist institutions.

2. If the judge is unable, even with the help of the parties, to
   establish the applicable foreign law, he must use that law
   which regulates similar cases or analogous matters.
   Failing this, Italian law must be applied.

Article 15 (Interpretation and application of foreign law)
1. Foreign law is applied according to its own principles of
   interpretation and application in force at the time.

Article 16 (Public policy limitations)
1. Foreign law must not be applied if its effects would be
   contrary to public policy.
2. In this situation, the law which regulates similar cases or analogous matters must be applied. Failing this, Italian law must be applied.

**Article 17 (Applicability of binding norms)**

1. Certain Italian norms which have a specific aim and content are applicable even in cases where foreign law has gained applicability.

**Article 18 (Multi-legislative systems)**

1. If the state in which the applicable law, as laid down by the present legislation, is found is one where more than one territorial or personal legislative system is in force, then the applicable law is determined according to the criteria laid down by that state’s legislation.

2. If these criteria are not specifically identifiable, the legal system to be applied is that which shows the closest connection with the case in hand.

**Article 19 (Stateless persons, refugees and persons holding multiple citizenship)**

1. When the present legislation requires the law of the country of nationality of a person to be applied, in the case of stateless persons or refugees, the applicable law is that of the law of the state of domicile, or failing that, the law of the state of residence.

2. If the person concerned has multiple citizenship and one of those is Italian citizenship, then Italian law prevails. Where Italian citizenship is not one of those held, the law of the state with which the citizen has the closest ties is applied.

**Part II: Legal capacity and rights of physical persons**

**Article 20 (Legal capacity of physical persons)**

1. The legal capacity of physical persons is regulated by the
law of the country of nationality. Special conditions of capacity which regulate relationships are regulated by the same law.

Article 21 (Joint death)
1. When it is necessary to establish survivorship of one person over another and it is not known which of them died first, the time of death is determined by the law regulating the relationship for which such fact is relevant.

Article 22 (Deceased persons, missing persons and those presumed dead)
1. The legal requirements for deceased persons, missing persons and those presumed dead and the effects of those situations are the same as those which apply to their last country of nationality.

2. Italian jurisdiction exists under part 1 (above) if:
   a) the last country of nationality of the person was Italy;
   b) the last country of residency of the person was Italy; or
   c) a determination of the status of the person as deceased, missing or presumed dead could produce legal effects in Italy.

Article 23 (Capacity of physical persons in proceedings)
1. The capacity of physical persons to effect legal acts is governed by the law of their country of nationality. However, when the law regulating proceedings lays down special provisions relating to the capacity to effect legal acts, those conditions are regulated by the same law of the country of nationality.

2. In relation to contracts between people who are situated in the same state: the person who is considered capable according to the law of the state where the contract was concluded may declare his incapacity by virtue of the regulating national law if, and only if, at the moment of conclusion of the contract the other party to the contract was aware of that incapacity or ignored it by his own
mistake.

3. In relation to unilateral acts: the person who is considered capable according to the law of the state where the contract was completed may declare his incapacity by virtue of the regulating national law if, and only if, this is not prejudicial to persons who, by no fault of their own, have placed trust in the capacity of the performers of the act.

4. The limits described in parts 2 and 3 are not applicable to cases involving family law, succession in case of death, or those relating to rights over immovable situated in a different state from that where the case has been brought.

**Article 24 (Personal Rights)**

1. The existence and content of personal rights are determined by the law of the state of nationality. However, rights which derive from a family relationship are determined by the law applicable to that relationship.

2. The violation of rights described in part 1 is governed by the law relating to responsibility for illegal acts.

**Part III: Juridicial Entities**

**Article 25 (Companies and other organizations)**

1. The law governing public or private companies, associations, foundations and any other organizations including those of a cooperative nature is that of the country in which the company was established. Nevertheless, Italian law is applied if the administrative headquarters are in Italy or if the principal object of the organization is exercised in Italy.

2. The law which regulates the organization determines the following:
   a) the juridicial nature of the organization;
b) the company's denomination;
c) the constitution and method of transformation and termination;
d) the legal competence;
e) the formation, powers and functional procedure of the bodies;
f) the representatives of the organization;
g) the method of acquiring and disposing of the capacity of associate or partner of the organization as well as the rights and obligations deriving from such capacities;
h) the responsibility for the obligations pertaining to the organization;
i) the consequences of violation of the law or of the constitutive acts.

3. The transfer of the registered office to another state, or the fusion of organizations with offices in various states, is only effective if carried out in conformity with the law of the states concerned.

Part IV: Persons and the family

Article 26 (Promise of marriage)
1. The legal effects flowing from a promise of marriage and its violation are determined by the national law which the couple have in common or, failing that, by Italian law.

Article 27 (Conditions necessary to enter into marriage)
1. The capacity to marry and the conditions necessary to enter into marriage are determined by the law of the country of nationality of each individual at the moment of marriage. However, if one of the spouses has obtained unmarried status by virtue of the decision of an Italian judge or a judgment which is recognized in Italy, this status is recognized.
Article 28 (Validity of marriage)

1. The form of a marriage is valid if it is considered valid by:
   a) the law of the place of celebration of the marriage; or
   b) the law of the country of nationality of at least one of the
      married couple at the moment of celebration of the
      marriage; or
   c) the law of the state where the couple are jointly resident at
      the time of the marriage.

Article 29 (Personal relations between spouses)

1. Personal relations between spouses are regulated by the
   law of the country of nationality which the couple have in
   common.

2. Personal relations between spouses with different
   nationalities or spouses with more than one state where
   they are both nationals are governed by the law of the state
   in which their married life is predominantly situated.

Article 30 (Patrimonial relations between spouses)

1. The law regulating spouses’ patrimonial relations is the
   same as that which regulates their personal relations. If
   expressly evidenced in writing, patrimonial relations may
   be governed by the law of a state where at least one of the
   spouses is a citizen or the law of a state where at least one
   of the spouses resides.

2. An agreement made between spouses as to the applicable
   law is valid if it is considered as such by:
   a) the chosen system of law; or
   b) the system of law in which the agreement was drawn up.

3. When patrimonial relations between spouses are regulated
   by foreign law, such law can be applied against third
   parties if, and only if, the third party was aware that the
   situation was governed by foreign law or ignored it by his
   own mistake. In relation to rights over immovable objects,
   the application of such rights over third parties is limited to
cases in which the form of publication required by the state in which the immovable is situated has been respected.

**Article 31 (Separation of spouses and dissolution of marriage)**

1. Separation of spouses and dissolution of marriage are regulated by the law of the country of nationality which the spouses have in common at the moment of the request for separation or dissolution; failing that, the law of the country in which the married life of the spouses is predominantly situated is applied.

2. If separation and dissolution of marriage are not provided for by the applicable foreign law then Italian law regulates the situation.

**Article 32 (Jurisdiction in the case of nullity, annulment, separation and dissolution of marriage)**

1. In the situation of nullity, annulment, separation and dissolution of marriage, in addition to the provisions and cases in Article 3, Italian jurisdiction governs the situation where one of the spouses is an Italian citizen or when the marriage was celebrated in Italy.

**Article 33 (Filiation)**

1. The status of a child is determined by the national law of the child at the time of its birth.

2. A child is legitimate if considered as such by the law of the country in which one of the parents is a citizen at the moment of the child’s birth.

3. The national law of the child at the moment of birth governs the assessment of the status of the child and the rules and regulations concerning a conflict over the status of the child. The status of a legitimate child which is determined by the national law of the country where one of the parents is a citizen cannot be contested under that same law.
Article 34 (Legitimation)

(Legitimation attributes to a person born outside of marriage the status of legitimate, natural child.)

1. Legitimation effected by the subsequent marriage of the parents is regulated by the law of the country of nationality of the child at the moment of birth or by the law of the country of nationality of one of the parents determined at the same point in time.

2. In other cases, legitimation is regulated by the law of the country of nationality of whichever parent determines legitimacy at the time of the request for legitimation. In the case where legitimation has effect after the death of the legitimating parent, legitimation is regulated by the law of the country of nationality of the parent at the moment of death.

Article 35 (Acknowledgement of natural children)

1. The conditions for acknowledgement of natural children are regulated by the law of the country of nationality of the child at the moment of birth or, if more favorable, by the law of the country of nationality of the person who is acknowledging the child, which is determined at the moment at which the recognition takes place.

2. The capacity of acknowledgement exercisable by the parent is regulated by the law of the country of nationality of that parent.

3. The form of the acknowledgement is regulated by the law of the country in which acknowledgement occurs or the law of the country which regulates the material.

Article 36 (Relations between parents and children)

1. Patrimonial and personal relations between parents and children, including parental authority, are regulated by the law of the country of nationality of the child.
Article 37 (Jurisdiction in cases concerning filiation)
1. Italian jurisdiction determines matters of filiation and the relations between parents and children in the following cases:
   a) when the situation falls under Articles 3 and 9;
   b) when one of the parents or the child is an Italian citizen or resides in Italy.

Part V: Adoption

Article 38 (Adoption)
1. The requirements, establishment and revocation of adoption are regulated by the law of the state of nationality, at the time of adoption, of the adopter or the national law which the couple have in common in the case of adopters or, failing that, the law of the State in which the adopters are both resident or where the married life of the spouses is predominantly situated. Nevertheless, if a request for the adoption of a minor is brought before an Italian judge, and from that request the child becomes legitimate, Italian law regulates the procedure.

2. In all cases where the adopted child is an adult, the national law of the child is applied in the discernment of relationships.

Article 39 (Relations between the adopted child and adopting family)
1. Patrimonial and personal relations between the adopted child and the adopter or adopters and the relatives of the adopted child are regulated by the law of the country of nationality of the adopter or adopters or, failing that, by the law of the country where the adopters are both resident or the country in which the married life of the adopters is primarily situated.

Article 40 (Jurisdiction in cases of adoption)
1. There is Italian jurisdiction when:
a) the adopters, or at least one of them, or the adopted child, is an Italian citizen or a foreigner with residency in Italy; or

b) the adopted child holds the status of an abandoned minor in Italy.

2. There is Italian jurisdiction in personal and patrimonial relations between the adopted child and the adopter or adopters and the relatives of both the child and the adopters in every situation where the adoption has been carried out in conformity with Italian law as well as in the case where the situation is included in Article 3.

Article 41 (Recognition of foreign provisions in cases of adoption)

1. Articles 64, 65 and 66 govern the recognition in Italy of foreign provisions in cases of adoption.

2. The special provisions for laws relating to the adoption of minors remain in place.

Part VI: Protection of the disabled and support obligations

Article 42 (The jurisdiction and applicability of law in the protection of minors)

1. The protection of minors is always regulated by the Hague Convention of October 5, 1961, concerning the Competence of Authorities and the Law Applicable in Cases Concerning the Protection of Minors enacted into Italian law by Decree number 742, October 24, 1980.

2. The provisions in the Convention are applicable not only to persons who are considered minors by virtue of their national law, but also to persons whose habitual residence is not in one of the member states of the Convention.276
Article 43 (Protection for persons who have reached adult age)

1. The national law of the disabled person regulates both the determination and effects of protective measures for disabled persons who have reached adulthood and the relations between the disabled person and his caregiver. In urgent cases, in order to temporarily protect the person or the property of the disabled person, the Italian judge may adopt measures provided by Italian law.

Article 44 (Jurisdiction in cases of the protection of persons who have reached adult age)

1. There is Italian jurisdiction in the protection of disabled persons of adult age in urgent cases where there is a need to temporarily protect the person or the property of the disabled person as well as in the cases which fall under Article 3 of the present legislation.

2. When a case concerning the capacity of a foreigner is based on Article 66 and therefore gives effect to a foreign provision, there is Italian jurisdiction in the determination of any necessary modifications or additions.

Article 45 (Obligations of support within the family)

1. The obligations for family support are regulated by the Hague Convention of October 5, 1961 concerning the Competence of Authorities and the Law Applicable in Cases Concerning the Obligations of Support, enacted into Italian law by Decree number 745, October 24, 1980.277

277 Decree number 745 of October 24, 1980, governs The ratification and execution of the following Conventions:

(1) the Convention concerning the adoption of cases abroad in civil and commercial matters, adopted in Hague on March 18, 1970;

(2) the Convention on the international administration of succession adopted in Hague on October 2, 1973;

(3) the Convention concerning the recognition and execution of decisions in support cases adopted in Hague on October 2, 1973;

(4) the Convention concerning the law applicable to cases of support adopted in Hague on October 2, 1973.
Part VII: Succession

Article 46 (Succession due to death)

1. Succession due to death is governed by the national law of the deceased at the moment of death.

2. The deceased may subject the whole question of succession, by an expressed declaration in testament, to the law of the country in which he resides. This express choice is ineffective if, at the time of death, the deceased no longer lives in that country. In the case of an Italian citizen, the expressed choice made cannot affect the rights which Italian law gives to legitimate Italian residents at the time of the death of the person whose succession is in question.

3. The division of the inheritance is subject to the law applicable to the question of succession, except when the inheritors have agreed among themselves to elect the law of the country of reading of the succession or have chosen to use the law of the place where one or more of the parts of the inheritance are situated.

Article 47 (Testamentary capacity)

1. The capacity to prepare, modify, or revoke a testament is governed by the national law of the testator at the moment of preparing, modifying or revoking the testament.

Article 48 (Testamentary form)

1. The form of the testament is valid if it is considered as such by the national law of the country which the testator has expressly chosen, or by the law of the country of which the testator was a citizen at the moment of making the testament or at the moment of his death or the law of the country where the testator was domiciled or resident.

278 That is, the country in which the estate will be opened.
Article 49 (State succession)\textsuperscript{279}

1. In the absence of successors and where the law governing succession does not provide for state succession, the parts of the inheritance situated in Italy are transferred to the Italian State.

Article 50 (Jurisdiction in cases of succession)

1. There is Italian jurisdiction in matters of succession in the following cases:
   a) if the deceased was an Italian citizen at the time of his death;
   b) if the succession opened in Italy;
   c) if the parts of the inheritance with the greatest monetary value are situated in Italy;
   d) if the defendant is domiciled or resident in Italy or has accepted Italian jurisdiction except in cases where the inheritance consists of immovable property situated abroad;
   e) if the case concerns property situated in Italy.

Part VIII: Real rights

Article 51 (Possession and rights)

1. Possession, proprietorship and real rights over movable and immovable property are governed by the law of the country in which the property is situated.

2. The same system of law governs the acquisition and disposal of property, except in cases of succession and cases where the allocation of a real right depends on a family relationship or a contract.

Article 52 (Real rights over property in transit)

1. Property in transit is governed by the law of the country of destination.

\textsuperscript{279} That is, escheat to the state.
Article 53 (Prescription of movable property)
1. The prescription of movable property is regulated by the law of the country in which the property is situated up until the termination of the prescription period.

Article 54 (Rights over intangibles)
1. Rights over intangibles are governed by the law of the country in which they are being utilized.

Article 55 (Publication of acts referring to real rights)
1. The publication of the acts of constitution, transferral and extinction of real rights is governed by the law of the country in which the property is situated at the moment of the enactment.

Part IX: Donations

Article 56 (Donations)
1. Donations are governed by the national law of the country of the donor at the time of the donation.

2. The donor may, by making an express declaration at the same time as the donation, elect that the donation be governed by the law of the country in which he resides.

3. The form of the donation is valid if it is considered as such by the law which regulates its substance or by the law of the country in which the act of donation is completed.

Part X: Contractual obligations

Article 57 (Contractual obligations)
1. Contractual obligations are, in all cases, governed by the Convention of Rome concerning the Law Applicable to Contractual Obligations signed on June 19, 1980, and
enacted into Italian law by Decree number 975, December 18, 1984. The application of this Convention does not prejudice the application of other relevant international conventions.  

Part XI: Non-contractual obligations

Article 58 (Unilateral promises)
1. Unilateral promises are governed by the law of the country in which they are declared.

Article 59 (Titles of credit).
1. Bills of exchange, promissory notes, and checks are, in all cases, governed by the regulations contained in the Convention of Geneva concerning Conflicts of Law over Bills of Exchange and Promissory Notes of June 7, 1930, enacted by royal Decree number 1130 into Italian law on August 25, 1932, and amended by Decree number 1946, December 22, 1932 and March 19, 1931, concerning the Conflicts of Law over Bank Checks enacted by royal Decree number 1077, August 24, 1933, and amended by Decree number 61, January 4, 1934.

2. These regulations also govern obligations which have been assumed outside the territory of a member state or if the law of a non-member state is nominated.

3. Other instruments of credit are governed by the law of the country in which each one of the instruments was released. Obligations which differ from those which are principal are governed by the law of the country in which

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280 Decree number 975 of December 18, 1984, governs ratification and execution of the Convention, protocol and two declarations concerning the applicable law in cases of contractual obligations adopted in Rome on June 19, 1980.

281 That is, drafted, signed by the parties, and registered if necessary.
those differing obligations are assumed.\textsuperscript{282}

\textbf{Article 60 (Voluntary representation)}

1. Voluntary representation is governed by the law of the country in which the representative has his principal office of business, on the condition that he is operating under a professional title and that this office is recognized or capable of recognition by a third party. In the absence of these conditions the law of the country where the representative exercises his principal power in the case governs the situation.

2. The form of an act of conferment of the powers of a representative is valid if considered as such by the law of the country which governs the case or by the law of the country of enactment.

\textbf{Article 61 (Obligations deriving from the law)}

1. The management of other people's affairs, unjust enrichment, unjust payment and other legal obligations which are not otherwise governed by the present law are governed by the law of the country where the act, from which the obligation derives, occurred.

\textbf{Article 62 (Responsibility for illegal acts)}

1. Responsibility for illegal acts is governed by the law of the country in which the event is verified. The injured party may, however, ask the court to apply the law of the country where the act which caused the damage occurred.

2. Whenever the illegal act involves citizens who are resident in the same country, the law of that country is applied.

\textsuperscript{282} Royal decree number 1130, August 25, 1932, amended by Decree number 1946 on December 22, 1932, governs execution of the Conventions between Italy and other states concerning the unification of the law of bills signed in Geneva on June 7, 1930.

Royal decree number 1077 of August 24, 1933, amended by Decree number 1934 on January 4, 1934, governs the execution of the Conventions between Italy and other states concerning the unification of the law of bills signed in Geneva on June 7, 1930.
Article 63 (Extra-contractual responsibility for damage to products)

1. Responsibility for damage to products is regulated, at the choice of the injured party, either by the law of the state in which the domicile or the management of the producer is situated or by the law of the state in which the product was bought unless the producer can prove that the product was on the market without his consent.

Heading IV: Effect of Foreign Legislation and Judgments

Article 64 (Recognition of foreign judgments)

1. A foreign judgment is recognized in Italy without the need for recourse to any other procedure when:
   a) the judge who declared the judgment is empowered to recognize the judgment according to the principles of jurisdictional competence contained in Italian legislation;
   b) the introductory case is brought to the attention of the defendant in such a way as foreseen by the law of the state in which the case is heard and when none of the fundamental rights essential to a defense have been violated;
   c) the parties were brought to trial according to the law of the place of trial or a default was declared in conformity with such law;
   d) when the judgment is no longer appealable according to the law of the country where the judgment is pronounced;
   e) the sentence is not contrary to another unappealable sentence decided by an Italian judge in court;
   f) no other trial, which would have begun before the foreign trial, is pending before an Italian judge concerning the same matter and parties;
   g) the judgment does not produce effects which are contrary to public policy.
Article 65 (Recognition of foreign provisions)

1. Provisions concerning the capacity of persons, the existence of family relations and rights of status when pronounced by the authority of the country whose law is recognized by the present law or when capable of legal effects in that country, even if pronounced by another state, all have effect in Italy providing that they are not contrary to public policy and that they respect the essential right to a defense.

Article 66 (Recognition of foreign provisions concerning voluntary jurisdiction)

1. Foreign provisions concerning voluntary jurisdiction are recognized without the need for recourse to other procedures, when they are produced by the authority of the country whose law is applicable according to the present legislation or if they produce effects in the legislation of that state, even though they form part of another state’s legislation, or they are declared by an authority which is competent in criteria corresponding to Italian legislation. In every case the foreign provisions must respect the conditions of Article 65 as far as they are applicable.

Article 67 (Implementation of foreign provisions and judgments in voluntary jurisdiction and the situation where recognition is challenged)

1. In the case of lapsed observance or a challenge to the recognition of a foreign judgment, or a foreign provision on voluntary jurisdiction, or if it is necessary to force observance, a request for the conditions for implementation of the recognized provisions may be made to the Court of Appeal of the place of execution of the foreign act by any interested party.

2. The foreign judgment and the foreign provisions on voluntary jurisdiction, together with the provisions which accompany the request in part 1 above, constitute title for the implementation and the forced execution.
3. If a challenge to a foreign judgment occurs during a trial, the judge can make a decision, but that decision's applicability is limited solely to that trial.

Article 68 (Implementation and execution of public acts received abroad)
1. In the case of the implementation and execution in Italy of public acts with executive force which are made abroad, these are governed by the provisions of Article 67.

Article 69 (Use of foreign judges' evidentiary methods)
1. Foreign judges' declarations and provisions concerning the examination of witnesses, technical and judicial verification and interrogations or other evidentiary methods to be used in the Republic, are made executive by a decree of the Court of Appeal in the place where these provisions need to be evidenced.

2. If the use of the evidentiary methods is requested by an interested party, the case is referred to the court by an appeal at which an authenticated copy of the judgment or provision which orders the evidence to be collected must be produced. If the interested party making the request is the original judge who decided the provision, the request must be made by diplomatic methods.

3. The court considers the case in the chamber of council and refers the acts to the appropriate judge in the event that their implementation is authorized.

4. The implementation of evidentiary methods, or the execution of other instructive acts which are not foreseen by the Italian legislative system may be laid down only when they do not conflict with the principles of the legislative system itself.

5. The implementation or performance is governed by Italian law. Foreign judges' decisions and formalities should be followed only if they are compatible with the Italian
Article 70 (Requests made by diplomatic methods)
1. If the request for the implementation of evidentiary methods of instruction is made by diplomatic methods and the interested party does not have a legal representative who could request the implementation, then the necessary provisions are declared by the proceedings judge and notification is made by the chancellor.

Article 71 (Notification of authoritative foreign acts)
1. The notification of a summons to appear before a foreign authority or other acts of a foreign state are authorized by the Public Ministry of the jurisdiction in which the summons must be performed.

2. A summons requested diplomatically is carried out, at the request of the Public Ministry, by a court official.

3. The summons is carried out in accordance with Italian law. The method of application requested by the foreign court should be assessed to evaluate its compatibility with the Italian legislative system. The summons may be presented in all cases to an addressee who voluntarily accepts it.

Heading V: Transitory and Final Provisions

Article 72 (Transitory provisions)
1. The present act is applicable to all cases begun after the date at which it came into force. Cases finished before this time should apply the previous international private law provisions which, only in these cases, are effective.

2. Pending cases are governed by the Italian judge if the facts and rules which determine their jurisdiction are discovered in the course of the case.
Article 73 (Revocation of incompatible legislation)
1. Articles 17 to 31 of the provisions contained in the general introduction to the Civil Code are revoked, as well as Articles 2505 and 2509 of the Civil Code and Articles 2, 3, 4, and 37(2) of the Civil Procedure Code and articles 796 to 805 of the Civil Procedure Code are revoked from June 1, 1996.283

Article 74 (Entry into force)
1. The present legislation enters into force 90 days after its publication in the Official Gazette of the Italian Republic.

The present legislation, signed with the State seal, will be inserted into the Official Records of the legislation of the Italian Republic. Each person is asked to respect them and to obey them as law.

Signed: SCALFARO
Signed: Dini, President of the Council of Ministers.

Note:
The text of the notes here published has been edited in accordance with Article 10(3) of the unified text concerning the regulation and production of the law with reference to the emanation of Presidential decrees and the official publications of the Italian Republic which was approved with D.P.R. number 1092 of December 28, 1985 with the sole purpose of assisting in the reading of the laws which are referred to herein.