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1. *Council of State, first division, opinion 28 November 2001, No. 1077* 555

Since the acquisition or re-acquisition of Italian citizenship is contemplated by Art. 14 of the Law of 5 February 1992 No. 91 only in favour of minor children living with a parent who acquires or re-acquires Italian citizenship, children who are of age and are in the situation described above may only request (and obtain) Italian citizenship pursuant to Arts. 4 and 9 of said Law.

2. *Busto Arsizio Tribunal, 13 December 2001* 151

Art. 39 of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods sets forth a general criterion. It provides that notice of the lack of conformity of goods is timely if it is given within a "reasonable time" after the buyer has discovered such lack of conformity or ought to have discovered it. For the correct interpretation of this general criterion, reference must be made to the case in question, and in particular to the nature of the lack of conformity of the goods.

Art. 49 of the 1980 Vienna Convention provides the buyer with a residual remedy It grants the buyer the right to declare the contract void, provided that the conditions set forth in said Article are met. Therefore, it would be contrary to the rationale of the provision and to the obligation of the parties to perform the contract in good faith to allege that the buyer should already have declared the contract void at the time of testing, due to the fact that the machinery did not function properly at that time.

3. *Milan Court of Appeal, 8 January 2002* 215

A decision of the EU Commission may not be invoked in proceedings before Italian courts in violation of domestic procedural rules and, particularly, of the rules setting forth time limits for the performance of certain activities by the parties to said proceedings.

4. *Perugia Court of Appeal, decree 10 January 2002* 218

In order to obtain explicit recognition of a foreign adoption decree pursuant to Art. 67, first paragraph of the Law of 31 May 1995 No. 218, the party seeking recognition shall initiate an ordinary trial proceeding (*giudizio ordinario di cognizione*) by filing a statement of claim (*atto di citazione*).

5. *Corte di Cassazione, 11 January 2002, No. 299* 218

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and Art. 7 of the Law of 15 January 1994 No. 64 implementing the aforesaid Convention apply if protection is requested in connection with the actual exercise of a right of access to a child which has already been recognised and regulated. The Juvenile Court may not amend the decision, issued by the competent court, regulating said right of access.

6. *Bergamo Tribunal, 21 January 2002* 451

Pursuant to Art. 18 of the Brussels Convention of 27 September 1968, there is no implied choice of court even if the defendant files his statement of defence contesting jurisdiction at the first hearing (*prima udienza di comparizione*) rather than within the terms set forth by Art. 166 of the Code of Civil Procedure.

Pursuant to Art. 5, No. 1 of the 1968 Brussels Convention, the obligation in question in an action for restitution of twice the amount paid as earnest money is the obligation which the defendant did not fulfil (i.e., in the instant case, the obligation to deliver an aircraft).

An action for restitution (*azione di ripetizione dell'indebito*) pursuant to Art. 2033 of the Civil Code does not fall within the matters relating to tort, delict or quasi-delict under Art. 5 No. 3 of the 1968 Brussels Convention. Therefore, only the general forum set forth by Art. 2 is applicable.

7. *Corte di Cassazione, 23 January 2002, No. 753* 219

No special form is required for the so-called special declaration of interest in delivery at destination provided for by Art. 22, second paragraph of the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules Relating to International Carriage by Air, as amended by the subsequent Protocols. Therefore, said declaration may be contained in the air waybill and shall not necessarily be included in the declaration of receipt of the goods issued by the carrier.

8. *Corte di Cassazione, 25 January 2002, No. 879* 221

Pursuant to Art. 13, seventh paragraph of the Legislative Decree of 25 July 1998 No. 286, the administrative authorities are required to notify a non-EU citizen of every act concerning his expulsion, together with the procedure for appealing it and a translation of the act into a language known by him or, if that is not possible, into French, English or Spanish. This requirement ceases only if the lower court has established, in a well-reasoned opinion, that the foreigner knows the Italian language. Furthermore, the translation of said act into a language known by the foreigner may be deemed impossible for the purpose of said provision only if the foreigner does not have any identification document and his State of origin cannot be identified, or if he belongs to a State whose language is not well-known and therefore a translator knowing such language cannot be easily found. The absence of a translation of the act into the language of the State of origin of the foreigner violates his right of defence, and cannot be excused in light of the time constraints of the relevant proceedings, since the Prefect may request the local head of police administration (*Questore*) to detain the foreigner in one of the temporary stay centres provided for by Art. 14 of the Legislative Decree of 25 July 1998 No. 286.

9. *Corte di Cassazione (plenary session), 25 January 2002, No. 911* 159

Orders concerning parental authority or providing foster care pursuant to Art. 4, second paragraph of the Law of 4 May 1983 No. 184 on Adoption cannot be appealed to the *Corte di Cassazione* pursuant to Art. 111 of the Constitution, even if said orders have been issued by a court on appeal or contain an express or implied decision on whether Italian courts have jurisdiction over the case in question.

10. *Corte di Cassazione (plenary session), 21 February 2002, No. 2513* 164

A decision on a request to revoke an expulsion order is subject to judicial review by ordinary courts, since an appeal of the expulsion of a non-EU citizen ordered by the Prefect must be brought before ordinary courts pursuant to Art. 13, eighth paragraph, of the Legislative Decree of 25 July 1998 No. 286. In addition, Art. 2 of the aforesaid Legislative Decree recognises that non-EU citizens enjoy not only the fundamental rights of human beings, but also the right to the same treatment given to Italian citizens with respect to the judicial

protection of rights (*diritti soggettivi*) and legitimate interests (*interessi legittimi*) vis-à-vis government authorities.

11. *Corte di Cassazione, 21 February 2002, No. 2036* 222

Art. 13-bis of the Legislative Decree of 25 July 1998 No. 286 – which regulates the appeal of the expulsion order of a non-EU citizen – permanently confers the capacity to be sued to the Prefect personally.

12. *Corte di Cassazione, order 8 March 2002, No. 3454* 166

Art. 14, sixth paragraph of the Legislative Decree of 25 July 1998 No. 286 – which regulates appeals of decrees confirming orders by the local head of police administration (*Questore*) requiring the detention of non-EU citizens to ensure their subsequent expulsion – does not make reference to Art. 13, tenth paragraph of said Legislative Decree, pursuant to which a notice of appeal of an expulsion order may be signed by the appellant personally. In fact, this possibility is provided for only with respect to an appeal to the *Pretore* (now Tribunal) and the Regional Administrative Tribunal, and does not concern proceedings before the *Corte di Cassazione*, which are regulated by the general provisions set forth by Arts. 360 et seq. of the Code of Civil Procedure.

13. *Corte di Cassazione, 19 March 2002, No. 3991* 168

Art. 31, third paragraph of the Legislative Decree of 25 July 1998 No. 286 expressly provides that a relative of a non-EU minor who is present in Italy may be authorised to enter or stay there (even as an exception to the other provisions of said Legislative Decree) for serious reasons related to the psycho-physical development of the minor, provided that said authorisation must be granted for a "definite period of time". However, the aforesaid provision does not apply to a case in which the ordinary school needs of the minor until completion of compulsory schooling are concerned.

14. *Corte di Cassazione, 3 April 2002, No. 4754* 170

The term set forth by Art. 13, ninth paragraph of the Legislative Decree of 25 July 1998 No. 286, pursuant to which the lower court shall rule on the appeal of the expulsion order of a non-EU citizen "within 10 days of the lodging of the appeal", is not mandatory but must be included among the terms whose violation is not directly sanctioned. This interpretation does not cause any prejudice to the foreigner against whom the expulsion order has been issued, since the Constitutional Court clarified that any delay by, or impediment to, the competent court in concluding the relevant proceedings entitles the foreigner apply for interim relief, provided he is not responsible for such delay or impediment. Thus, the court hearing the appeal may find the most appropriate instrument for suspending the enforceability of the expulsion order within the legal system.

15. *Corte di Cassazione, 5 April 2002, No. 4847* 461

The apodictic statement by a lower court that the grounds for illegitimacy of an expulsion order issued against a non-EU citizen, and raised by said citizen in his appeal before the lower court, simply do not exist (the statement in question being simply that "the various alleged grounds for illegitimacy of the challenged act can not be found"), constitutes insufficient reasoning on decisive issues of the dispute. Therefore, the appeal before the *Corte di Cassazione* is granted.

16. *Corte di Cassazione, 9 April 2002, No. 5050* 463

An administrative order expelling a non-EU citizen pursuant to Art. 13, second paragraph, litt. a, b and c of the Legislative Decree of 25 July 1998 No. 286, as amended by the Legislative Decree of 13 April 1999 No. 113, is not discretionary and is issued upon the occurrence of certain factual circumstances pre-determined by the law. The nature of said order implies that the application of the rule of *audi alteram partem* is not required within administrative proceedings, as it may be deferred to the related judicial proceedings. Accordingly, there is no requirement to notify the interested party of the beginning of the administrative proceedings pursuant to Art. 7 of the Law of 7 August 1990 No. 241. This is even more true if there is an urgent need for an immediate order because the expulsion concerns a person who has provided a non-existent address and is without certain abode, so that it may not be possible to locate him at a later date.

17. *Corte di Cassazione, 9 April 2002, No. 5051* 466

The occurrence of one of the circumstances specified under Art. 13, second and third paragraphs of the Legislative Decree of 25 July 1998 No. 286 implies that the competent Prefect shall automatically issue an order specifying the legal basis for the expulsion of a non-EU citizen. No further investigation aimed at verifying, on a case-by-case basis, the existence of public policy reasons justifying the adoption of said order is required. In fact, the law has pre-determined the circumstances under which the issue of such an order is required and, therefore, has precluded the exercise of any discretionary power in this respect.

18. *Constitutional Court, order 3 May 2002, No. 146* 556

A challenge to the constitutional legitimacy of Art. 13, second paragraph of the Legislative Decree of 25 July 1998 No. 286 – raised with reference to Arts. 2, 3 and 35 of the Constitution – requiring that the Prefect, after having verified the existence of the circumstances provided for by the law order the expulsion of non-EU citizens, is manifestly unfounded. In fact, humanitarian and solidarity issues are not ignored by the Legislative Decree No. 286 of 1998, which in Art. 19 provides for various cases in which the expulsion of foreigners is not allowed. Thus, the aforesaid Legislative Decree fulfils the need to protect special "personal situations" without abdicating the principle of legality, which is the only principle that can ensure an orderly immigration flow.

19. *Varese Tribunal, order 9 May 2002* 468

Pursuant to Art. 7 of the Law of 31 May 1995 No. 218, *lis pendens* exists if two actions have been initiated between the same parties – in the instant case, the first in Israel and the second in Italy – and both actions relate to the same matter – here, a distribution contract entered into between the parties. The fact that another person is a party to the action pending abroad is irrelevant.

The Israeli rules of procedure shall be taken into consideration for purposes of determining whether an action pending in Israel was brought before an action pending in Italy. Since said rules provide that proceedings are initiated at the time the statement of claim is filed – and, therefore, necessarily before notice is served to the defendant – it can be inferred that the renewal of service to the defendant, as authorised by the court, is irrelevant for the purpose of determining the time at which said proceedings have been initiated.

20. *Constitutional Court, order 10 May 2002, No. 188* 557

A challenge to the constitutional legitimacy of Art. 14, fourth and fifth paragraphs of the Legislative Decree of 25 July 1998 No. 286, raised with

reference to Art. 13, second and third paragraphs of the Constitution, for failure to require a judicial decision outlining the legal basis for determining the period of time during which a non-EU citizen against whom an expulsion order has been issued can be retained at centres of temporary stay and assistance is manifestly unfounded. Similarly, a challenge to the constitutional legitimacy of Art. 14, first paragraph of said Legislative Decree, raised with reference to Art. 13, second paragraph of the Constitution, for permitting the local head of police administration (*Questore*) to order the retention of a foreigner at the above mentioned centres when it is not possible to immediately execute the expulsion order by accompanying the foreigner to the border because of the unavailability of a carrier or other adequate means of transportation, is also manifestly inadmissible.

21. *Corte di Cassazione (plenary session), 10 May 2002, No. 6737* 1022

In order to notify an Italian citizen who has relocated abroad when only the new place of residence, but not the exact address of said citizen is specified in the registers of births, marriages and deaths (*registri anagrafici*), it is necessary to carry out further investigation at the consular office in whose district said citizen resides before the procedure set forth by Art. 143 of the Code of Civil Procedure can befollowed.

22. *Council of State (IV Session), 14 May 2002, No. 5708* 944

Art. 1, fourth paragraph, litt. b of the Law Decree of 30 December 1989 No. 416, converted into law with amendments by the Law of 28 February 1990 No. 39, provides that a foreigner who intends to apply for recognition of refugee status is not allowed to enter Italy if he is entering from a State in which he has stayed for a certain period of time, and which is a Contracting State of the Geneva Convention of 28 July 1951 but is not his State of origin. The aforesaid provision fully complies with the Geneva Convention, implemented in Italy by the Law of 24 July 1954 No. 722, as it is inspired by the duty of international cooperation voluntarily undertaken by all Contracting States, it reconciles two conflicting interests – i.e., the public interest in protecting the domestic order and the interest of non-EU citizens in having their refugee status recognised when the requirements set forth by said Convention are met – and it is consistent with the proper interpretation of international conventions based on the principle of good faith.

Pursuant to Art. 1, first paragraph of the Presidential Decree of 15 May 1990 No. 136, the regulation implementing Art. 1, second paragraph of the Law of 28 February 1990 No. 39, it is the local police administration (*Questura*) – and in particular the competent border police station – which has the responsibility of verifying whether there are any circumstances preventing the recognition of refugee status pursuant to Art. 1, fourth paragraph of the Law of 28 February 1990 No. 39, and not the Central Commission for the recognition of political refugee status.

23. *Council of State (IV Session), decision 14 May 2002, No. 6523* 948

EU provisions (particularly those set forth by EC directives 64/221 of 25 February 1964, 90/364 and 90/365 of 28 June 1990), as well as the domestic provisions set forth by the Presidential Decree of 30 December 1965 No. 1656 and the Law of 28 February 1990 No. 39 (referring to the entry and stay of EU citizens in a Member State), always provide for the possibility of derogating there from for reasons of public policy, public security or public health, and specifically regulate the expulsion of EU citizens from the territory of a Member State under limited conditions.

The provisions set forth by the Law of 28 February 1990 No. 39 – including the provision concerning expulsion from Italy for reasons of public policy or public security laid down by Art. 7 – apply to EU citizens who are not in one of the situations specified by the Presidential Decree of 30 December 1965 No. 1656, to the extent that they are compatible with the special status of said citizens and without prejudice to more favourable provisions.

The expulsion of EU citizens cannot be considered to conflict with the principle of freedom of movement for persons if the expulsion is ordered on grounds of public policy, public security or public health. In fact, the aforesaid EU and domestic provisions contain a specific exception that applies under said circumstances. In the present case, the order of expulsion epitomizes the deterrent necessary to ensure compliance with the principle of freedom of movement. The reasons of humanitarian solidarity cannot be affirmed beyond the proper balancing of the interests in question made by the Legislature.

24. *Corte di Cassazione (plenary session), 6 June 2002, No. 8224* 473

Pursuant to Art. 5 No. 1 of the Brussels Convention of 27 September 1968, Italian courts have jurisdiction if the place of performance of the obligation in question is in Italy. The place of performance shall be determined according to the law applicable to the contract in dispute, and, therefore, pursuant to the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations.

A contract for future sale under which the seller is obliged not only to transfer the title and deliver the good, but also to carry out the installation and commissioning of the good in Italy, is most closely connected with Italy pursuant to Art. 4 of the 1980 Rome Convention. Therefore, the contract is governed by Italian law.

25. *Corte di Cassazione, 14 June 2002, No. 8503* 1027

Since Arts. 5 and 6 of the European Convention on Human Rights – insofar as they provide for generic rights to compensation and to a public hearing, respectively – are not self-executing, neither the fact that Italian law does not comply with the aforesaid provisions of the Convention nor the violation of these provisions by any provision of Italian law may give rise to the State's liability pursuant to Art. 2043 of the Civil Code.

26. *Corte di Cassazione, 14 June 2002, No. 8510* 479

A decree whereby the Court of Appeal ruled on the appeal against a decree issued by the Juvenile Court – which, pursuant to Art. 31, third paragraph of the Legislative Decree of 25 July 1998 No. 286, authorised the entry or stay of relatives of a non-EU minor present in Italy as an exception to the other provisions of said Legislative Decree if there are substantial reasons related to the psychological and physical development of the minor for doing so – can be appealed before the *Corte di Cassazione*.

The authorisation of temporary residency in Italy for relatives of a minor can not be granted as a result of circumstances which last for an indefinite or extended period of time, such as the completion of the entire educational process of the minor. In fact, the granting of said authorisation under such circumstances would clearly be contrary to both the literal interpretation and the purpose of the law, and would have the anomalous consequence of enabling foreigners to evade compliance with immigration regulations. In fact, such a rule would allow adults to improperly benefit from the recognition of certain rights to infants under international conventions, such as the New York Convention of 20

November 1989 on the Rights of the Child, in order to surreptitiously obtain undue authorisations to enter or stay in Italy.

However, the fortuitous and exceptional circumstances that allow the granting of such authorisations are not only those in which there is an emergency or a present danger for the minor, as these circumstances would in any case justify behaviours that do not comply with the general rules based on the principle of necessity, and regardless of the provision set forth by Art. 31 of the Legislative Decree No. 286.

27. *Corte di Cassazione, 21 June 2002, No. 9088* 486

The provision set forth by Art. 31, third paragraph of the Legislative Decree of 25 July 1998 No. 286, concerning the authorisation of the entry or temporary residency of relatives of a non-EU minor who is present in Italy (even as an exception to the other provisions of said Legislative Decree) for substantial reasons related to the psychological and physical development of the minor, has clearly been laid down for emergency situations. The rule is aimed at protecting the psychological and physical wellbeing of the minor whenever circumstances occur that may seriously undermine his normal psychological development. Therefore, this provision does not apply to the normal situation in which the minor lives with his parent. Nor can it be used to turn a factual situation into a legal status, whereby families that illegally enter or arbitrarily stay in Italy and who do not meet the requirements for an ordinary residence permit are allowed to circumvent the law.

28. Council of State (IV Session), decision 24 June 2002 No. 2366 955

The Geneva Convention of 28 July 1951 relating to the Status of Refugees, implemented by the Law of 24 July 1954 No. 722, requires the Contracting States to protect persons who are (even potentially) persecuted by their respective States of origin. However, if a person being persecuted has obtained or could have obtained assistance from one of the Contracting States, there is no reason for which the other Contracting States should remain obliged to accord to said person further protection in lieu of the Contracting State, which is in breach of its obligations under the Convention.

Art. 1, fourth paragraph of the Law of 28 February 1990 No. 39 does not allow a foreigner who intends to apply for recognition of refugee status to enter Italy in the event that said foreigner is entering from a State – other than the State of origin – in which he has stayed for a certain period of time and which is a Contracting State of the Geneva Convention. The aforesaid provision is not in conflict with Art. 10, third paragraph of the Constitution, since the "programmatic" nature of that Article allows the Legislature to lay down the conditions and limits for the recognition of the right of asylum which, in all cases, must be reconciled with other interests that are unquestionably protected by the Constitution, such as public policy and national security.

29. *Corte di Cassazione, 25 June 2002, No. 9247* 491

As already provided for by the now repealed Art. 797 of the Code of Civil Procedure, under Art. 64, litt. a of the Law of 31 May 1995 No. 218, the *Corte di Cassazione* may not review the findings of fact on which a foreign court whose judgement is being declared enforceable in Italy based its jurisdiction.

As already provided for by the now repealed Art. 797 of the Code of Civil Procedure, under Art. 64 of the Law No. 218 of 1995, the absence of an explicit legal basis for the decision in a foreign judgement does not prevent its being declared enforceable in Italy.

30. *Corte di Cassazione, 28 June 2002, No. 9493* 497

The requirement that a party requesting the recognition of a foreign arbitral award supply either the original or a certified copy of the arbitration agreement – provided for by Art. IV, first paragraph, litt. b of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards – is not a condition for bringing the action (*condizione dell'azione*), but rather a procedural requirement (*presupposto processuale*). Accordingly, it is possible to file a new application for recognition of the same award.

A new application for recognition of a foreign arbitral award filed after the entry into force of the 1994 Law on arbitration reform, and after a similar application has been rejected under the rules previously in force, is not subject to the old rules but to the new provisions set forth by said Law.

31. Corte di Cassazione, 28 June 2002 No. 9499 501

The violations that justify the expulsion of a non-EU citizen by the Prefect under current regulations are strictly specified in lits. *a, b* and *c* of Art. 13, second paragraph of the Legislative Decree of 25 July 1998 No. 286. It may be inferred from this fact that the issuance of an expulsion order by the Prefect is not discretionary. Therefore, only the occurrence of the specific violation with which the person being expelled has been charged, and which has been expressly considered as a basis for the proposed expulsion, shall be investigated in the judicial proceedings reviewing the legitimacy of said expulsion.

Pursuant to Art. 13, second paragraph, litt. a of the Legislative Decree of 25 July 1998 No. 286, a foreigner who has entered Italy producing a valid passport and entry visa at the border has not entered Italy illegally, regardless of the fact that he did not apply for a residence permit within the applicable terms.

32. *Constitutional Court, order 4 July 2002, No. 315* 147

The question of the constitutional legitimacy of Art. 729 of the Code of Criminal Procedure, as amended by the Law of 5 October 2001 No. 367 (which implements the agreement of 10 September 1998 between Italy and Switzerland completing the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and facilitating its application), raised with reference to Arts. 3, 10 and 111 of the Constitution, is manifestly inadmissible. In fact, said question of constitutional legitimacy consists of an interpretive contrast between the text of the challenged provisions and an alleged well-established international practice. Therefore, the court submitting the aforesaid question to the Constitutional Court shall verify, before raising it, whether it is possible – by using all available means of interpretation, including the principles set forth by the Vienna Convention of 23 May 1969 on the Law of Treaties – to give to such provisions an interpretation different from that being challenged.

33. *Corte di Cassazione, 12 July 2002, No. 10145* 958

For the purposes of expelling a non-EU citizen, the fact that said non-EU citizen, who does not know the Italian language, is unaware of the provision laid down by Art. 5 of the Legislative Decree of 25 July 1998 No. 286 (requiring him to apply for a residence permit within one week of his arrival in Italy) does not constitute excusable error pursuant to Art. 5 of the Criminal Code. In fact, "unavoidable ignorance of the law" is only that which affects citizens generally as a consequence of the modalities by which the relevant provision has been laid down, and can not be represented by the an individual's misconception of the contents of said provision, howsoever justified that misconception.

The existence of the requirements for obtaining a residence permit on the

date on which an expulsion order has been issued pursuant to Art. 13 of the Legislative Decree of 25 July 1998, No. 286, is not sufficient to render the expulsion order illegitimate. In fact, the achievement of the policy concerning immigration flow in Italy requires that persons authorised to stay in Italy be rapidly identified, and the short time limit for applying for a residence permit is meant to ensure that the applicant is already in the position to remain in Italy. The fact that the requirements for remaining in Italy are met after the expiration of the deadline but before expulsion is irrelevant.

34. *Rome Tribunal, order 22 July 2002* 174

Foreign States may not invoke sovereign immunity with respect to activities which are solely private, such as the issue of debentures.

Italian courts have jurisdiction over proceedings for interim relief brought by Italian citizens against the State of Argentina in relation to the purchase of debentures issued by that State, pursuant to both Arts. 3 and 10 of the Law of 31 May 1995 No. 218 and Art. 8, second paragraph of the Convention of 22 May 1990 on the Promotion and Protection of Investments between Italy and Argentina. In fact, the latter provision states that the courts of the State in which the investment is located have jurisdiction over any dispute on investments arising between a Contracting State and an investor.

35. *Milan Court of Appeal, 23 July 2002* 177

Pursuant to Arts. 64 and 67, litt. g of the Law of 31 May 1995 No. 218, a Swiss divorce decree approving the ancillary provisions on the maintenance of the wife which have been signed by the parties may be declared enforceable in Italy. In fact, such provisions are not contrary to public policy, since they have been agreed upon within the ambit of the divorce proceedings.

In light of the prohibition on reviewing the merits of the case, Italian courts cannot make any amendment to the contents of a foreign judgement in the course of reviewing its enforceability.

36. *Corte di Cassazione, 25 July 2002, No. 10901* 1030

A power of attorney *ad litem* that is contained in a notarial act or in a document with an authenticated signature and which has been executed in a Contracting State of the Hague Convention of 5 October 1961 (i.e., in present case, in Switzerland) is valid even in the absence of legalisation by the competent Italian consulate.

37. *Corte di Cassazione (plenary session), order 25 July 2002, No. 10994* 503

Pursuant to Art. 3, first paragraph of the Law of 31 May 1995 No. 218, Italian courts have jurisdiction over a dispute concerning a contract for lease of real property in which the defendant has its seat in Italy.

Art. 57 of Law No. 218 of 1995 does not apply to questions of jurisdiction, but rather determines the law applicable to contracts.

38. *Corte di Cassazione, 1st August 2002, No. 11434* 505

The absence of a translation of a document drafted in a foreign language, which is assumed to authorise an attorney to defend in court a party to the proceedings, does not fall within the scope of absolute and irremediable nullity set forth by Art. 156 of the Code of Civil Procedure. Rather, it falls within the scope of relative nullity, which may be cured pursuant to Art. 157 of the Code of Civil Procedure. Consequently, the lack of a translation can not be pleaded by the party who did not raise the relevant objection at any time

during the proceedings, as failure to raise an objection implies a tacit waiver pursuant to the third paragraph of said Art. 157.

The Italian-German Convention of 7 June 1969 on Exemption from Legalisation dispenses with the requirement of the legalisation of signatures in case of a power of attorney *ad litem* issued abroad by a German citizen.

Pursuant to Art. 25 of the Preliminary Provisions to the Civil Code, the law of the place in which the contract was entered into applies to a shareholders' agreement entered into in Germany.

In cases where an interpretation of foreign law has been made by Italian courts pursuant to the criteria that were applicable before the Law of 31 May 1995 No. 218 entered into force, the requirement that the court shall ascertain *sua sponte* the foreign law pursuant to Art. 14 of said Law is not applicable. Accordingly, under the aforesaid circumstances the court is allowed to make a "factual" determination of the meaning of the foreign law which is not subject to review by the *Corte di Cassazione*, as such review is limited to questions of law.

39. *Corte di Cassazione, 7 August 2002, No. 11921* 962

Italian courts have jurisdiction over an application for the determination of costs based on a judgement of the London Court of Appeal, which granted the applicant the right to be reimbursed for said costs without specifying the amount thereof. Said judgement is automatically recognised pursuant to Art. 26 of the Brussels Convention; it therefore constitutes good and valid title for the purposes of said application.

40. *Belluno Tribunal, decree 25 September 2002* 509

Pursuant to Art. 94, Nos. 3 and 4 of the special cadastral law (*legge tavolare*), the cadastral court, for the purpose of ordering that a registration be made in the land register, shall verify whether the relevant application is supported by the contents of the documents filed, as well as whether those documents meet all the requirements set forth by the law governing the requested registration.

Pursuant to Art. 11 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition, a trust may be considered legally cognizable only if it has been created in accordance with the provisions of the foreign legal system specified by the Convention.

Pursuant to Art. 4 of the 1985 Hague Convention, the acts by virtue of which assets are transferred to the trust (to be distinguished from the instrument creating the trust) are governed by the law specified by the general conflict of laws rules. Therefore, in a matter concerning a domestic trust with no foreign elements, the governing law of such acts of transfer can only be Italian law.

Art. 13 of the 1985 Convention allows "non-trust" States to refuse recognition of a trust that – taking into account the most significant elements of said trust, and regardless of the will of the settlor – can be considered purely domestic with respect to a State that does not have the institution of the trust.

A trust whose sole foreign element with respect to the Italian legal system is represented by the choice of a foreign governing law by the settlor can not be registered in the land registers of the special cadastral system (*sistema tavolare*). This rule does not conflict with Art. 3 of the Constitution.

41. *Rome Tribunal, 30 September 2002* 181

Pursuant to Art. 13 of the Brussels Convention of 27 September 1968, which is referred to by Art. 3, second paragraph of the Law of 31 May 1995 No. 218, Italian courts have jurisdiction over proceedings for interim relief related to a dispute arising from the purchase in Italy of debentures issued by

a foreign State, since the contracts for the purchase of said debentures shall be considered consumer contracts Therefore the relevant suit may be brought before the court of the consumer's domicile.

42. *Corte di Cassazione (criminal), 15 October 2002, No. 34576* 185

In a case concerning international letters rogatory where both the requesting judicial authority and the requested judicial authority belong to States which are parties to the European Convention on Mutual Assistance in Criminal Matters signed in Strasbourg on 20 April 1959, the former authority may address the letter rogatory directly to the latter. In fact, this procedure complies with both the international conventions referred to by Art. 696, first paragraph of the Code of Criminal Procedure and well-established practice in the interpretation and application of these conventions, which is relevant under Art. 31, third paragraph, litt. b of the Vienna Convention of 23 May 1969 on the Law of Treaties. This remains the case even after the Law of 5 October 2001 No. 367 entered into force.

43. *Corte di Cassazione (plenary session), order 18 October 2002, No. 14837* 937

Pursuant to Art. 5 No. 1 of the Brussels Convention of 27 September 1968, the court having jurisdiction over an action for termination of a contract, and for damages arising from the breach of various obligations under the same contract, is that of the place of performance of the principal obligation. As a consequence thereof, the jurisdiction of said court extends to all ancillary obligations.

Pursuant to Art. 5 No. 1 of the 1968 Brussels Convention, the place of performance of the obligation to deliver certain goods under a contract granting an exclusive resale license is determined pursuant to Art. 31, litt. a of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, which provides that, unless otherwise agreed by the parties, the obligation of the seller to deliver the goods consists in handing them over to the first carrier. Accordingly, Italian courts do not have jurisdiction in the present case, since the parties to the contract have agreed that the seller, which has its seat in Germany, shall arrange for the transportation of the goods, either by carrier "free on board" or through the mail service.

44. *Council of State (IV Session), decision 7 November 2002, No. 6063* 1031

In exercising their discretion on whether to grant Italian citizenship to an applicant, the competent government authorities shall take into account, *inter alia*, the ability of said applicant to fulfil the financial obligations arising from his admission to the State's community.

45. *Corte di Cassazione (criminal), 8 November 2002, No. 37774* 188

As far as international letters rogatory are concerned, Art. 3, third paragraph of the European Convention on Mutual Assistance in Criminal Matters signed in Strasbourg on 20 April 1959 shall be interpreted in light of Art. 696 of the Code of Criminal Procedure, which – although amended by the Law of 5 October 2001 No. 367 – still makes reference to international conventions and customary international law. The general principle on the interpretation of treaties set forth by Art. 31, third paragraph of the Vienna Convention of 21 March 1986 on the Law of Treaties among States and international organisations (*editor's note: the correct reference is to the Vienna Convention of 23 May 1969 on the Law of Treaties*) is that a well-established practice in the interpretation and application of a treaty cannot be disregarded. For this reason, the aforesaid provision of the Strasbourg Convention allows the requested State to transmit certified copies or certified photostat copies of the

records and documents requested without certifying their conformity to the originals.

46. *Trieste Court of Appeal, 9 November 2002* 532

Art. 41 of EC Regulation No. 44/2001 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters provides that a judgement shall be declared enforceable immediately on completion of the formalities in Art. 53, without any review under Arts. 34 and 35.

Pursuant to Art. 55 of EC Regulation No. 44/2001, the court before which enforcement of a foreign judgement is sought may discharge the applicant from producing the certificate drafted by the authority that issued the judgement in conformity with Annex V to the Regulation.

An applicant who has attached to the application a German decree of enforceability (*Vollstreckungsbescheid*) related to a summary injunction, which includes a determination of the costs of the proceedings, may be relieved from producing the aforesaid certificate.

47. *Corte di Cassazione, 11 November 2002, No. 15822* 978

Pursuant to Art. 6, second paragraph, litt. a of the Rome Convention of 19 June 1980, in the absence of a choice of law by the parties, an employment relationship which is entered into, performed and terminated in the United States is governed by the law of the country in which the work is carried out, i.e., the United States. The contents of said law shall be ascertained by the court on its own motion pursuant to Art. 14 of the Law of 31 May 1995 No. 218.

A foreign law that generally does not provide for any protection against unfair dismissal is manifestly contrary to public policy pursuant to Art. 16 of the 1980 Rome Convention.

48. *Tivoli Tribunal, 14 November 2002* 534

Pursuant to Arts. 3 and 32 of the Law of 31 May 1995 No. 218, Italian courts have jurisdiction in an action for dissolution of marriage brought by an Albanian citizen against a spouse residing in Italy.

By virtue of Art. 31 of Law No. 218 of 1995, the dissolution of a civil marriage between two Albanian citizens is governed by their common national law.

Art. 94 of the Albanian Family Code, which, in instances of domestic abuse, allows divorce without requiring a request for legal separation beforehand, is not contrary to public policy.

Based on Arts. 30 and 39 of Law No. 218 of 1995, the economic relationship between spouses is governed by their common national law, to which the principle of *iura novit curia* does not apply.

49. *Milan Tribunal, 21 November 2002* 539

Pursuant to Art. 3, first and second paragraphs of the Law of 31 May 1995 No. 218, Italian courts have jurisdiction over a dispute related to the administration of a trust if the defendant is a resident or otherwise domiciled in Italy.

Pursuant to Art. 7 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition, where no applicable law has been chosen by the settlor, English law applies to a trust created in London by two Italian spouses and having as its object real estate located in London.

Based on both the Trustee Act of 1925 and the following Acts of 1996 and 2000, two spouses who have not fulfilled their duties as trustees to act for the

benefit of their two minor daughters shall be removed from their office of trustees, and two other persons shall be appointed to replace them.

50. *Constitutional Court, 22 November 2002, No. 469* 1032

The question of the constitutional legitimacy of Art. 1469-*bis* of the Civil Code for violation of Art. 3 of the Constitution – insofar as said Art. 1469-*bis* does not grant small and artisanal undertakings the same protection granted to consumers – is unfounded. In fact, the purpose of the aforesaid provision is to protect persons who usually lack the skills necessary to negotiate, whereas small businessmen and craftsmen normally have experience in conducting negotiations at arms' length.

51. *Bergamo Tribunal, 4 December 2002* 986

Pursuant to Art. 60, first paragraph of the Law of 31 May 1995 No. 218, the law applicable to a power of attorney is that of the place in which the attorney-in-fact exercises the powers granted to him under said power of attorney.

The condition of reciprocity laid down by Art. 16 of the Preliminary Provisions to the Civil Code is a limitation that applies only to legal situations which are directly regulated by Italian law. Thus, said condition does not concern any right claimed by a foreigner as a result of the operation of conflict of law rules.

Pursuant to Art. III No. 8 of the Convention of 25 August 1924 on the Unification of Certain Rules of Law relating to Bills of Lading, any clause, covenant or agreement shortening the one-year time limit for bringing suit against the carrier, which is set forth by No. 6 of said Art. III, is null and void, unless an extension has been validly agreed upon by the parties to the contract of carriage and by any person who has been granted any right under said contract, including the consignee, pursuant to the aforesaid Art. III No. 6.

The Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations applies to insurance contracts covering risks situated outside of the territories of the Member States pursuant to Art. 1, first paragraph of said Convention. Accordingly, said Convention applies to an insurance contract entered into in Singapore, where the insured has its seat.

Art. 13, first paragraph of the 1980 Rome Convention applies to credit subrogation related to "contractual claim[s]", which include contracts for the benefit of third parties. Contracts of carriage, including those of carriage by sea, which grant the consignee the right to receive the goods – even if the consignee is not a party to the relevant contract – are contracts for the benefit of third parties.

Art. 13, first paragraph of the 1980 Rome Convention refers to the law which governs a third party's duty to satisfy the creditor (i.e., in the present case, the law governing the insurance contract). Said law shall only determine whether the right to subrogation exists, whereas the law governing the right that is the object of the subrogation shall also govern the exercise of said right, including the exceptions and objections that may be raised against the third party.

Though English law (which is the law applicable to the merits of the dispute) requires that the insurer who intends to be subrogated to the right of the insured shall act in the name of the latter, such requirement has procedural nature. Accordingly, in proceedings before Italian courts, Art. 12 of the Law No. 218 of 1995 applies, and the insurer may act in his name only, in compliance with Art. 81 of the Code of Civil Procedure.

52. *Corte di Cassazione, 11 December 2002, No. 17647* 999

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction does not apply to the enforcement of judicial

decisions issued by the courts of a Contracting State (i.e., in the present case, by the courts of Italy) in proceedings between citizens of said State concerning a minor who is retained in the same State and thereby prevented from returning to a different State.

53. *Corte di Cassazione (plenary session), order 13 December 2002, No. 17912* 1002

Pursuant to Art. 3, second paragraph, last sentence of the Law of 31 May 1995 No. 218, with regard to matters excluded from the scope of application of the Brussels Convention of 27 September 1968, Italian courts have jurisdiction, *inter alia*, based on the criteria for the determination of venue.

Pursuant to Art. 20 of the Code of Civil Procedure and Art. 24 of the Royal Decree of 16 March 1942 No. 267, Italian courts have jurisdiction over an "action paulienne" (*azione revocatoria fallimentare*) in which the trustee in bankruptcy claims restitution of the amount paid and said obligation must be performed in Italy at the domicile of the trustee in bankruptcy (i.e., at the domicile of the creditor pursuant to Art. 1182, third paragraph of the Civil Code).

54. *Corte di Cassazione, 20 December 2002, No. 18155* 1011

Art. 832 of the Code of Civil Procedure defines international arbitration as an arbitration over a contract in which a significant or substantial part (even if not the preponderant or main part) of the obligations shall be performed abroad. It is understood that the significance of the obligations to be performed abroad shall be inferred from the economic and social function of the contract, as well as from the intention of the parties.

A reference to the general terms and conditions of a public tender does not constitute *per se* an agreement of the parties contrary to the limitation of the grounds based on which an international arbitral award can be challenged for the purposes of Art. 838 of the Code of Civil Procedure.

55. *Milan Court of Appeal, 20 December 2002* 1005

Art. 6 No. 1 of the Brussels Convention of 27 September 1968 – pursuant to which, in an action involving a number of defendants, the courts of the place where any of said defendants is domiciled or has its seat also have jurisdiction over the other defendants – cannot be interpreted so as to confer jurisdiction over the original claim to the court having jurisdiction only over an ancillary claim on warranty or guarantee.

Pursuant to Art. 2 of the Brussels Convention of 27 September 1968, Italian courts do not have jurisdiction over a dispute between a company having its seat in Italy and a company having its seat in France. Based on Art. 336 of the Code of Civil Procedure, Italian courts also do not have jurisdiction over a claim concerning an insurance guarantee whose resolution is dependent upon the resolution of the aforesaid dispute.

56. *Rimini Tribunal, 8 January 2003* 190

Under Art. 1 of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, the Convention applies to an international contract for the sale and purchase of goods entered into between a seller having its place of business in France and a purchaser having its place of business in Italy, provided that the parties to said contract have not exercised their right to exclude the application of the Convention.

The examination of goods is preliminary to the notice by the buyer to the seller specifying the nature of the lack of conformity of the goods, which shall be sent by the buyer within "a reasonable time" after it has or ought to have

discovered said lack of conformity pursuant to Art. 39, first paragraph of the 1980 Vienna Convention. If the performance of the sale and purchase contract involves the shipment of goods, the aforesaid examination may be deferred until after the goods have arrived at their destination pursuant to Art. 38, second paragraph of said Convention, provided that the examination shall be carried out "within as short a period as is practicable" having regard, *inter alia*, to the nature of the goods.

57. *Corte di Cassazione, 9 January 2003, No. 131* 1033

Based on Art. 35 of the Italian-Yugoslavian Convention of 14 November 1957 on Social Security, Art. 30 of the related administrative agreement of 10 October 1958 and Art. 3, seventeenth paragraph of the Law of 8 August 1995 No. 335, the filing, with the appropriate Yugoslav authority, of an application for pension benefits containing all the information and documents required, is for all purposes equivalent to the filing of a similar application with the competent Italian authority.

58. *Corte di Cassazione (plenary session), 10 January 2003, No. 261* 1035

The jurisdiction of Italian courts over bankruptcy-related proceedings that were initiated before the Law of 31 May 1995 No. 218 entered into force shall be determined based on the criteria set forth by Art. 4 of the Code of Civil Procedure.

The existence of jurisdiction is a procedural requirement (*presupposto processuale*). Accordingly, Italian courts may rule on whether they have jurisdiction even if they are not the proper venue, since the determination of jurisdiction is preliminary to the determination of venue.

59. *Corte di Cassazione, 14 January 2003, No. 365* 201

In light of the principle of preservation of defective acts set forth by Art. 156, last paragraph of the Code of Civil Procedure, the choice of the type of proceedings (i.e. ordinary proceedings or *in camera* proceedings) and of the type of claim (i.e. *atto di citazione* or *ricorso*) in relation to an action for recognition of a foreign judgement before the Court of Appeal is irrelevant, provided that the statute of limitations has not run and the right of defence has not been affected.

Pursuant to Art. 3 of the Convention of 9 March 1936 on Recognition of Judgements between Italy and Germany, a judgement relating to a non-economic dispute can be recognised if it has been issued by the courts of the State of which the parties to the dispute are citizens or in which such parties are domiciled.

Pursuant to Art. 64, litt. a of the Law of 31 May 1995 No. 218, Italy can recognise a German judgement concerning a judicial declaration of paternity issued based on the criterion of the citizenship of the child (which is similar to that set forth by Art. 37 of said Law) and on the criterion of the acceptance of jurisdiction by the defendant (which is similar to that set forth by Art. 4, first paragraph of said Law).

The fact that the German legal system does not provide for preliminary proceedings to determine whether an action for judicial declaration of paternity is admissible and the fact that in said action the foreign court applies the national law of the child are not contrary to public policy under Art. 64, litt. g of the Law No. 218 of 1995.

60. *Corte di Cassazione (criminal), 14 January 2003, No. 3785* 212

By virtue of the combined provision of Art. 7 of the Law No. 120 of 1994 and Art. 2 of the Agreement of 6 February 1997 on the Enforcement of

Judgements of the International Criminal Tribunal for the former Yugoslavia between Italy and the United Nations, a forty-year prison sentence issued against a person who shall serve said sentence in Italy must be converted into a thirty-year prison sentence.

61. *Constitutional Court, order 30 January 2003, No. 14* 937

The question of the constitutional legitimacy of Art. 116, first paragraph of the Civil Code – raised with reference to Art. 2 of the Constitution – is manifestly inadmissible, since in the majority of cases a declaration that there are no impediments to marriage (required pursuant to the aforesaid provision) does not limit, but on the contrary, facilitates the marriage of foreigners in Italy.

The question of the constitutional legitimacy of Art. 116, first paragraph of the Civil Code – raised with reference to Art. 2 of the Constitution – is manifestly unfounded, as Italian courts may authorise the publication of banns without regard to the provisions of an applicable foreign law prohibiting the marriage of a foreigner, insofar as the application of the foreign law is contrary to Italian public policy.

62. *Corte di Cassazione (plenary session), order 11 February 2003, No. 2060* 547

Under the Italian private international law rules currently in force (Law of 31 May 1995 No. 218), the only relevant general criterion for determining the jurisdiction of Italian courts is the domicile or residence of the defendant in Italy. The distinction between Italian defendants and foreign defendants is no longer relevant for this purpose.

The jurisdiction of Italian courts over a dispute brought against Italian citizens who reside in the Principality of Monaco shall be determined according to Art. 3, second paragraph, first part of the Law No. 218 of 1995, to the extent that the dispute concerns matters which are not excluded from the scope of application of the Brussels Convention of 27 September 1968.

Pursuant to Art. 5 No. 3 of the 1968 Brussels Convention, as interpreted by the Court of Justice, in an action for damages arising from a tort, only the place where the event giving rise to the damage directly produced its harmful effects upon the immediate victim (i.e., the person who is the victim of that event) is relevant.

Pursuant to Art. 5 No. 4 of the 1968 Brussels Convention, in an action for damages, the defendant may be sued before the court seised of related criminal proceedings, provided that said court has also jurisdiction to entertain the civil proceedings.

Art. 6 No. 2 of the 1968 Brussels Convention concerning the "attraction" of the warranty or guarantee action under the jurisdiction of the court seised of the original proceedings is not applicable if said proceedings were instituted in a court outside the domicile of the defendant.

Italian courts do not have jurisdiction in an action brought against Italian citizens residing abroad and arising from a road accident that occurred outside Italy.

63. *Constitutional Court, order 27 March 2003, No. 85* 940

The question of the constitutional legitimacy of Art. 29-*bis* of the Law of 4 May 1983 No. 184 – as introduced by the Law of 31 December 1998 No. 476 – and of related provisions, raised with reference to Arts. 3, 30 and 2 of the Constitution, insofar as said provisions exclude the possibility that, under special circumstances, single persons may be declared eligible for international adoption, is manifestly inadmissible due to insufficient reasoning.

64. *Corte di Cassazione, 6 June 2003, No. 9085* 1014

Notwithstanding the fact that Art. 73 of the Law of 31 May 1995 No. 218 has repealed Art. 796, last paragraph of the Code of Civil Procedure, the participation of the *pubblico ministero* in proceedings for the recognition of foreign divorce decrees is still required pursuant to Art. 70, first paragraph of the Code of Civil Procedure.

EUROPEAN COMMUNITIES CASES

Acts of Community institutions: 6, 12, 13.

Brussels Convention of 1968: 3, 4, 5, 8, 15, 16, 17.

Community proceedings: 1, 13.

Contracts: 9, 10.

External relations: 7.

Freedom of movement of persons: 10.

Non contractual liability of the Community: 11.

Preliminary ruling on interpretation: 2, 16.

Prohibition of discrimination: 19.

Right of residence and establishment: 18.

Treaties and general international rules: 14.

1. *Court of Justice, order 24 October 2001, case C-186/01* 224

The EC Court of Justice has no jurisdiction to grant an interim relief pending a preliminary ruling procedure as its entertainment is a matter for the national court seised.

2. *Court of Justice, 4 June 2002, case C-99/00* 1095

Where the decisions of a national court can be appealed to the Supreme Court of that Member State under the conditions that apply to decisions of the referring court, such a court is not under the obligation referred to in the third paragraph of Article 234 EC.

3. *Court of Justice, 11 July 2002, case C-96/00* 226

The jurisdiction rules set out in the 1968 Brussels Convention, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions, are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining

payment of that financial benefit, are contractual in nature in the sense contemplated in Article 13, first paragraph (3) of that Convention.

4. *Court of Justice, 17 September 2002, case C-334/00* 236

In circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or *quasi*-delict within the meaning of Article 5(3) of the 1968 Brussels Convention, as amended by the 1978, the 1982 and the 1989 Accession Convention.

5. *Court of Justice, 1st October 2002, case C-167/00* 241

The rules on jurisdiction laid down in the 1968 Brussels Convention, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions, must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or *quasi*-delict within the meaning of Article 5(3) of that Convention.

6. *Court of Justice, order 24 October 2002, case C-233/01* 585

As an EC Directive may not on itself impose obligations on a private individual and may not therefore be relied on as such against him.

7. *Court of Justice, 5 November 2002, case C-466/98* 1099

Article 234 of the EC Treaty (now, after amendment, Article 307 EC) providing that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States, on the one hand, and one or more non-member countries, on the other, is of general scope and applies to any international agreement irrespective of subject-matter which is capable of affecting application of the Treaty.

The application of Article 52 of the EC Treaty (now, after amendment, Article 43 EC) does not depend on the question whether the EC has adopted legislation in the field concerned, but on the question whether the specific situation under consideration is governed by EC law. Even where a situation falls within the powers of Member States, these must exercise that power consistently with Community law.

The so called 1977 Bermuda II Agreement on Air Services between the United Kingdom and the United States of America, which provides for the revocation, the suspension or the limitation of the operating authorisations or of the technical permissions in case a substantial part of the ownership and of the effective control of the airlines designated by the United Kingdom is not vested in the United Kingdom itself or its nationals, constitutes a discrimination against the Community airlines, that are therefore prevented from benefiting of the treatment which the United Kingdom accords to its own nationals and such discrimination cannot be justified invoking the public policy reasons set forth in Article 56 of the EC Treaty (now, after amendment, Article 46 EC).

8. *Court of Justice, 14 November 2002, case C-271/00* 249

Article 1, first paragraph of the 1968 Brussels Convention, as amended by the 1978 and the 1982 Accession Conventions, must be interpreted as meaning that the concept of 'civil matters' encompasses an action under a right of recourse

whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in 'civil matters'.

Article 1, second paragraph, (3) of the 1968 Brussels Convention must be interpreted as meaning that the concept of "social security" does not encompass the action under a right of recourse by which a public body seeks from a person governed by private law recovery in accordance with the rules of the ordinary law of sums paid by it by way of social assistance to the divorced spouse and the child of that person.

9. *Court of Justice, 21 November 2002, case C-473/00* 559

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair.

10. *Court of Justice, 26 November 2002 in case C-100/01* 590

Neither Article 48 of the EC Treaty (now, after amendment, Article 39 EC) nor the provisions of secondary legislation which implement the freedom of movement for workers preclude a Member State from imposing, in relation to a migrant worker who is a national of another Member State, administrative police measures limiting that worker's right of residence to a part of the national territory, provided that (i) such action is justified by reasons of public order or public security based on his individual conduct; (ii) that, by reason of their seriousness, those reasons could otherwise give rise only to a measure prohibiting him from residing in, or banishing him from, the whole of the national territory; and (iii) that the conduct which the Member State concerned wishes to prevent gives rise, in the case of its own nationals, to punitive measures or other genuine and effective measures designed to combat it.

11. *Court of Justice, 26 November 2002, case C-275/00* 564

Article 235 EC, in conjunction with Article 240 EC and the second paragraph of Article 288 EC, preclude a national court from ordering, with respect to one of the institutions of the Community, proceedings for an expert report whose purpose is to determine the role of that institution in events alleged to have caused damage, for the purposes of subsequent proceedings against the European Community to establish its non-contractual liability.

12. *Court of Justice, 10 December 2002, case C-29/99* 596

Partial annulment of a decision is possible if the elements whose annulment is sought may be severed from the remainder of the decision.

The fact that the Euratom Treaty does not provide that the Court may rule by way of an opinion on the compatibility with that Treaty of international agreements which the Community is planning to conclude does not preclude the Court from being asked to review the legality of an act approving a decision to accede to an international convention in an action for annulment under Article 146 of the Euratom Treaty.

13. *Court of First Instance, 15 January 2003, joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01* 573

For the purposes of Article 230 EC, a decision by the EC Commission to bring an action before the court of a Non-Member State cannot be considered to be a decision which is open to challenge before the EC Court of Justice, because it does not produce binding legal effects in the Community legal order.

14. *Court of Justice, 11 February 2003, joined cases C-187/01 and C-385/01* 1037

The *ne bis in idem* principle, laid down in Article 54 of the Convention implementing the 1985 Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen, also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

15. *Court of Justice, 10 April 2003, case C-437/00* 1045

Article 5(1) of the 1968 Convention, as amended by the 1978, the 1982 and the 1989 Accession Conventions, must be interpreted as meaning that, in a dispute between an employee and a first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee's contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer in a place decided on by the latter. The existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case.

Article 5(1) of the Brussels Convention must be interpreted as meaning that, in matters relating to contracts of employment, the place where the employee carries out his work is the only place of performance of an obligation which can be taken into consideration in order to determine which court has jurisdiction.

16. *Court of Justice, 8 May 2003, case C-111/01* 1052

Article 21 of the 1968 Brussels Convention, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions, must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by the defendant.

In accordance with the 1971 Protocol the EC Court of Justice cannot rule on a question referred by a national court for a preliminary ruling where, *inter alia*, the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to rule on the questions submitted to it. Thus the question is inadmissible when from the order for reference it is not clear how the exact legal nature of the contract on which the applicant bases its claim would be relevant for the purpose of giving judgment.

17. *Court of Justice, 15 May 2003, case C-266/01* 1059

The first paragraph of Article 1 of the 1968 Brussels Convention, as amended by the 1978, the 1982 and the 1989 Accession Conventions, must be

interpreted as follows: "civil and commercial matters", within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals; "customs matters", within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the legal relationship between the State and the guarantor, under that contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals, even if the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

18. *Court of Justice, 30 September 2003 case C-167/01* 1067

It is contrary to Article 2 of the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State for national legislation such as the Law on Formally Foreign Companies (Wet op de Formeel Buitenlandse Vennootschappen) of 17 December 1997 to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

It is contrary to Articles 43 EC and 48 EC for national legislation such as the mentioned Law to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.

19. *Court of Justice, 2 October 2003 case C-148/02* 1088

Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.

CASES IN FOREIGN COURTS

High Court (Queen's Bench Division), 15 March 2002 599

Both under the Second Directive on Non-Life Insurance and under Article 3 of the 1980 Rome Convention on the Law Applicable to Contracts, the parties are free to choose the law applicable to the contract. Where no choice is actually

expressed, the choice must be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.

Where the policy was negotiated and issued in the State where the assured had its principal place of business and where it engaged the broker, and the policy refers to the laws of the State within which it was issued, the terms of the contract, taken with the general circumstances of the case, demonstrate with reasonable certainty that the parties made a real choice to the effect that the insurance contract should be governed by the law of that State.

According to Article 1(3) of 1980 Rome Convention in order to determine whether a risk is situated in the territory of an EC Member State the court should apply its internal law.

Where the policy holder is not an individual but has an "establishment" in a Member State on the date when the insurance contract was entered into and the policy "relates" to that establishment, then the risk is deemed to be situated in the Member State where that establishment is situated.

Under Article 4 of the 1980 Rome Convention, to the extent that the law applicable was not chosen by the parties, an insurance contract is governed by the law of the State with which it is most closely connected having regard to all the circumstances.

High Court (Chancery Division), 20 March 2002 608

Since Article 1(2)(b) of the 1980 Rome Convention on the Law Applicable to Contract does not apply to contractual obligations relating to wills and successions, the law applicable to the validity and the effectiveness of a deed of variation of the conditions under which a trust was established is determined by the 1985 Hague Convention on the Law Applicable to Trusts an their Recognition.

Under Article 6 of the 1985 Hague Convention the law applicable to a trust created by will is the law expressly chosen by the testator as governing the will. Reference to the circumstances of the case cannot be made when the choice of law is express but only in order to determine whether there was an implied choice.

Had there been no express nor implied choice, the trust would have been governed by the law with which it was most closely connected under Article 7 of the Hague Convention. In ascertaining the law with which a trust is most closely connected, reference shall be made in particular to a number of matters including the *situs* and assets of the trust, the residence of the trustee, and the objects of the trust and the places where they are to be fulfilled.

Pursuant to Article 8 of the Hague Convention the question of the ability of the beneficiaries to end or reconstitute the trust is governed by the law applicable to the trust as determined through Article 6 or Article 7.

The purpose of Article 15 of the 1985 Hague Convention is to preserve the mandatory effect of the law designated by the conflict of laws rules for matter other than trusts, such as succession rights.

Court of Appeal (Civil Division), 28 June 2002 258

Under Article 4(2) of the 1980 Rome Convention on the Law Applicable to Contracts, it shall be presumed that a contract for the provision of services, entered into in the course of the supplier's trade or profession, is most closely connected with the country in which the principal place of business of the services provider is situated or, where under the terms of the contract the performance is to be effected through a place of business other that the principal place of business, the country in which that other place of business is situated.

According to a constructive interpretation of its Article 18, the terms of the

Rome Convention have to be construed in accordance with the realisation of its objectives set out in its preamble, namely the one of predictability of the applicable law. Therefore the sentence «under the terms of the contract» of Article 4(2) has to be interpreted as providing a reasonably clear method of establishing the place of performance and stating expressly or impliedly whether the principal place of business is to be displayed by some other place of business. This can be disregarded, pursuant to Article 4(5), only where the evidence clearly shows that the contract is most closely connected with another country.

Court of Appeal (Civil Division), 4 February 2003 271

Pursuing to Article 11 of Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (Brussels II), where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, the court first seised shall have jurisdiction.

Council Regulation (EC) No 1347/2000 is not applicable to financial claims ancillary to the proceedings for divorce, judicial separation or nullity, which fall into the scope of application of Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

On a strict construction of Article 12 of Council Regulation (EC) No 1347/2000, due to its primary aim of simplifying jurisdictional rules and eliminating expensive and superfluous litigation, an application for maintenance pending suit cannot be categorised as a provisional measure when there is no evidence of urgency.

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Direttore responsabile: prof. FAUSTO POCAR
Grafiche Fiorini - 37131 Verona, Via Altichiero, 11