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1. *Rovereto Criminal Tribunal, 19 February 2002* 309

In light of the fact that foreign judgments on civil matters are immediately effective in Italy pursuant to Art. 64 of the Law of 31 May 1995 No. 218, a foreign divorce decree which has been issued on the basis of mutual consent and is not contrary to public policy pursuant to Art. 64, *litt.* (g) of said Law may constitute one of the elements of the crime of failure to make maintenance payments to the former spouse, which is provided for by Art. 12-*sexies* of the Law of 1 December 1970 No. 898.

2. *Council of State (I Session), opinion 22 May 2002 No. 1225* 707

A marriage celebrated between an Italian citizen and a foreigner for the sole purpose of allowing the latter to acquire Italian citizenship pursuant to Art. 5 of the Law of 5 February 1992 No. 91 is a sham marriage. The fact that a foreigner entered into such a sham marriage cannot be considered among the "proved grounds pertaining to the safety of the Republic" for the purpose of preventing said foreigner from acquiring Italian citizenship pursuant to Art. 6 of the aforementioned Law.

3. *Corte di Cassazione (plenary session), order 5 June 2002 No. 8157* 311

The choice of the modalities for conducting military operations falls within the so-called acts of government and represents a prerogative of political power. Therefore, said choice may not be subject to judicial review. The provisions of international law, such as those contained in the 1977 Protocol 1 additional to the Geneva Conventions and the 1950 European Convention on Human Rights, apply only to the relationships among States, and the laws implementing said

provisions in Italy do not grant to the victims any right to damages in case of breach of the aforesaid provisions.

4. *Corte di Cassazione, 16 July 2002 No. 10303* 312

In light of the procedure for the appointment of a public defender provided for by Art. 13 of the Legislative Decree of 25 July 1998 No. 286, in case of appeal against the order of expulsion of a non-EU citizen issued by the Prefect, no relationship exists between said non-EU citizen and his public defender, other than that which may be entertained outside of the proceedings or at the appearance hearing where both the appellant and the public defender appear. As a consequence, a decision rejecting the appeal is null and void if the appellant did not receive legal notice of the appearance hearing and was not put in the condition of being heard, since the appellant's right of defence has been affected.

5. *Corte di Cassazione (plenary session), order 22 July 2002 No. 10723* 234

A plea that an arbitration clause is void – based on the fact that the dispute cannot be referred to arbitration – does not represent a question of jurisdiction but a question of merits, since the arbitral award has a contractual nature. As a consequence, a petition to initiate special proceedings for a preliminary ruling on jurisdiction under these circumstances is not admissible.

The same applies, and the special proceedings for a preliminary ruling on jurisdiction are also inadmissible with respect to a clause providing for foreign arbitration, since, in order to ascertain the validity of this clause, one should determine whether the jurisdiction of courts has been waived, and not (as is the case under Art. 11 of the Law of 31 May 1995 No. 218) whether the dispute in question shall be decided by Italian courts or foreign courts.

6. *Corte di Cassazione, 27 July 2002 No. 11139* 313

The fact that a non-EU citizen – against whom an expulsion order has been issued pursuant to Art. 5, second paragraph of the Legislative Decree of 25 July 1998 No. 286 on the ground that he remained in Italy without requesting a residence permit – has subsequently filed a request for a residence permit based on the curative provisions (*sanatoria*) set forth by the Decree of the President of the Council of Ministers of 16 October 1998 does not in any way affect the appeal against said expulsion order.

7. *Udine Tribunal, 2 August 2002* 237

Pursuant to Art. 4 of the Rome Convention on the Law Applicable to Contractual Obligations, a construction contract is governed by the law of the country with which it is most closely connected (or almost exclusively connected), even if the habitual residence of the party who is to effect the performance which is characteristic of the contract (*i.e.*, the contractor) is located in a different country. In fact, Art. 4, second paragraph of the Rome Convention, which provides for the application of the law of the country where said party has its habitual residence, does not lay down an absolute presumption, but merely sets forth a subsidiary criterion.

Pursuant to Art. 5 No. 1 of the Brussels Convention of 27 September 1968, Italian courts do not have jurisdiction if the payment obligation in question must be performed in Austria pursuant to the governing law of the contract, *i.e.*, this case, Austrian law (and specifically paragraph 905 of the ABGB).

8. *Sassari Juvenile Court, decree 8 August 2002* 708

In a dispute concerning the right of access to a child where a German decision cannot be enforced in Italy pursuant to Art. 15, second paragraph,

litt. (d) of the EC Regulation No. 1347/2000 of 29 May 2000 – on the grounds that no opportunity to be heard was given to one of the parents of said child – a previous German decision to which the Luxembourg Convention of 20 May 1980 (rather than the aforementioned EC Regulation) applies may be declared enforceable.

9. *Trieste Court of Appeal, 11 September 2002* 243

Art. 2, first paragraph of the Law of 31 May 1995 No. 218 and Art. 57 of the Brussels Convention of 27 September 1968 provide, respectively, that said Law and said Convention shall not affect multilateral conventions on particular matters.

Pursuant to Art. 31 of the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road, Italian courts have jurisdiction if said Convention is referred to in the consignment note and the goods which are the object of the dispute are received in Italy.

10. *Corte di Cassazione (plenary session), order 17 October 2002 No. 14769* 245

Art. 57, first paragraph of the Brussels Convention of 27 September 1968 – which provides that said Convention shall not affect any conventions to which the Contracting States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments – shall be interpreted so as to exclude the application of any provisions of said Convention to questions regulated by a convention on particular matters. Accordingly, if the latter convention contains provisions on jurisdiction but does not contain any provisions on *lis pendens* and related actions, Arts. 21 and 22 of the Brussels Convention shall apply.

Pursuant to Art. 21 of the 1968 Brussels Convention, an Italian court that is not the court first seised shall not verify whether a foreign court (which is deemed by said Italian court to be the court first seised) has jurisdiction, but shall only stay the proceedings before it until such time as said foreign court has ascertained whether it has jurisdiction in accordance with its procedural rules. As a consequence, even if special proceedings for a preliminary ruling on jurisdiction can be initiated under these circumstances to determine whether Italian courts have jurisdiction, the object of said proceedings cannot be to determine whether an Italian court has been seised before or after a foreign court.

Both an action for damages arising from pollution caused by the sinking of a ship – even if it has been brought against persons different from the owner of the ship and its insurers – and a negative declaratory action having the same object – which, in this case, has been brought by persons who have inspected the ship and may therefore be held liable jointly with any other liable person – fall within the scope of application of Art. IX of the Brussels Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage. As said Convention confers exclusive jurisdiction to the courts for the place where the pollution damage occurred, Italian courts do not have jurisdiction if the pollution damage occurred in other States.

11. *Corte di Cassazione, 22 November 2002 No. 15301* 259

Art. 25 of the Law of 31 May 1995 No. 218, rather than Art. 16 of the Preliminary Provisions to the Civil Code, shall apply for the purpose of determining the law applicable to a foreign company.

Pursuant to Art. 25 of the Law No. 218 of 1995, a company incorporated in Switzerland which does not appear to have its headquarters or principal place of business in Italy shall be deemed for all purposes to be an independent legal

person and, particularly, a *società di capitali*, if it is so considered by the laws in force in the legal system of origin.

12. *Corte di Cassazione, 10 December 2002 No. 17564* 314

Art. 117, first paragraph of the Constitution concerns the relationship between the general legal system and the local legal systems of the Republic of Italy, and is not aimed at regulating the relationship between domestic law and EC law.

In order to determine whether a decision of the EC Commission has direct effects in the Italian legal system, the competent court shall refer exclusively to the criteria laid down in the case law of the EC Court of Justice, which – in order for a Community act to be directly applicable – require the existence of a legal obligation which is: (a) "sufficiently clear and precise" vis-à-vis the Member States; (b) "unconditional"; and (c) applicable or enforceable without the need for Member States or the EC institutions to exercise any "discretionary power".

The decision of the EC Commission No. 91/500/EEC of 28 May 1991 declared illegitimate certain subsidies granted to enterprises in the Friuli-Venezia Giulia Region pursuant to Arts. 2 and 4 of the Law No. 26 of 1986. Notwithstanding the fact that said decision represents in fact an administrative act which, potentially, may be subject both to judicial review as to its legitimacy and to a request for a preliminary ruling from the EC Court of Justice pursuant to Art. 234, first paragraph, *litt.* (b) of the EC Treaty, said decision is applicable in the Italian legal system, since: (a) it is binding upon those to whom it is addressed (Art. 249, fourth paragraph of the EC Treaty) and, particularly, it "takes effect" with respect to them upon its notification (Art. 254, third paragraph of the EC Treaty); (b) any actions brought before the EC Court of Justice against it do not suspend its effects (Art. 242, first paragraph of the EC Treaty); and (c) its judicial review by the EC Court of Justice is limited to questions concerning its legitimacy, given the discretionary powers granted by Art. 87 of the EC Treaty to the EC Commission.

13. *Corte di Cassazione, 14 January 2003 No. 367* 262

Pursuant to Art. 33 of the Law of 31 May 1995 No. 218, minority status is determined by the national law of the child at the time of her birth.

If a minority status has been ascertained by the competent authorities of the foreign State of which the child is a citizen, Italian courts are not allowed to overrule said ascertainment based on any other sources of information, whether foreign or domestic.

14. *Sassari Juvenile Court, decree 31 January 2003* 619

In light of the United Nations Convention of 20 November 1989 on the Rights of the Child, the power of a natural mother to institute an action for a declaration of paternity vis-à-vis the natural father or his heirs falls within the serious reasons related to the psychological and physical development of the minor, based on which the Juvenile Court may authorise the entry or stay in Italy of a relative of said minor pursuant to Art. 31, third paragraph of the Legislative Decree of 25 July 1998 No. 286 (in this case the court authorised the mother to stay in Italy for five months).

15. *Corte di Cassazione, 10 February 2003 No. 1943* 1069

The right of the consignee to request the delivery, against a receipt, of the second copy of the consignment note, which is provided for by Art. 13 of the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road, does not affect the actual delivery of the goods.

Accordingly, the fact that said documents have not been exchanged does not necessarily exclude the possibility that the delivery of the goods actually occurred.

16. *Corte di Cassazione, 20 February 2003 No. 2584* 265

Pursuant to Art. 27 of the Preliminary Provisions to the Civil Code (now replaced by Art. 12 of the Law of 31 May 1995 No. 218), legal proceedings are governed by the law of the State in which they are held.

Pursuant to Art. 142, third paragraph of the Code of Civil Procedure, the service of process on a defendant who is neither resident nor domiciled in Italy, and does not have his abode (*dimora*) in Italy, shall be effected according to one of the methods contemplated by the international conventions or the domestic provisions regulating diplomatic procedures.

The Hague Convention of 1 March 1954 relating to Civil Procedure and the exchange of letters signed in Bern on 2 June 1988 between Italy and Switzerland apply to the service of documents in Switzerland before 1 January 1995 (*i.e.*, before the date on which the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters has entered into force as far as Switzerland is concerned).

Absent any express opposition by the Contracting States of the 1954 Convention and the 1988 exchange of letters, both of the following methods must be considered valid as far as the service of judicial documents in Switzerland during the years 1992 and 1993 is concerned: the direct mailing of a registered letter with return receipt by the process server to the addressee resident in Switzerland, and direct service on the Italian citizen by the Italian consul.

The Constitution of the Universal Postal Union dated 10 July 1964 and related additional protocols contain provisions concerning exclusively the sending and delivery of mail abroad, including any mail containing documents for which delivery by mail constitutes a valid service of process.

17. *Milan Court of Appeal, order 24 February 2003* 622

A decision on the dissolution of a marriage and the provisions relating to the custody of children issued by the High Court of Justice, Family Division of London, may be declared enforceable in Italy if none of the grounds of non-recognition laid down in Arts. 15, 16 and 17 of the EC Regulation 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 applies.

18. *Venezia Tribunal, order 28 February 2003* 272

Pursuant to Art. 5 No. 1 of the Lugano Convention of 16 September 1988, Italian courts have jurisdiction over a Paulian action concerning a gift (*donazione*) if the object of the related restitution obligation consists of real estate located in Italy and cash to be returned at the domicile of the donor, which is also located in Italy.

Italian courts have jurisdiction over the pre-trial acquisition of evidence (*provvedimenti di istruzione preventiva*) to be performed in Italy, as Art. 24 of the 1988 Lugano Convention refers to "provisional, including protective, measures".

Art. 56 (and, therefore, the national law of the donor), rather than Art. 57 of the Law of 31 May 1995 No. 218, applies to a gift, by virtue of the rule that a provision specifically regulating a certain matter prevails over a more general provision that would otherwise apply to said matter.

19. *Corte di Cassazione, 6 March 2003 No. 3334* 275

The term set forth in Art. 7, third paragraph of the Law of 15 January 1994 No. 64, within which the Juvenile Court is required to decide upon the application for the return of a child who has been wrongfully removed, is not a mandatory term.

Pursuant to Art. 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the fact that a parent having the care of her child was not actually exercising her custody rights must be ascertained in order to reject the application for the return of the child.

20. *Constitutional Court, 14 March 2003 No. 71* 711

The question of the constitutional legitimacy of Art. 423 of the Navigation Code, raised with reference to Art. 3 of the Constitution, is manifestly unfounded, notwithstanding the fact that said provision sets forth, with reference to domestic carriage of goods by sea, a limitation of the carrier's liability that is different from that set forth, with reference to international carriage of goods by sea, by Art. 4, fifth paragraph of the Brussels Convention of 25 August 1924, as amended by the 1968 Visby Protocol and the 1979 Brussels Protocol.

21. *Corte di Cassazione, 28 March 2003 No. 4742* 1070

The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents provides that the exemption from legalisation is conditional upon the issue by the authorities of the State from which the document emanates of a special *apostille* to be placed on the document itself or on an *allonge*; such *apostille* shall be in the form of the model annexed to said Convention. Accordingly, Italian courts cannot declare a foreign judgment (*i.e.* in the present case, a judgment of the U.S. District Court for Southern California) enforceable if said judgment does not comply with the above-mentioned formalities and is accompanied only by a certification of the clerk of said District Court.

22. *Corte di Cassazione (plenary session), order 2 April 2003 No. 5108* 278

The jurisdictional criterion relating to contractual obligations set forth by Art. 5 No. 1 of the Lugano Convention of 16 September 1988 may be invoked, *inter alia*, by a person claiming the invalidity of the contract from which its obligation arises. In fact, in this case the place of performance of the obligation in question shall be that where the main or characteristic obligation of the contract is to be performed.

For the purpose of determining the place of performance of the obligation in question in a case concerning the invalidity of a mandate to carry out brokerage activities in connection with a sale of shares, regard should be had to the obligation to carry out said activities, rather than to the obligation to pay the related fee.

Italian courts do not have jurisdiction over a dispute concerning brokerage activities if said activities had to be performed in Switzerland pursuant to Art. 4, first paragraph of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations and Art. 74 of the Swiss *Code des obligations*.

Art. 5 No. 1 of the 1988 Lugano Convention applies to a negative declaratory action concerning the existence of certain contractual obligations.

23. *Corte di Cassazione, 3 April 2003 No. 5115* 1071

The principles underlying the provisions concerning the recognition of children who are under sixteen years old – which are laid down by Art. 250

of the Civil Code – are not inconsistent with Arts. 3 and 7 of the New York Convention of 20 November 1989 on the Rights of the Child.

24. *Corte di Cassazione, 15 April 2003 No. 5944* 283

Notwithstanding the fact that Art. 29 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and Art. 7, first paragraph of the Law of 15 January 1994 No. 64 implementing said Convention provide for the right of the parent who claims that there has been a breach of custody or access rights to apply directly to the competent court, the parent who has only filed an application for the return of his child with the competent Central Authority is also entitled to appeal to the *Corte di Cassazione* against the decree issued by the Juvenile Court.

Even if Art. 12 of the 1980 Hague Convention provides that the competent court shall order the return of the child forthwith if the relevant proceedings are commenced within one year from the date of the wrongful removal or retention of the child, said court may, pursuant to Art. 13 of said Convention, disregard the aforementioned term and refuse to order the return of the child in light of the overall behaviour of the parent who has filed the application.

25. *Corte di Cassazione, 17 April 2003 No. 6164* 999

An action to declare a foreign arbitral award unenforceable in Italy (*azione di accertamento negativo*) is inadmissible.

26. *Corte di Cassazione (plenary session), order 18 April 2003 No. 6349* 289

A petition to initiate special proceedings for a preliminary ruling on jurisdiction in which the petitioner requests the *Corte di Cassazione* to declare the lack of jurisdiction of Italian courts due to the invalidity of an arbitration clause providing for foreign arbitration is inadmissible.

Art. II, third paragraph of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards does not require the dispute to be referred to arbitration based on a declaration of lack of jurisdiction. On the contrary, said provision refers to the law of the Contracting States as the mechanism through which the court seised decides not to hear the dispute and to refer the parties to arbitration.

Pursuant to Art. II, third paragraph of the 1958 New York Convention – which provides that the court seised shall refer the parties to arbitration upon the express request of one of the parties – both the power and the duty to decide on the validity, enforceability and applicability of an arbitration clause belong to all courts, and not only to those having jurisdiction.

27. *Corte di Cassazione (plenary session), 29 April 2003 No. 6634* 624

Pursuant to Art. 21 of the Brussels Convention of 27 September 1968, there is no international *lis pendens* if, before the proceedings in question are initiated in Italy, a settlement has been reached by the parties during appellate proceedings abroad and, in addition, the two proceedings involve different causes of action.

Based on Art. 5 No. 1 of the 1968 Brussels Convention, Italian courts have jurisdiction over a labour dispute if the employee habitually performs his work in Italy. The fact that said employee resides in Germany is irrelevant.

Pursuant to Art. 17 of the 1968 Brussels Convention, the tacit acceptance of a proposal contained in a written document is not sufficient to render an agreement conferring jurisdiction valid.

28. *Corte di Cassazione (plenary session), 29 April 2003 No. 6635* 628

Art. 13, eighth paragraph of the Legislative Decree of 25 July 1998 No. 286 provides that the validity of the expulsion of a non-EU citizen ordered by the Prefect is subject to the judicial review of the ordinary courts. However, even decisions on appeals for the revocation of expulsion orders issued before the aforesaid Legislative Decree entered into force are subject to the judicial review of the ordinary courts, since said orders may affect not only the freedom of movement of the foreigner who is present in the Italian territory, but also his personal freedom.

29. *Corte di Cassazione, 6 May 2003 No. 6866* 630

A promise of payment contained in a fax sent from Italy is governed by Italian law even if it is intended to produce its effects on a company having its seat in Austria. In fact, Art. 58 of the Law of 31 May 1995 No. 218 provides that a promise of payment is governed by the law of the State in which it is made. Therefore, it is irrelevant that said promise must be communicated to the addressee in order to be effective.

30. *Corte di Cassazione (plenary session), 7 May 2003 No. 6899* 635

An action brought by an ex-wife (as a maintenance creditor) against her ex-husband to obtain a declaration that a real estate sale and purchase contract entered into by the latter is a sham contract or constitutes a fraudulent conveyance falls within the ambit of the "civil and commercial matters" referred to in Art. 1 of the Brussels Convention of 27 September 1968 (which expression is also referred to in Art. 3, second paragraph of the Law of 31 May 1995 No. 218). In fact, the claim of the ex-wife is meant to ascertain either that said contract was not genuinely entered into, or that it was genuinely entered into but for the sole purpose of impairing her right to maintenance.

Art. 5 No. 3 of the Brussels Convention does not apply to the aforementioned action, since neither an action for declaration that said contract is a sham contract nor a Paulian action is an action for the payment of damages. On the contrary, both actions are based on the pre-existence of a legal relationship between the parties.

The fact that the aforementioned action is brought by a person who is not a party to the contractual relationship in question does not prevent the application of Art. 5 No. 1 of the Brussels Convention, since the obligation in question – which has been determined in accordance with Italian law, *i.e.* the governing law of said contract pursuant to Art. 4, third paragraph of the Rome Convention – is the obligation to deliver the real estate being sold, which shall be performed at the place where said real estate is located.

31. *Corte di Cassazione, 16 May 2003 No. 7630* 713

Because the conditions for the State's liability laid down by the Court of Justice in the Francovich case are met, the Italian State is required to compensate a doctor for damages he suffered as a result of the fact that Council Directives No. 75/363/EEC of 16 June 1975 and No. 82/76/EEC of 26 January 1982 concerning the establishment by Member States of training courses in specialised medicine and the payment of adequate remuneration to the participants in said courses have not been implemented. Reference shall be made to this ruling of the Court of Justice, since it has the effect of a precedent even beyond the case in which it has been rendered.

32. *Corte di Cassazione, 29 May 2003 No. 8588* 1414

As far as recognition of foreign judgments is concerned, a violation of Art.

64, *litt.* (a) of the Law of 31 May 1995 No. 218 – which concerns compliance by foreign courts with the jurisdictional criteria set forth by Italian law – or of Art. 64, *litt.* (b) of said Law – which concerns the service of summons and the time for appearance – cannot be invoked before the *Corte di Cassazione* for the first time.

33. *Corte di Cassazione, 30 May 2003 No. 8764* 646

The repeal of Arts. 796 and 797 of the Code of Civil Procedure by Art. 73 of the Law of 31 May 1995 No. 218 has no effect on the Agreement of 18 February 1984 modifying the Lateran Concordat of 11 February 1929 nor on the related Additional Protocol.

Pursuant to Art. 8, second paragraph of the 1984 Agreement and Art. 4, *litt.* (b) of the Additional Protocol, Arts. 796 and 797 of the Code of Civil Procedure continue to apply for the purposes of a declaration that an ecclesiastical judgment of nullity of marriage is effective in Italy.

34. *Corte di Cassazione, 30 May 2003 No. 8765* 649

The purpose of the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance is to establish instruments of international cooperation whereby a maintenance creditor who is present in the territory of a Contracting State may enforce her claim against the relevant debtor, who is subject to the jurisdiction of another Contracting State.

The 1956 New York Convention does not contemplate any age limit for the maintenance creditor for the purposes of its application, nor does it require the maintenance claim to be based on a judicial decision.

35. *Corte di Cassazione, 11 June 2003 No. 9365* 654

Arts. 19 and 24 of the Convention of 25 January 1979 between Italy and the Russian Federation lay down rules of so-called indirect jurisdiction. Pursuant to these rules, the court before which the recognition of a judgment is sought shall verify whether the court that issued said judgment had jurisdiction based on the criteria laid down by said Convention.

Based on Art. 24, *litt.* (c) of the Convention between Italy and the Russian Federation, a judgment issued by a Russian court concerning a claim for damages arising from the imperfect performance of an obligation to deliver certain goods cannot be declared enforceable in Italy if the place of performance of said obligation, as determined pursuant to Art. 31, *litt.* (a) of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, is not in Russia.

36. *Constitutional Court, 18 June 2003 No. 213* 225

The question of the constitutional legitimacy of the Law of 29 January 2002, No. 2, of the Bolzano Province on the adoption of children in said Province – raised with reference to Arts. 117 and 118 of the Constitution – in relation to the provisions implementing the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption laid down by the Law of 31 December 1998 No. 476, is inadmissible.

37. *Corte di Cassazione (plenary session), 26 June 2003 No. 10164* 661

Pursuant to Art. 5 No. 1 of the Brussels Convention of 27 September 1968, the court for the place where the employee habitually performs his work has jurisdiction over labour disputes. Normally, this place is where the work must be carried out pursuant to the contract of employment, unless the work is habitually performed at a different place.

Italian courts have jurisdiction over a dispute brought by an employee against a German company if said employee has been hired to work in Italy, even if he has performed the initial part of his work in Germany.

38. *Corte di Cassazione, 4 July 2003 No. 10577* 665

Pursuant to Art. 13, first paragraph, *litt.* (b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the requested State is not bound to order the return of the child if there is a grave risk that his or her return would expose the child to physical or psychological harm.

Art. 13 of the Hague Convention of 25 October 1980 provides that the person, institution or other body which opposes the return of the child has the burden of proving the occurrence of one of the circumstances contemplated by said Article, but does not authorise any limitation as to the evidence that may be used in the relevant proceedings, since the subject matter of these proceedings is governed by the principle that the best interests of the child shall always prevail.

Based on Art. 3, first paragraph of the New York Convention of 20 November 1989 on the Rights of the Child, the courts must privilege the best interests of the child over any other questions, so as to spare the child from personally experiencing the consequences of the unjust and self-serving behaviour of the adults.

39. *Corte di Cassazione (plenary session), order 10 July 2003 No. 10896* 674

The inquiry into the existence and validity of a clause providing for foreign arbitration is not a question of jurisdiction, since the clause for arbitration has a contractual nature.

Pursuant to the ruling of the EC Court of Justice in its judgment of 17 September 2002, 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 Art. 5 No. 3 of the Brussels Convention of 27 September 1968.

As far as pre-contractual liability is concerned, both the courts for the place where the conduct of the person causing harm (which is allegedly contrary to good faith) has occurred and the courts for the place where the damages have initially been suffered have jurisdiction.

Pursuant to Art. 5 No. 3 of the 1968 Brussels Convention, Italian courts have jurisdiction over an action founded on pre-contractual liability brought by a company having its seat in Italy where the relevant damages have been suffered entirely in Italy.

40. *Milan Court of Appeal, 15 July 2003* 1367

Art. 5 No. 1 of the Brussels Convention of 27 September 1968, rather than Art. 23 of the Code of Civil Procedure (which is referred to by Art. 3, second paragraph of the Law of 31 May 1995 No. 218), applies in order to determine the court having jurisdiction over a dispute concerning an option agreement to re-purchase certain shares. In fact, said dispute does not constitute a dispute between shareholders, but rather a dispute over an independent contract.

Pursuant to Art. 5 No. 1 of the Brussels Convention of 27 September 1968, Italian courts do not have jurisdiction over a dispute concerning an option agreement to re-purchase certain shares entered into between an Italian citizen and a company having its registered office in France, since pursuant to Art. 1247 of the French Civil Code (which applies by virtue of Art. 4 of the Rome Convention of 19 June 1980) the obligation in question (*i.e.* the obligation to deliver the shares) must be performed in the State in which the party who is to effect the characteristic performance has its central administration.

41. *Rome Court of Appeal, order 15 July 2003* 1415

Pursuant to Art. 669-*ter*, third and fourth paragraphs of the Code of Civil Procedure (the latter provision being applicable by way of analogy), an application for the arrest of a ship (*sequestro conservativo di nave*) to secure a claim based on a foreign arbitral award must be filed with the President of the Court of Appeal that is competent pursuant to Art. 839 of the Code of Civil Procedure. The President will then appoint the judge who will rule on said application.

42. *Corte di Cassazione (plenary session), order 24 July 2003 No. 11526* 678

Pursuant to Art. 4 of the Law of 31 May 1995 No. 218, Italian courts have jurisdiction if the defendant enters an appearance without raising the issue of lack of jurisdiction in his first pleading. A plea that the court seised is not the proper venue (*eccezione di incompetenza territoriale*) is irrelevant for this purpose.

A defendant in default of appearance is entitled to subsequently initiate special proceedings for a preliminary ruling on jurisdiction.

The criterion of the habitual residence of the maintenance creditor, which is laid down by Art. 5 No. 2 of the Brussels Convention of 27 September 1968, applies only to said creditor.

The criterion laid down by the last part of Art. 5 No. 2 of the 1968 Brussels Convention, whereby a court having jurisdiction over a divorce action also has jurisdiction to issue the related maintenance orders, does not apply to a petition concerning the variation of said maintenance orders.

Pursuant to Art. 6 No. 1 of the 1968 Brussels Convention, Italian courts have jurisdiction if, when there are multiple defendants, one of them is domiciled in Italy.

43. *Corte di Cassazione (plenary session), order 29 July 2003 No. 11647* 1001

Pursuant to Art. 28 of the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air, as amended by Arts. VII and VIII of the Guadalajara Convention of 18 September 1961, an action for damages against the actual carrier may be brought, at the option of the plaintiff, against either that carrier or the contracting carrier, or against both together or separately. Such an action may be brought either before a court in which an action may be brought against the contracting carrier or before the court for the place where the actual carrier is ordinarily resident or has its principal place of business.

Italian courts have jurisdiction if the contracting carrier has its principal place of business in Italy. In this case, Italian courts also have jurisdiction over an action brought against the actual carrier with its principal place of business abroad.

Pursuant to Art. VII of the 1961 Guadalajara Convention, Italian courts also have jurisdiction over actions on a guarantee brought against the actual carrier.

44. *Constitutional Court, order 4 August 2003 No. 293* 232

The question of the constitutional legitimacy of Art. 9, first paragraph, *litt.* (b) of the Law of 5 February 1992 No. 91 on Italian citizenship, raised with reference to Arts. 2 and 3 of the Constitution, insofar as it does not provide that a foreigner of age who has lost her original citizenship following her adoption by an Italian citizen immediately acquires Italian nationality, is manifestly inadmissible.

45. *Corte di Cassazione, 8 August 2003 No. 11966* 1420

It may be inferred from the provision set forth by Art. 142 of the Code of Civil Procedure that Art. 151 of the Code of Civil Procedure does not apply in case of service abroad of judicial documents if a specific procedure for serving said documents is provided for by international conventions. In the present case, a service of documents by international courier must be considered as inexistent (*inesistente*) pursuant to the Convention of 1979 between Italy and the United Soviet Socialist Republic on judicial assistance in civil matters, which now applies to Ukraine. In fact, Arts. 7 and 9 of said Convention provide that judicial documents must be served through rogatory letters sent by diplomatic means.

46. *Rome Tribunal, 14 August 2003* 685

Pursuant to the combined provision of Art. 9 of the Bankruptcy Law, Art. 25, first paragraph of the Law of 31 May 1995 No. 218 and Art. 3 of the EC Regulation No. 1346/2000 of 29 May 2000, Italian courts have jurisdiction to open the special administration procedure (*amministrazione straordinaria*) under the Legislative Decree of 8 July 1999 No. 270 against a corporation that has its registered office in another Member State of the European Union, but has its operational and directional centre – which coincides with its headquarters – in Italy. For the purposes of this ruling, it has also been taken into account that said corporation is entirely owned by an Italian company and that all Italian members of its board of directors reside in Italy.

47. *Venice Tribunal, order 28 August 2003* 688

The prohibition on reviewing the substance of a foreign judgment, which is set forth by Art. 36 of the EC Regulation No. 44/2001, does not apply to provisional measures, such as a preliminary injunction issued in Greece.

The Italian court having jurisdiction over the merits of the related dispute may, pursuant to Art. 669-*decies* of the Code of Civil Procedure, revoke a preliminary injunction issued by a Greek court pursuant to Art. 31 of the EC Regulation No. 44/2001.

48. *Corte di Cassazione, 29 August 2003 No. 12703* 1005

A Philippine decision rendered in non-contentious proceedings (*provvedimento di volontaria giurisdizione*) that approves a separation agreement between two spouses in the Philippines must be taken into consideration by an Italian court hearing an action for judicial separation brought by one of the spouses. This is the case even if said decision has been tardily filed (*i.e.* in the present case, during appellate proceedings) and has not been recognised pursuant to Arts. 796 and 797 of the Code of Civil Procedure, since it is not invoked in order to establish the legal situation contemplated by it, but only to frustrate the request of the other spouse for judicial separation.

49. *Corte di Cassazione (plenary session), order 11 September 2003 No. 13390* 1008

An action founded on pre-contractual liability is a matter relating to tort, delict or quasi-delict within the meaning of Art. 5 No. 3 of the Brussels Convention of 27 September 1968.

Pursuant to Art. 5 No. 3 of the 1968 Brussels Convention, Italian courts have jurisdiction over an action founded on pre-contractual liability if the relevant damages have been suffered entirely in Italy.

50. *Milan Court of Appeal, 19 September 2003* 1011

Pursuant to Art. 5 No. 1 of the Brussels Convention of 27 September 1968 and Art. 57, first paragraph of the Vienna Convention of 11 April 1980 on

Contracts for the International Sale of Goods, Italian courts have jurisdiction over a dispute concerning an international sale of goods if the obligation that has not been performed (*i.e.* in the present case, the obligation to pay the purchase price) should have been performed in Italy.

51. *Bologna Tribunal, 1 October 2003* 294

Art. 6 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition grants to the settlor absolute freedom in choosing the governing law of a trust; Art. 13 of said Convention allows the competent court to refuse recognition of a trust whose only foreign element with respect to the domestic legal system is represented by the governing law only if said trust has unlawful and/or fraudulent purposes. By virtue of the aforementioned provisions, the so-called domestic trust is admissible in the Italian legal system.

Art. 2740 of the Civil Code does not represent a principle of economic public policy of the Italian legal system, as several law provisions exist which derogate from such principle.

52. *Corte di Cassazione, 1 October 2003 No. 14545* 1020

Pursuant to Art. 33, third paragraph of the Law of 31 May 1995 No. 218, the national law of the child at the time of birth governs the requirements for and the effects of the establishment or contesting of a parent-child relationship.

In light of Art. 33 of the Law No. 218 of 1995, the certificates and judicial decisions issued in the foreign State whose law is applicable must be referred to for any determination concerning a parent-child relationship, provided that Italian courts may verify the authenticity of the relevant documents.

The provisions of Ghanaian law whereby a parent-child relationship may be established on the sole basis of the statements of the parents – which may be rendered even years after the child is born – are not contrary to public policy within the meaning of Art. 16 of the Law No. 218 of 1995.

53. *Corte di Cassazione, 2 October 2003 No. 14680* 1014

The Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road applies when the place of taking over of the goods and the place designated for delivery are situated in two different countries and the consignment note provides that the contract is subject to the provisions of the Convention.

Pursuant to Art. 17, fourth paragraph, *litt.* (d) and Art. 18, fourth paragraph of the 1956 Geneva Convention, in a matter concerning the carriage of perishable goods performed in vehicles specially equipped to protect said goods from the effects of variations in temperature, the carrier must prove that no variation in temperature occurred for the entire duration of the carriage in order to be relieved of liability for the fact that the goods were in bad condition at the time of delivery.

54. *Corte di Cassazione, 10 October 2003 No. 15145* 1023

Pursuant to Art. 3 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the removal of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person, either jointly or alone, under the law of the State in which the child is habitually resident.

The exclusive purpose of the Hague Convention of 25 October 1980 is to protect the custody of children as a mere factual situation that must be reinstated

with their prompt return to the State of their habitual residence, regardless of whether a legal basis for custody exists.

Art. 13, second paragraph of the Hague Convention of 25 October 1980 and Art. 12, first and second paragraphs of the New York Convention of 20 November 1989 on the Rights of the Child do not provide that a child may always express his views in all matters affecting him. On the contrary, according to said provisions the court has the discretion to decide whether the child must be heard, based on the capacity of the child to form his own views, his age and degree of maturity.

The European Convention on the Exercise of Children's Rights, signed in Strasbourg on 25 January 1996, requires Contracting States to consider granting children the right to exercise the rights of parties in proceedings affecting them. However, while the minor must be considered a party to the proceedings contemplated by Art. 336 of the Civil Code, in the absence of an express provision of law on the matter, the same conclusion is not mandatory for summary proceedings.

55. *Como Tribunal, decree 21 October 2003* 1032

Pursuant to Art. 42, second paragraph of the Law of 31 May 1995 No. 218, the Hague Convention of 5 October 1961 on the Protection of Minors applies even to persons who are considered minors only by their national law and to persons whose habitual residence is not in one of the Contracting States.

Pursuant to Art. 42, second paragraph of the Law No. 218 of 1995 and Art. 23 of the same Law – which concerns the legal capacity of a natural person to exercise rights (*capacità di agire*) – the guardianship of a Tunisian national must be extended until he comes of age according to his national law, in the instant case, until he is twenty years old.

56. *Parma Tribunal, decree 21 October 2003* 332

Pursuant to Art. 12 of the Hague Convention of 1 July 1985, which expressly provides for the possibility of registering the instrument creating a trust insofar as this is not prohibited by or inconsistent with the law of the State where registration is sought, the registration of a trust may not be refused based exclusively on the fact that the instrument creating said trust does not fall within the scope of application of the provisions set forth by Arts. 2643 *et seq.* of the Civil Code.

57. *Corte di Cassazione (plenary session), order 12 November 2003 No. 17087* 1034

The Sovereign Order of Malta is an independent subject of international law and therefore enjoys immunity from Italian jurisdiction. Said immunity also extends to the public law institutions through which the Order of Malta pursues its institutional and public purposes, which themselves are independent subjects of international law.

Based on the customary international law principle of so-called limited or relative immunity, however, foreign States are not immune from jurisdiction in matters concerning disputes on employment relationships relating to the performance of activities that are merely ancillary to the institutional purposes of the foreign entity, nor in matters regarding disputes brought by employees whose duties pertain to said institutional purposes. This is particularly the case if the dispute brought before Italian courts concerns exclusively economic issues and thus, the court decision on said dispute cannot affect or interfere with the institutional purposes of the foreign entity.

Italian courts have jurisdiction over a dispute concerning the remuneration of an employee of the Association of the Italian Knights of the Order of Malta.

58. *Corte di Cassazione (plenary session), 14 November 2003 No. 17209* 1037

The validity of an agreement conferring jurisdiction on French courts shall be determined based on Art. 17 of the Brussels Convention of 27 September 1968 if the domicile of one of the parties to said agreement is located in a Member State. It is irrelevant that said Member State is not the State upon whose courts have been conferred jurisdiction, and equally irrelevant that the other party to said agreement is domiciled in a State that is not a party to the Convention at the time at which the proceedings on the merits is initiated.

The fact that Art. 17 of the 1968 Brussels Convention applies results in the irrelevance of Art. 4, second paragraph of the Law of 31 May 1995 No. 218 for purposes of determining the validity of an agreement conferring jurisdiction on French courts.

Italian courts do not have jurisdiction over a dispute concerning a commercial agency agreement (*contratto di rappresentanza commerciale*) if an agreement conferring jurisdiction on French courts exists which is valid pursuant to Art. 17 of the 1968 Brussels Convention.

The provisions of law granting to labour courts mandatory competence on certain matters (*competenza funzionale*) apply only if Italian courts have jurisdiction over the relevant disputes. Accordingly, said provisions cannot interfere – in the absence of any express provision of law to the contrary – with the criteria for conferring jurisdiction, if according to said criteria jurisdiction is conferred upon a foreign court.

59. *Corte di Cassazione, 17 November 2003 No. 17388* 1042

The provisions of foreign law that apply pursuant to the Preliminary Provisions of the Civil Code cannot be considered as mere facts. Accordingly, their violation by lower courts may constitute grounds for appeal to the *Corte di Cassazione*, and the lower courts are required to ascertain the existence of such foreign laws autonomously and on their own motion, possibly with the assistance of the parties. Furthermore, judges are not bound by the prohibition on making use of their own private knowledge, since the principle of *iura novit curia* applies with respect to the applicable foreign law even in relation to proceedings initiated before Law No. 218 of 1995 entered into force.

60. *Rome Tribunal, 26 November 2003* 691

Pursuant to the combined provision of Art. 9 of the Bankruptcy Law and Art. 3 of the EC Regulation No. 1346/2000 of 29 May 2000, Italian courts have jurisdiction to open the special administration procedure (*amministrazione straordinaria*) under the Legislative Decree of 8 July 1999 No. 270 against a company that has its registered office in another Member State of the European Union, but has its strategic and directional centre in Italy, is managed by Italian nationals who operate in Italy and belongs to a group of undertakings that is collectively managed from Italy.

61. *Corte di Cassazione, order 16 December 2003 No. 19277* 1047

Even if the presence of the *pubblico ministero* is generally no longer mandatory since Art. 796, last paragraph of the Code of Civil Procedure was repealed by Art. 73 of the Law of 31 May 1995 No. 218, the participation of the *pubblico ministero* in proceedings for the recognition of foreign divorce decrees is still required pursuant to Art. 70, first paragraph, No. 2 of the Code of Civil Procedure.

62. *Corte di Cassazione, 19 December 2003 No. 19544* 1050

Art. 12, second paragraph of the New York Convention of 20 November

1989 on the Rights of the Child and Art. 13, second paragraph of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction do not provide that a child may always express his views in all matters affecting him. On the contrary, according to said provisions the child must be heard only if the court so decides in its discretion, after having weighed the capacity of the child to form his own views.

Both the Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction are aimed at preventing wrongful removals of children, but have different contents and purposes.

The adoption in a Contracting State of an enforceable decision relating to the custody of a child before his removal, or of a decision relating to the custody of a child after his removal declaring said removal to be unlawful, is a requirement for the application of the Luxembourg Convention.

The exclusive purpose of the Hague Convention is to protect the custody of children as a mere factual situation that must be reinstated with their prompt return to the State of their habitual residence, regardless of whether a legal basis for the custody exists.

Pursuant to Art. 13 of the Hague Convention of 25 October 1980, the person, institution or other body which opposes the return of the child has the burden of proving the existence of a grave risk of physical or psychological harm for the child.

63. *Corte di Cassazione, 19 December 2003 No. 19546* 1059

The examination of a child by a court-appointed expert is not incompatible with the in camera proceedings provided for by the Law of 15 January 1994 No. 64, which implemented the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

The determination by a Juvenile Court of the possible risks arising from the return of a child constitutes a factual investigation. Accordingly, the *Corte di Cassazione* may only re-examine the consistency and completeness of the opinion rendered by said court.

64. *Corte di Cassazione (plenary session), 19 December 2003 No. 19550* 1372

Art. 5 No. 3 of the Brussels Convention of 27 September 1968 applies to claims concerning the liability of the defendant in tort and, therefore, only to claims concerning the ascertainment of damages or claims that are functionally and necessarily linked to said ascertainment. As a consequence, an action for negative declaration (*azione di accertamento negativo*), *i.e.* in the present case an action for declaration that no patent violation or act of unfair competition occurred, does not fall within the scope of application of the aforementioned provision.

65. *Corte di Cassazione, 9 January 2004 No. 115* 1377

Neither Art. 15 nor Art. 14 of the Law of 31 May 1995 No. 1995 requires the courts to turn to an expert for the purposes of interpreting foreign laws. In fact, said provisions merely provide that the courts are entitled to do so.

Pursuant to Art. 64, *litt.* (d) of the Law No. 218 of 1995, a foreign judgment may become enforceable in Italy if it is *res judicata* according to the law of the place where it was issued.

The orders of a Hong Kong court ruling on maintenance payments and custody of children following the issuance of a divorce decree cannot be enforced in Italy, since they provisionally rule on facts that are subject to change.

66. *Corte di Cassazione (plenary session), order 23 January 2004 No. 1244* 1381

The requirement that a power of attorney granted abroad be legalized by the Italian Consulate does not apply if said power of attorney has been drafted by a notary public in a Contracting State of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

The mere fact that the credit constituting the basis for a bankruptcy petition has been the object of a separate declaratory action brought by the debtor before the same court with which said bankruptcy petition has been filed is not sufficient to conclude that the debtor company is prevented from objecting that said court lacks jurisdiction in relation to the bankruptcy petition pursuant to Art. 4 of the Law of 31 May 1995 No. 218. In fact, the object of the aforementioned declaratory action is different from that of the petition for the opening of a bankruptcy proceedings.

Pursuant to Art. 25 of the Law of 31 May 1995 No. 218, in case the registered office and the central administration of a company have been transferred abroad and, as a consequence, said company has lost the Italian nationality and has assumed a foreign nationality in application of the company's seat principle, said company is subject exclusively to its new governing law.

Arts. 43 and 48 of the Treaty establishing the European Community, which concern the right of establishment, are not relevant for the purposes of determining the extinction of a legal entity. In fact, the existence and functioning of a company, as well as the requirements and formalities necessary for transferring its registered office, are still governed by the laws of the Member States.

Italian courts have jurisdiction in relation to a bankruptcy petition filed against an Italian company that has transferred abroad its registered office and central administration. The EC Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings is not relevant for this purpose.

67. *Bari Tribunal, 27 January 2004* 1386

Pursuant to its Art. 1, second paragraph, No. 2, the Brussels Convention of 27 September 1968 shall not apply to bankruptcy proceedings, proceedings for approval of the scheme of arrangement (*omologazione del concordato preventivo*) and appeals against the determination of bankruptcy liabilities (*opposizione allo stato passivo*), as well as to any actions (such as claw-back actions) which – even if they are not part of the bankruptcy proceedings in a strict sense – directly arise from such proceedings, as they may be brought only after the relevant insolvency proceedings have been initiated.

Art. 3, second paragraph of the Law of 31 May 1995 No. 218 provides that, with reference to matters that do not fall within 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 (*competenza territoriale*). Accordingly, Italian courts have jurisdiction over a claw-back action brought by a trustee in bankruptcy of a foreign company that has been declared bankrupt in Italy.

68. *Corte di Cassazione (plenary session), order 3 February 2004 No. 1994* 1390

Pursuant to Art. 3, second paragraph, last sentence of the Law of 31 May 1995 No. 218 – which refers to Art. 18, second paragraph of the Code of Civil Procedure – Italian courts have jurisdiction over an action for judicial separation of a foreign couple if, at the time of filing the application, the plaintiff resides in Italy *de facto*, but with the intent to establish her permanent residence in Italy.

69. *Parma Tribunal, 4 February 2004* 693

Italian courts have jurisdiction to ascertain whether a subsidiary company is insolvent if the registered office of said company – which in this case constitutes only a formal or sham office – is located in another Member State of the European Union, but the head office of said company, *i.e.* the centre that actually directs and manages its business, is located in Italy at the same place where the offices of the parent company are also located. The relevant provisions for the purposes of this case are set forth by Arts. 3, second paragraph and 25, first paragraph, last sentence of the Law of 31 May 1995 No. 218. In substance, these provisions refer to Art. 9 of the Bankruptcy Law, which, in turn, is confirmed by Art. 3 of the EC Regulation No. 1346/2000 of 29 May 2000 on Insolvency Proceedings.

70. *Corte di Cassazione (plenary session), 19 February 2004 No. 3331* 1392

A law enacted before the Constitution that has thereafter been declared unconstitutional ceases to be effective from the date on which the Constitution entered into force, *i.e.* from 1 January 1948.

Notwithstanding the judgment of the Constitutional Court of 16 April 1975 No. 87, the children of an ex-Italian citizen, who lost her original citizenship before 1 January 1948 due to marriage pursuant to Art. 10, third paragraph of the Law of 13 June 1912 No. 555 and has not re-acquired the same by making the declaration referred to in Art. 219, first paragraph of the Law of 19 May 1975 No. 151, cannot be considered Italian citizens *iure sanguinis* by virtue of the judgment of the Constitutional Court of 9 January 1983 No. 30.

71. *Parma Tribunal, 20 February 2004* 1062

Where bankruptcy matters are concerned, Arts. 3, second paragraph and 25 of the Law of 31 May 1995 No. 218 refer to Art. 9 of the Bankruptcy Law. According to said provisions – which are confirmed by Art. 3, first paragraph of the EC Regulation No. 1346/2000 on insolvency proceedings – the courts of the (Member) State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open the relevant insolvency proceedings. In the case of a corporation, in the absence of proof to the contrary, the place of its registered office shall be presumed to be said centre.

According to the thirteenth recital of EC Regulation No. 1346/2000, the centre of the debtor's main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

Italian courts have jurisdiction to determine whether a company having its registered office in Ireland is insolvent if the real seat of the company is in Italy and the business activities of the company have actually been managed from Italy in a manner ascertainable by third parties.

The mere facts that a petition for winding-up has been filed with an Irish court and that said court has appointed a Provisional Liquidator may not affect the jurisdiction of Italian courts to open insolvency proceedings, nor its authority to characterise said proceedings as primary proceedings pursuant to Art. 3, third paragraph of EC Regulation No. 1346/2000.

72. *Padua Tribunal, Division of Este, 25 February 2004* 697

For the purposes of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, the fact that the counsels of the parties have made reference to domestic law is not *per se* sufficient to establish that the parties intended, even tacitly, to exclude the application of said Convention.

The law governing the set-off of credits shall be determined based on the rules of Private International Law, as this is a matter that is excluded from the sphere of application of the Vienna Convention even if all credits concerned arise from contracts to which said Convention applies. In particular, the governing law of the contract giving rise to the credit that is the object of the action – *i.e.* the credit in respect of which the set-off is pleaded – shall also apply to the set-off of said credit, as the set-off constitutes a fact causing the discharge of said credit.

73. *Corte di Cassazione, 10 March 2004 No. 4878* 1402

A request of the adopting parents of a foreign child to indicate, in the birth certificate of said child, an Italian town as the place of birth (instead of the foreign town in which said child was actually born) must be rejected in light of, among other things, Arts. 27 and 28 of the Law of 4 May 1983 No. 184 on adoption, which concern, respectively, the acquisition by the adoptive child of the status of legitimate child and the contents of the certificates of birth, marriage and death (*attestazioni di stato civile*) relating to said child.

74. *Constitutional Court, 15 July 2004 No. 222* 1343

Art. 13, paragraph 5-*bis* of the Legislative Decree of 25 July 1998 No. 286 (introduced by Art. 2 of the Law Decree of 4 April 2002 No. 51 as converted with amendments into the Law of 7 June 2002 No. 106), is constitutionally illegitimate, insofar as it does not provide that the proceedings aimed at confirming an order to accompany at the border a non-EU citizen to be expelled from the Italian territory shall be held, in compliance with the *audi alteram partem* rule and the right of defence, before the order is enforced. In fact, as a consequence of the above, the constitutional guarantee laid down by Art. 13, third paragraph of the Constitution is frustrated – since the above mentioned order, which limits the personal freedom, would not cease to produce its effects if the judicial authority rules that it is not confirmed or does not confirm it within forty-eight hours – and the essential core of the right of defence of the foreigner is violated.

The issues of constitutional legitimacy of Art. 13, fourth and fifth paragraphs of the Legislative Decree of 25 July 1998 No. 286, and of Art. 13, fourth paragraph of said Legislative Decree, as replaced by Art. 12, first paragraph, *litt.* (c) of the Law of 30 July 2002 No. 189 (which lay down the cases in which non-EU citizens are expelled through accompaniment to the border by the police), raised with reference to Arts. 3, 24 and 111 of the Constitution, are manifestly inadmissible.

75. *Constitutional Court, 15 July 2004 No. 223* 1358

According to Art. 14, paragraph 5-*ter* of the Legislative Decree of 25 July 1998 No. 286, it is a crime for a foreign citizen not to comply with an order to leave the Italian territory within five days, issued by the local head of police administration (*questore*) pursuant to paragraph 5-*bis* of said Art. 14. Art. 14, paragraph 5-*quinquies* of said Legislative Decree, introduced by Art. 13, first paragraph of the Law of 30 July 2002 No. 189, is constitutionally illegitimate insofar as it provides that the arrest of the person who committed the crime contemplated by the above mentioned paragraph 5-*ter* is mandatory, since it conflicts with Art. 13 of the Constitution. In fact, said paragraph 5-*quinquies* entails a provisional limitation of the personal freedom of the arrested person that is not aimed at the adoption of any preventive detention order or other order limiting the personal freedom of said person and, therefore, is manifestly unreasonable.

The question of constitutional legitimacy of the combined provision of Art. 558 of the Code of Criminal Procedure and Arts. 13, paragraphs 3, 3-*bis* and 3-*quarter* and 14, paragraph 5-*quinquies* of the Legislative Decree of 25 July 1998 No. 286, as amended by the Law of 30 July 2002 No. 189, which provide for the adoption of a summary procedure (*giudizio direttissimo*) and require the courts to grant (upon confirmation of the arrest pursuant to Art. 14, paragraph 5-*quinquies*) the authorisation to the expulsion and to issue an order dismissing the charges (*sentenza di non luogo a procedere*), raised with reference to Arts. 24, 101, second paragraph and 111 of the Constitution, is manifestly inadmissible.

76. *Trento Tribunal, Division of Cavalese, cadastral decree 20 July 2004* 1406

The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition, which has been implemented in Italy, does not require for its application the existence of any foreign elements other than the choice of a foreign law. Therefore, the recognition in Italy of a domestic trust governed by a foreign law chosen by the settlor (whose choice is free and legitimate based on Art. 6 of said Convention) is possible and lawful.

Both legal effects that are characteristic of a trust, namely the restrictions on the use and disposal of the trust assets and the separation of the trust assets from the settlor's and the trustee's own estates, fall within the legal effects that, if related to real estate, must be published pursuant to Arts. 2643 *et seq.* of the Civil Code. Furthermore, the transfer of assets to a trust shall be registered in the special cadastral register (*registro tavolare*) in accordance with Art. 12 of the 1985 Hague Convention.

77. *Brescia Tribunal, 12 October 2004* 1410

Pursuant to Art. 13 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition, the fact that the significant elements of a trust created in accordance with and governed by a foreign law chosen by the settlor are more intensely linked with the Italian legal system, so as to characterise said trust as a domestic trust, is not *per se* sufficient to refuse recognition of said trust in Italy. In fact, the recognition of a trust may be refused only if a fraudulent intention exists which is aimed at creating conditions that are in contrast with the legal system in which the trust must operate, or if there is no reasonable and legitimate cause for the creation of the trust.

Based on Arts. 15, 16 and 18 of the 1985 Hague Convention, if a recognised trust produces effects that are contrary to mandatory provisions of law, *i.e.* contrary to Italian public policy, Italian law must apply instead of the foreign governing law chosen by the settlor, with the consequence that – since the Italian legal system does not provide for the institution of trusts – the trust will produce residual or no effects.

Pursuant to Art. 13 of the Hague Convention (which is a general provision), the recognition of a domestic trust governed by foreign law is refused if it produces effects that – even if not contemplated by Arts. 15, 16 and 18 of said Convention – are incompatible with the law of the forum.

Based on Art. 11 of the Hague Convention, the principle that the trust property constitutes a separate fund represents a legitimate exception to the principle of economic public policy laid down by Art. 2740 of the Civil Code, whereby a debtor is liable with all his assets for the performance of his obligations.

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Torts: 26.

1. *Court of Justice, 7 January 2003 case C-306/99* 391

The EC Court of Justice has jurisdiction in a procedure for preliminary rulings to interpret national law that, while transposing an EC Directive, makes it applicable to a purely domestic situation because the problems of interpretation which the national court seeks to resolve are essentially connected with the interpretation of the Community law act and it is therefore neither an hypothetical problem nor a question bearing no relation to the actual facts of the main action or its purpose.

2. *Court of Justice, 13 February 2003 case C-131/01* 743

By retaining rules requiring patent agents established in other Member States to be enrolled on the Italian register of patent agents and to have a residence or place of business in Italy, in order to provide services before the Italian Patent Office, the Italian Republic has failed to fulfil its obligations under Articles 49 EC to 55 EC.

3. *Court of Justice, 6 March 2003 case C-485/01* 398

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents does not preclude national legislation from making registration of a commercial agent in the register of undertakings subject to that agent's enrolment in a register provided for that purpose, on condition that non-registration in the register of undertakings does not affect the validity of an agency contract which that agent has concluded with his principal or that the consequences of such non-registration do not adversely affect in any other way the protection which that directive confers on commercial agents in their relations with their principals.

4. *Court of Justice, 20 March 2003 case C-187/00* 401

In the case that legislative provisions or provisions of collective agreements

introduces a discrimination contrary to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, the national courts are required to set aside that discrimination, using all the means at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the setting aside of the provisions by the legislature, by collective negotiation or otherwise.

5. *Court of Justice, 22 May 2003 case C-462/99* 748

Where a Member State has not implemented Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, as amended by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997, requiring Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the national regulatory authority has a right of appeal to an independent body, in order to ensure that national law is interpreted in compliance with such Directive and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal against decisions of the national regulatory authority which satisfies the criteria laid down in Article 5a(3) of Directive 90/387. If national law cannot be applied so as to comply with the requirements of Article 5a(3) of that directive, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excludes its competence, such as that at issue in the main proceedings, has the obligation to disapply that provision.

6. *Court of Justice, 10 July 2003 case C-87/01 P* 716

An out-of-court set-off between claims governed by two separate legal orders can take effect only in so far as it satisfies the requirements of both legal orders concerned.

7. *Court of Justice, 9 September 2003 case C-198/01* 334

Where undertakings engage in conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed has a duty to disapply the national legislation; may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation; may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard; may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted.

It is for the referring court to assess whether national legislation such as that at issue in the main proceedings, under which competence to fix the retail selling prices of a product is delegated to a ministry and power to allocate production between undertakings is entrusted to a consortium to which the relevant producers

are obliged to belong, may be regarded, for the purposes of Article 81(1) EC, as precluding those undertakings from engaging in autonomous conduct which remains capable of preventing, restricting or distorting competition.

8. *Court of Justice, 18 September 2003 case C-168/01* 406

Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, interpreted in the light of Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes a national provision which, when determining the tax on the profits of a parent company established in one Member State, makes the deductibility of costs in connection with that company's holding in the capital of a subsidiary established in another Member State subject to the condition that such costs be indirectly instrumental in making profits which are taxable in the Member State where the parent company is established.

9. *Court of Justice, 23 September 2003 case C-109/01* 345

In order to be able to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

Article 10 of Regulation No. 1612/68 is not applicable where the national of a Member State and the national of a non-Member State have entered into a marriage of convenience in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.

Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State.

Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No. 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, provided that the marriage is genuine.

10. *Court of Justice, 30 September 2003 case C-224/01* 355

The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision,

the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 7(1) of Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community are to be interpreted as meaning that they preclude the grant, under conditions such as those laid down in Article 50a of the Gehaltsgesetz 1956 (law on salaries of 1956), as amended in 1997, of a special length-of-service increment which, according to the interpretation of the Verwaltungsgerichtshof (Austria) in its judgment of 24 June 1998, constitutes a loyalty bonus.

An infringement of Community law, such as that stemming in the circumstances of the main proceedings from the judgment of the Verwaltungsgerichtshof of 24 June 1998, does not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance.

11. *Court of Justice, 30 September 2003 case C-93/02 P* 754

It is for the Community judicature to review the legality of the Community measures in the light of the WTO rules only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements.

12. *Court of Justice, 9 December 2003 case C-116/02* 371

A national court may, under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively.

13. *Court of Justice, 13 January 2004 case C-453/00* 724

The principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where

– under national law, it has the power to reopen that decision;

– the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;

– that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234(3) EC; and

– the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.

14. *Court of Justice, 15 January 2004 case C-433/01* 385

Article 5(2) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the 1978, the 1982 and the 1989 Accession Conventions must be interpreted as meaning that it cannot be relied on by a public body which seeks, in an action for recovery, reimbursement of sums paid under public law by way of an education grant to a maintenance creditor, to whose rights it is subrogated against the maintenance debtor.

15. *Court of Justice, 5 February 2004 case C-18/02* 730

Article 5(3) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions, must be interpreted as meaning that a case concerning the legality of industrial action, in respect of which exclusive jurisdiction belongs, in accordance with the law of the Contracting State concerned, to a court other than the court which has jurisdiction to try the claims for compensation for the damage caused by that industrial action, falls within the definition of "tort, delict or quasi-delict".

For the application of Article 5(3) of the Brussels Convention to a situation such as that in the dispute in the main proceedings, it is sufficient that that industrial action is a necessary precondition of sympathy action which may result in harm.

The application of Article 5(3) of the Brussels Convention is not affected by the fact that the implementation of industrial action was suspended by the party giving notice pending a ruling on its legality.

In circumstances such as those in the main proceedings, Article 5(3) must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State to which a ship registered in another Contracting State sails can be regarded as having occurred in the flag State, with the result that the shipowner can bring an action for damages against that trade union in the flag State.

16. *Court of Justice, 5 February 2004 case C-157/02* 1097

A body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon. Therefore, when contracts are concluded with road users, the provisions of a directive capable of having direct effect may be relied upon against a legal person governed by private law where the State has entrusted to that legal person the task of levying tolls for the use of public road networks and where it has direct or indirect control of that legal person.

17. *Court of Justice, 5 February 2004 case C-265/02* 738

Article 5(1) of the Convention of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the 1978, the 1982, the 1989 Accession Conventions, must be interpreted as follows: "matters relating to a contract" do not cover the obligation which a guarantor who paid customs duties under a guarantee obtained by the forwarding agent seeks to enforce in legal proceedings by way of subrogation to the rights of the customs authorities and by way of recourse against the owner of the goods, if the latter, who was not a party to the contract of guarantee, did not authorise the conclusion of that contract.

18. *Court of Justice, 11 March 2004 case C-9/02* 1102

The principle of freedom of establishment laid down by Article 52 of the EC Treaty (now, after amendment, Article 43 EC) must be interpreted as precluding a Member State from establishing, in order to prevent a risk of tax avoidance, a mechanism for taxing as yet unrealised increases in value such as that laid down by Article 167a of the French Code Général des Impôts, where a taxpayer transfers his tax residence outside that State.

19. *Court of Justice, 23 March 2004 case C-138/02* 1073

A national of both a Member and a Non Member State, who moves to another Member State in search of a employment after a long time, is not a worker for the purposes of Title II of Part I of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community (as amended by Council Regulation (EEC) No. 2434/92 of 27 July 1992). It is, however, for the national court or tribunal to establish whether the term "worker" as referred to by the national legislation at issue is to be understood in that sense.

The right of residence in a Member State referred to in Articles 4 and 8 of Directive 68/360/EEC, on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, is accorded only to nationals of a Member State who are already in employment in the first Member State. Persons seeking employment are excluded. They can rely solely on the provisions of that directive concerning their movement within the Community.

Member State nationals who move in search of employment qualify for such equal treatment only as regards access to employment in accordance with Article 48 of the EC Treaty (now, after amendment, Article 39(2) EC) and Articles 2 and 5 of Regulation No. 1612/68/EEC, but not with regard to social and tax advantages, which is laid down by Article 7(2) of that regulation.

A national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement place at a disadvantage Member State nationals who have exercised their right of movement in order to seek employment in the territory of another Member State. That requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions. It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.

20. *Court of Justice, 27 April 2004 case C-159/02* 1084

The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the 1978, the 1982 and the 1989 Accession Conventions, is to be interpreted as precluding the grant

of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

21. *Court of Justice, 29 April 2004 case C-224/02* 1111

Community law in principle precludes legislation of a Member State under which the attachable part of a pension paid at regular intervals in that State to a debtor is calculated by deducting from that pension the income tax prepayment levied in that State, while the tax which the holder of such a pension must pay on it subsequently in the Member State where he resides is not taken into account at all for the purposes of calculating the attachable portion of that pension.

On the other hand, Community law does not preclude such national legislation if it provides for tax to be taken into account, where taking the tax into account is made subject to the condition that the debtor prove that he has in fact paid or is required to pay within a given period a specified amount as income tax in the Member State where he resides. However, that is only the case to the extent that, first, the right of the debtor concerned to have tax taken into account is clear from that legislation; secondly, the detailed rules for taking tax into account are such as to guarantee to the interested party the right to obtain an annual adjustment of the attachable portion of his pension to the same extent as if such a tax had been deducted at source in the Member State which enacted that legislation; and, thirdly, those detailed rules do not have the effect of making it impossible or excessively difficult to exercise that right.

22. *Court of Justice, 10 June 2004 case C-168/02* 1090

Article 5(3) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions, must be interpreted as meaning that the expression "place where the harmful event occurred" does not refer to the place where the claimant is domiciled or where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

23. *Court of Justice, order 10 June 2004 case C-555/03* 1094

Pursuing Article 68 of the EC Treaty, the EC Court of Justice clearly has no jurisdiction to give a preliminary ruling on the interpretation of Regulation No. 44/2001 where reference to the Court has been made by a tribunal whose decisions are amenable to appeal under national law.

24. *Court of Justice, 7 September 2004 case C-319/02* 1422

Articles 56 and Article 58 EC preclude legislation whereby the entitlement of a person fully taxable in one Member State to a tax credit in relation to dividends paid to him by limited companies is excluded where those companies are not established in that State.

25. *Court of Justice, 7 September 2004 case C-456/02* 1441

Article 39 EC can be applied only if the paid activity carried out is real and genuine.

A citizen of the European Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and

conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the "minimex".

26. *Court of Justice, 9 September 2004 case C-397/02* 1430

In principle, the law applicable to tort is the law of the Member State in whose territory the injury has occurred. Article 85 of the EC Staff Regulations is not to be interpreted as conferring on the Communities the right to obtain a subrogation unless the applicable law so dispose.

27. *Court of Justice, 9 September 2004 case C-70/03* 1434

The third sentence of Article 5 of Council Directive 93/13/EEC on unfair terms in consumer contracts is a binding legislative provision which confers rights on consumers and assists in determining the result which the directive seeks to achieve.

Although the deliberately vague term "close connection with the territory of the Member States" chosen by the Community legislature in Article 6(2) of Council Directive 93/13/EEC may be given concrete effect by means of presumptions, it cannot be circumscribed by a combination of predetermined criteria such as the cumulative conditions of residence and conclusion of the contract referred to in Article 5 of the 1980 Rome Convention on the law applicable to contractual obligations.

The provisions of Member State implementing Article 6(2) of Council Directive 93/13/EEC are incompatible with the level of protection laid down therein when it restricts its scope of application to contracts connected with that State only by the consumer's residence or its consent.

CASES IN INTERNATIONAL COURTS

International centre for settlement of investment disputes (ICSID), 7 July 2004 in case ARB/02/7... 1448

Pursuant to Article 25 of the Bilateral Investment Treaty between Italy and the United Arab Emirates dated 22 January 1995, the jurisdiction of the International Centre for Settlement of Investment Disputes shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

When, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding.

Pursuant to Article 8, para. 1 of Italian Law 13 June 1912 No. 555, whoever spontaneously acquires a foreign citizenship and establishes his residence abroad loses the Italian citizenship. Pursuant to Article 13(1) litt. *d* of Italian Law 5 February 1992 No. 91, whoever has lost his Italian citizenship reacquires it one

year after the date at which he established his residence in the territory of the Republic of Italy, save in case of explicit renunciation within the same time-limit.

In order to prove reacquisition of Italian citizenship pursuant to Article 13 (1) litt. *d* of Italian Law 5 February 1992 No. 91 an International Tribunal is not bound by rules of evidence in Italian civil procedure. Accordingly, reacquisition of Italian citizenship may not be established conclusively relying on passport, or on certificates of Italian nationality issued by Italian authorities prior to its loss, or after the loss, if such authorities had no knowledge of the previous loss of nationality nor did they undertake any inquiry in order to determine if the conditions for reacquisition were fulfilled.

CASES IN FOREIGN COURTS

French Cour de Cassation, 28 May 2002 765

The 1924 Brussels Convention on Bill of Lading is applicable to a contract concerning the carriage of goods by sea to Senegal, notwithstanding the fact that this country is also a Contracting State of the Hamburg Rules given that the Brussels Convention was expressly chosen as the law applicable in the bill of lading and that neither Senegal denunciated such Convention nor does any mandatory rule of this State prevent such choice of law.

High Court (Chancery Division), 7 February 2003 767

EC Regulation No. 1346/2000 of 29 May 2000 gives jurisdiction to the courts of a Member State to open main insolvency proceedings in relation to a company incorporated outside the EC Community, whenever the centre of the company's main interests is in that Member State.

Bundesgerichtshof, 13 March 2003 411

Pursuing to the EC Court of Justice *Überseering* judgment, dated 5 November 2002, case C-208/00, where a company formed in accordance with the law of a Member State exercises its freedom of establishment in another Member State as set forth by the EC Treaty, then it has the capacity to bring an action before the court of any Member State for the purposes of enforcing rights arising out of a contract when it enjoys such capacity under the law of the State of incorporation even if its actual centre of administration is in another Member State.

High Court (Chancery Division), Leeds, 16 May 2003 774

When determining the jurisdiction to open insolvency proceedings under Article 3(1) of EC Regulation No. 1346/2000 of 29 May 2000, the relevant factor is the centre of debtor's main interests, *i.e.* following Recital 13, the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

The identification of the debtor's main interests requires to consider both the scale of the interests administered at a particular place and their importance in comparison with the scale and importance of the interests administered in any other place.

It is particularly relevant that the place of the debtor's main interests must be ascertainable by third parties, among whom the most important are the potential creditors such as, in the case of a trading company, its trade suppliers and its financiers.

Tribunal de commerce de Pontoise, 26 May 2003 780

Under EC Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, a judgment opening insolvency proceedings against a subsidiary company cannot be recognized in the Member State in the territory of which such company has its registered office.

Cour d'Appel de Versailles, 4 September 2003 783

The decision of the court of a Member State to open main insolvency proceedings on the basis that the centre of the company's main interests is in such State, as set forth in Article 3(1) of EC Regulation No. 1346/2000 of 29 May 2000, must be recognised in the Member State where such company has its registered office.

Under EC Regulation No. 1346/2000 the recognition of a judgment opening main insolvency proceedings in a Member State prevents courts of other Member States from opening insolvency proceedings against the same debtor.

Irish High Court, 23 March 2004 1120

The decision of the court of a Member State appointing a provisional liquidator is a judgment, even if not final, opening insolvency proceedings within the meaning of Article 3(1) of EC Regulation No. 1346/2000 of 29 May 2000.

Under Article 2 litt. *f* of EC Regulation No. 1346/2000 insolvency proceedings are deemed to be opened at the time at which the judgment, whether it is a final judgment or not, becomes effective having regard to the law of the court seized.

Under Article 3(1) of EC Regulation No. 1346/2000 the courts of the Member State in the territory of which the registered office of a company is situated have jurisdiction to open main insolvency proceedings where all factual circumstances demonstrate this is the centre of main interests of the company.

Under Article 26 of EC Regulation No. 1346/2000 a judgment opening insolvency proceedings delivered by a court of a Member State in violation of the right to a fair hearing of creditors, as recognised by Article 6 of the European Convention on Human Rights and included in general principles of European Union law, is manifestly contrary to public policy and therefore shall not be recognised.

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Registrazione presso il Tribunale di Milano al n. 6418, in data 26-11-1963
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