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1. *Corte di Cassazione, 15 February 2008 No 3798* 437

The notion of habitual residence of the child envisaged by Article 3 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction must be construed as the place where the child, based on a constant and enduring stay, even if only *de facto*, has the centre of his affective relationships, including, but not limited to, the relationship with his parents, as

they arise from his everyday life in said place. The court of the merits shall be exclusively competent to ascertain the above facts, and its determination cannot be challenged before the *Corte di Cassazione* if appropriately and logically reasoned.

Although the right of the child to be heard in proceedings that concern him is contemplated in several international agreements, none of them provides for specific modalities for the hearing. Hence the court when investigating whether the child has attained an adequate degree of understanding for the purpose of evaluating his objection to being returned pursuant to Article 13(2) of the 1980 Hague Convention is not required to appoint an expert of its own motion (*consulenza tecnica d'ufficio*) for the relevant evaluation, provided that its refusal to follow the opinion expressed by the child is adequately reasoned.

2. *Corte di Cassazione (plenary session), 17 July 2008 No 19595* 93

In judgments No 348 and No 349 of 24 October 2007, the Constitutional Court has ruled that, pursuant to Article 117(1) of the Constitution, the legislative power of the State and of the Regions shall be exercised in compliance with the provisions of the European Convention on Human Rights and that, accordingly, the provisions of said Convention – and particularly Article 6 – may constitute an indirect reference for a question of constitutional legitimacy. After said judgments, an interpretation constitutionally oriented of Article 3 of Law of 31 May 1995 No 218 is required in order to avoid that neither Italian courts nor any foreign court have jurisdiction over a certain matter. Accordingly, a defendant contesting Italian jurisdiction shall be required to indicate the foreign court having jurisdiction.

Pursuant to Article 5(1)5 of the Brussels Convention of 27 September 1968, which is referred to by Article 3(2) of Law No 218 of 1995, Italian courts have jurisdiction over a dispute concerning a maritime employment relationship on a ship if the ship – which shall be considered as the place of business engaging the employee – remains in an Italian harbour after said engagement, prior to starting a cruise in foreign and international waters.

An interpretation constitutionally oriented of Article 3 of Law No 218 of 1995 requires that the criteria relating to venue set forth in paragraph 2, second sentence of said provision apply if the criteria set forth in the paragraph 1 and in paragraph 2, first sentence are not applicable.

3. *Ancona Tribunal, 22 October 2008* 493

Pursuant to Article 6 No 1 of the Brussels Convention of 27 September 1968 – which is referred to by Article 3(2), first part of Law of 31 May 1995 No 218 – Italian courts have jurisdiction over an action for declaring that certain denominative and composite trademarks are null and void and for damages suffered as a result of unfair competition, which has been brought against a person domiciled in Italy and a person domiciled outside the European Union. In fact, the claims brought against the defendants are so closely connected that it is expedient to hear and determine them together.

4. *Palermo Court of Appeal, decree 14 November 2008* 767

Article 98(2) of Presidential Decree of 3 November 2000 No 396 on Civil Status constitutes an obstacle to the exercise of the right to move and reside freely within the territory of the Member States, as interpreted by the EC Court of Justice, insofar as it requires registration with the sole family name of the father of a child of Italian citizens born in the United Kingdom and there registered with the family names of both parents.

5. *Corte di Cassazione (criminal), 20 February 2009 No 7687* 167

The *ne bis in idem* principle, which is set forth by Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement on the gradual abolition of checks at common borders, applies only if a judgment or criminal order has been issued and has become final. Accordingly, a decree ordering the dismissal of a charge issued by a foreign judicial authority – which, as such, does not finally dispose of the trial with a conviction or acquittal – does not preclude the institution of proceedings in Italy with respect to the same underlying facts.

6. *Corte di Cassazione (plenary session), 25 February 2009 No 4466* 101

The Italian citizenship shall be granted by the court – regardless of the declaration made by the interested person under Article 219 of Law of 19 May 1975 No 151 – to a woman who has lost said citizenship before 1 January 1948 as a consequence of her marriage with a foreigner pursuant to Article 10(3) of Law of 13 June 1912 No 555. In fact, the unintentional loss of the citizenship is an enduring effect of said provision, which is unconstitutional due to its conflict with Articles 3 and 29 of the Constitution.

Also the son of said woman – born before 1 January 1948 pending Law No 555 of 1912 – reacquires the Italian citizenship from that date The Italian citizenship shall be transmitted by him to his daughter, who is currently claiming it, by virtue of their parental relationship.

7. *Corte di Cassazione, 10 March 2009 No 5708* 168

The interpretation of a rule of Community law by the EC Court of Justice is limited to clarifying and defining the meaning and scope of said rule, as it ought to have been interpreted from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment on the preliminary ruling, unless, in exceptional cases and in application of the general principle of legal certainty inherent in the Community legal system, the EC Court of Justice itself – and not the national court – has restricted such possibility so as to avoid for any person concerned of relying on a provision the Court has interpreted with a view to calling in question legal relationships established in good faith or to causing serious inconvenience.

8. *Corte di Cassazione (criminal), 10 March 2009 No 10693* 495

Article 705(2)(b) of the Code of Criminal Procedure prohibits the court from ordering extradition if the judgment whose enforcement is being sought contains any ruling that is contrary to the fundamental principles of the Italian legal system; such is the case if it is alleged that the legal system of the requesting State does not guarantee the right to defence and to a fair trial, but it does not apply if a mere violation of the procedural rules set forth by said legal system is maintained.

9. *Turin Tribunal, 10 March 2009* 496

Italian courts do not have jurisdiction over an action concerning the infringement of the English part of a European patent that has occurred in England, since the ascertainment of said infringement requires a preliminary ruling on the validity and enforceability of said part of the patent which is reserved exclusively to English courts pursuant to Article 22 No 4 of EC Regulation No 44/2001 of 22 December 2000. Furthermore, Italian courts do not have jurisdiction over reciprocal claims of unfair competition occurred in England, based both on the fact that said claims are connected to the ruling on

the validity of the patent and on the criterion of the place where the harmful event occurred or may occur within the meaning of Article 5 No 3 of said Regulation.

10. *Corte di Cassazione, order 11 March 2009 No 5894* 497

Pursuant to Article 2(3)(a) of Law of 24 March 2001 No 89 – and differently from a ruling of the European Court of Human Rights in relation to Article 6 of the European Convention on Human Rights – the amount used as a basis to calculate non-economic damage that is due for the unreasonable duration of proceedings shall be multiplied only by the number of years exceeding the reasonable duration of the relevant proceedings. Italian courts, if in doubt as to whether a domestic provision is compatible with an 'interposed' international rule, cannot disapply said domestic provision, but shall refer the question to the Constitutional Court pursuant to Article 117(1) of the Constitution.

11. *Corte di Cassazione (criminal), 11 March 2009 No 10752* 498

A foreigner has a right to be expelled even when he meets the legal requirements to benefit from a sanction alternative to expulsion pursuant to Article 16(5) of Legislative Decree of 25 July 1998 No 286. Accordingly, the lower court has no discretional power as to the granting of the expulsion, and the *pubblico ministero* has no discretion as to whether he shall authorise the issuance of the relevant order.

12. *Milan Tribunal (industrial and intellectual property division), order 16 March 2009* 112

Pursuant to Article 5(3) of EC Regulation No 44/2001 of 22 December 2000, Italian courts have jurisdiction – being the courts of the place where the harmful event occurred – over an action for interim relief brought against an English company for illegal exploitation of a database protected by copyright and of the trademarks of the plaintiff, an Italian company, through its web site. In fact, the alleged illegal activities have been carried out in Italy as the web site of the defendant is addressed exclusively to Italian users and is in direct competition with the web site of the plaintiff, which is also active on the Italian market.

In an action for interim relief brought against an English company for illegal exploitation of a database protected by copyright and of the trademarks of the plaintiff through its web site, the actual existence of the rights claimed by the plaintiff on the basis of a contract previously entered into between the parties – which is not subject to the jurisdiction of national courts due to a clause providing for international arbitration – is irrelevant for the purpose of determining whether the court seised has jurisdiction, since in an action for interim relief the existence of said rights can be ascertained only incidentally, as per Article 6 of Law of 31 May 1995 No 218, for the sole purpose of determining the existence of a *prima facie* case (*fumus boni iuris*).

13. *Corte di Cassazione (plenary session), order 19 March 2009 No 6598* 117

The carve-out of bankruptcy, compositions and analogous proceedings made by Article 1(2)(b) of EC Regulation No 44/2001 of 22 December 2000 does not apply to a legal action that a person subject to insolvency proceedings may have brought regardless of the opening of said proceedings (such as those relating to the existence of a receivable of the bankrupt). Accordingly, said legal actions are not excluded from the scope of application of the aforesaid Regulation.

Pursuant to Article 5(1)(b) of EC Regulation No 44/2001, the place of delivery of the goods being sold is always the sole criterion that is relevant in order to determine the jurisdiction with respect to contracts for the sale of goods, regardless of the obligation that the plaintiff is actually seeking to enforce. Said place, if not identified in the contract, shall be determined in accordance with the conflict-of-law rules of the court seised.

Italian courts do not have jurisdiction over an action brought by the seller for the payment of the purchase price if the parties have agreed orally that the goods being sold should have been delivered in Spain, and written evidence of said agreement is provided.

14. *Corte di Cassazione, order 27 March 2009 No 7572* 499

Where no appeal has been lodged against a decision denying the granting of the status of refugee, the consequent expulsion order can be opposed only alleging new and different situations of persecution which have not been examined during the previous proceedings for the granting of the refugee status or the humanitarian protection, and which are specifically referred to as supervening reasons triggering the prohibition from expulsion pursuant to Article 19 of Legislative Decree of 25 July 1998 No 286.

15. *Florence Tribunal, 15 April 2009* 769

Article 31(2) of Law of 31 May 1995 No 218 provides for the application of Italian law only if the competent foreign legal system does not allow legal separation or divorce. Accordingly, pursuant to Article 31(1) of said Law, the dissolution of a marriage between spouses holding different citizenships may be declared based on the foreign law of the place of prevailing localisation of the matrimonial life, if said law contemplates the possibility to dissolve the marriage.

16. *Padua Tribunal, division of Este, 22 April 2009* 772

Pursuant to Article 24 of EC Regulation No 44/2001 of 22 December 2000, Italian courts have jurisdiction over an action to terminate a contract if the defendant, which is domiciled in another Member State, has entered an appearance without objecting in any way the lack of jurisdiction or territorial competence of the court seised.

Pursuant to Article 3 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, which is similar to the corresponding provision of EC Regulation No 593/2008 of 17 June 2008, Italian law applies to a license contract for the use of a trademark and the exclusive manufacturing of certain patented products, based on the express choice of law made by the parties in said contract.

17. *Corte di Cassazione (plenary session), 23 April 2009 No 9671* 122

In a case concerning the relationship between Italian jurisdiction and German jurisdiction on tax matters, where German authorities have stated that an enforcement order has become final since "it was uncontested" and have requested the Italian authorities to collect the relevant taxes (and namely VAT) and to carry out the related enforcement actions in accordance with the provisions of the Italian-German Convention on Administrative and Judicial Assistance on Tax Matters of 9 June 1938, the opposition filed by the Italian taxpayer after receipt of the custom injunction pursuant to Article 82 of Presidential Decree of 23 January 1973 No 43 – whereby the taxpayer has claimed that said enforcement order and the foreign request for collection have not been duly notified – does not result in a dispute on the modalities for the carrying out of the relevant enforcement actions, which would be subject

to the jurisdiction of Italian courts. In fact, the regularity of said enforcement actions is not under discussion, since Article 346-*bis* of Presidential Decree No 43/1973 – which applies ratione temporis – does not require that the foreign order be notified prior to the issuance of the injunction.

18. *Saluzzo Tribunal, 28 April 2009* 773

The claim brought against a financial intermediary by an investor who has adhered to ICSID arbitration proceedings through a mandate granted to the association for the protection of investors and a power of attorney *ad litem* granted to a law firm is admissible. In fact, the letter of instructions to the bondholders signed by the investors at the time of their adherence to the aforesaid initiative merely contains a recommendation to any investor to abandon the arbitration proceedings where an ordinary legal action against the financial intermediary is brought. In fact in such a case, and upon issuance of a final judgment declaring the nullity or annulment of the contract whereby the bonds have been purchased, the investor would no longer be considered as such – a quality which is essential in order to promote an ICSID arbitration.

19. *Corte di Cassazione (criminal), 29 April 2009 No 17913* 775

In a case of extradition governed by international treaties, if the applicable convention does not require an evaluation by the requested State as to whether serious evidence of guiltiness exists, extradition shall be granted by the Italian judicial authorities based solely on the examination of the documents attached to the relevant request. Said examination shall not be limited to verifying that that the documents have been transmitted or to a merely formal control of the same, but shall be conducted with a view of ascertaining that the reasons for the requested extradition result from such documentation.

20. *Corte di Cassazione, 7 May 2009 No 10504* 776

Article 16 of the Preliminary Provisions to the Civil Code on the condition of reciprocity applies only with respect to rights of persons that are not fundamental, whereas fundamental rights such as the right to life, to safety and to health cannot be limited by said provision, since they are recognised by the Constitution and their protection shall therefore be guaranteed to each individual, regardless of his/her nationality. The aforesaid condition, as a factual requirement for the existence of the right in question, does not need to be proved if the counterparty did not timely challenge its fulfilment pursuant to Article 167 of the Code of Civil Procedure.

21. *Corte di Cassazione (plenary session), order 18 May 2009 No 11398* 125

The presumption set forth by Article 3(1) of EC Regulation No 1346/2000 of 29 May 2000, according to which the centre of main interests of a company coincides with the place where its registered office is located, shall be deemed rebutted if no business activity is carried out at the new registered office, and the centre of the directional, administrative and organisational activities of the company has not been transferred to said new office.

Pursuant to Article 3(1) of EC Regulation No 1346/2000, Italian courts have jurisdiction to declare the bankruptcy of a company that – even if it has transferred its registered office to another Member State prior to the filing of the bankruptcy petition – has, however, maintained its centre of main interests in Italy.

22. *Corte di Cassazione (plenary session), 19 May 2009 No 11529* 443

Pursuant to Article II of the New York Convention of 10 June 1958 on the

Recognition and Enforcement of Foreign Arbitral Awards, an arbitral clause through which the parties refer the resolution of a dispute to foreign arbitration is valid only if agreed upon in writing. Article 4(2) of Law of 31 May 1995 No 218 is irrelevant for the present purpose, since – apart from its different scope of application – said provision requires that a clause derogating from Italian jurisdiction be evidenced in writing, but does not exclude the application of any other rule that imposes the written form for the validity of such clause.

The requirement of written form laid down by Article II of the 1958 New York Convention is not satisfied if an agreement contains a generic reference to general terms and conditions that include an arbitral clause, without express reference to said clause (so-called reference *per relationem imperfectam*).

23. *Corte di Cassazione (plenary session), order 19 May 2009 No 11532* 128

Pursuant to Article 27 of EC Regulation No 44/2001 of 22 December 2000, Italian courts do not have jurisdiction over an action for damages having the same object as an action seeking declaratory relief aimed at ascertaining that no liability exists (*domanda di accertamento negativo*), previously brought before German courts by the defendant in the Italian proceedings.

Pursuant to Article 5(3) of EC Regulation No 44/2001, Italian courts do not have jurisdiction over an action for damages brought by the heirs of an Italian citizen against the legal representative of the latter, who has not accepted the office of administrator of the deceased's assets (*esecutore testamentario*) but has disposed of the deceased's real estate. In fact, both the place of the event giving rise to the damage and the place of the damage are located exclusively in Germany and Austria since the real estate is located there, the deceased was resident in Germany, and the bank that received the proceeds of the sale has its seat in Austria.

Pursuant to Article 5(1)(a) of EC Regulation No 44/2001, Italian courts do not have jurisdiction over an action brought by the heirs of an Italian citizen to ascertain that a loan agreement entered into by the deceased with an Austrian bank is null and void, since, according to said provision, the obligation that is relevant for the purpose of determining the place of performance is the main obligation, i.e., with reference to a loan agreement, the obligation to deliver the loan amount to the borrower, and said obligation should not have been performed in Italy. Nor does Article 5(3) of said Regulation apply since the disclosure obligation that has been breached is contractual in nature, and therefore cannot give rise to tortious liability.

In a case concerning a loan agreement entered into by a consumer domiciled in Austria with an Austrian bank, Italian courts do not have jurisdiction pursuant to Articles 15 *et seq.* of EC Regulation No 44/2001 over an action brought by the heirs of the consumer – who are domiciled in Italy – against the bank. In fact, even though the State where the plaintiff-consumer is domiciled shall be identified at the time of lodging of the statement of claim and therefore by reference to the domicile of the heirs, and not to that of the deceased, in order for the provisions on special jurisdiction to apply, the person who pursues professional activities shall direct said activities to the Member State where the consumer is domiciled or to several States including that Member State.

Article 22 of EC Regulation No 44/2001 does not apply to an action for nullity of a declaration of destination (*dichiarazione di destinazione*) of a general mortgage (*ipoteca astratta*) granted over real estate located in Germany in favour of the lender, an Austrian bank, since *in rem* security is excluded from the scope

of application of said provision. On the contrary, Article 5(1)(b) of said Regulation applies. According to this provision, Italian courts do not have jurisdiction since the mortgage is ancillary to the loan agreement, in which the characteristic obligation, i.e. the payment of the loan amount, shall be performed in Austria.

Pursuant to Article 50 of Law of 31 May 1995 No 218, Italian courts have jurisdiction over the actions for reduction (*domande di riduzione*) of the donations made by the deceased, an Italian citizen, to the woman living with him, an Austrian citizen resident in Austria.

24. *Corte di Cassazione (plenary session), order 26 May 2009 No 12105* 136

Pursuant to the combined provision of Article 28 of the Warsaw Convention of 12 October 1929 and of Article 24 of EC Regulation No 44/2001 of 22 December 2000, Italian courts have jurisdiction over an action on a guarantee brought by the defendant, an Italian company, against a French company in relation to a contract of international carriage by air, if the French company has entered an appearance and has objected only that the court seised is not the proper venue, without pleading the lack of jurisdiction of Italian courts.

25. *Gorizia Tribunal, order 26 May 2009* 138

In a case governed by an agreement conferring jurisdiction to Swiss courts, Italian courts do not have jurisdiction to issue orders on technical investigation (*accertamento tecnico*), judicial inspection (*ispezione giudiziale*) and pre-trial technical advice for the settlement of a dispute (*consulenza tecnica preventiva ai fini della composizione della lite*) pursuant to Articles 696 and 696-*bis* of the Code of Civil Procedure, since the purposes of said orders are not compatible with either the derogation of the Italian jurisdiction or the exercise of jurisdiction to grant provisional measures pursuant to Article 24 of the Lugano Convention of 16 September 1988.

26. *Corte di Cassazione, 5 June 2009 No 13087* 140

The ascertainment of the contents of foreign law – which shall be carried out by the seised court of its own motion pursuant to Article 14 of Law of 31 May 1995 No 218 – does not exempt the interested party from the burden of alleging, before the court of the merits, the factual elements necessary to identify the conflict-of-law criteria based on which the applicable law shall be determined.

In a dispute brought by an Italian employee working at the employer's premises in Germany against his employer concerning his dismissal, where the plaintiff has previously invoked the exclusive application of Italian law both in the interim proceedings and in the proceedings on the merits, instead of alleging the factual elements relevant under Article 6 of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations, referred to by Article 57 of Law of 31 May 1995 No 218 (first of all as to whether any choice of the applicable law has been made by the parties), the plaintiff is not entitled to request the application of German law for the first time before the *Corte di Cassazione*. In fact, such request shall be considered inadmissible since its the solution of the question raised by it depends on a factual investigation that should be carried out by the court of the merits in compliance with the *audi alteram partem* principle.

27. *Corte di Cassazione, 24 June 2009 No 14777* 717

Following the adoption of Law of 31 May 2005 No 218, and pursuing to Article 14 of the same, the court shall acquire knowledge of the foreign law by its

own motion and using any means, even when such law is relevant for the application of the reciprocity condition laid down by Article 16 of the Preliminary Provisions to the Civil Code.

For the purpose of verifying whether the condition of reciprocity laid down by Article 16 of the Preliminary Provisions to the Civil Code is satisfied, a circular letter issued by a foreign Consulate which sets out (even if only in part) the foreign provisions relevant for said purpose and certifies the conformity thereof to the original can be used without any need for legalisation. In fact, the rules laid down by Article 33 of Presidential Decree of 28 December 2000 No 445 do not apply.

28. *Corte di Cassazione (plenary session), 1 July 2009 No 15386* 447

Pursuant to Article 30 of EC Regulation No 44/2001 of 22 December 2000, only the service or lodging of a document which is, *per se*, able to start the proceedings aimed at the issuance of an enforceable decision is relevant for the purposes of determining the court first seised. With respect to the proceedings for detailed assessment of costs provided for under English law, said document is only the "notice of commencement", pursuant to which a party summons the other party that lacking any objection the court will issue the requested enforceable order and not the "bill of costs", which is a mere note of costs that the party sends to the other to notify the amount that it deems fair in order to reach an agreement, even if the attempt to reach agreement with these modalities is expressly contemplated by English law.

Pursuant to Article 33 of EC Regulation No 44/2001, an order to pay costs for an indeterminate amount, which has been issued at the end of English proceedings, is automatically recognised in any Member State in which it is invoked, without any special procedure being required. Pursuant to Article 2 of EC Regulation No 44/2001, an action for detailed assessment of costs relating to the aforesaid proceedings, which has been brought against a defendant domiciled in Italy, is admissible and subject to the jurisdiction of Italian courts. In fact, on the one hand, the foreclosure provided for by Article 91 of the Code of Civil Procedure does not apply with respect to foreign proceedings at the end of which an order to pay costs for an indeterminate amount has been issued in accordance with the procedural rules of the relevant foreign legal system, and, on the other hand, the principle whereby the procedure for detailed assessment of costs before the cost judge – which is provided for by English law – constitutes the sole procedure for the determination of said costs applies only within the English legal system.

29. *Corte di Cassazione, 6 July 2009 No 15798* 778

Based on the principles laid down by the Brussels Convention of 23 April 1970 on Travel Contracts, the tour operator shall adopt all appropriate measures to avoid damages to travellers. For said purpose, it is sufficient that its conduct is adequate, which, however, does not imply that it shall necessarily exceed the average level of diligence.

30. *Corte di Cassazione, 6 July 2009 No 15800* 779

The provisions laid down by the Brussels Convention of 23 April 1970 on Travel Contracts grant to travellers a minimum and indefectible protection, which is in addition to (rather than in substitution for) the protection granted by the general principles of law on breach of contracts. Therefore, the compensation provided for by Article 13 of said Convention in favour of a traveller in case of liability of the tour operator or of the travel intermediary is

due irrespective of the requirements laid down by the Civil Code for the termination of the travel contract.

31. *Corte di Cassazione, 23 July 2009 No 17291* 142

Pursuant to Article 839(2) of the Code of Civil Procedure, the filing of the original or of an authenticated copy of the arbitration agreement simultaneously with the application for recognition of the arbitral award constitutes a procedural requirement (*presupposto processuale*) that, as such, shall be satisfied at the beginning of the proceedings, rather than a condition for bringing the action (*condizione dell'azione*), which may be fulfilled during the course of the proceedings.

32. *Corte di Cassazione (criminal), 6 August 2009 No 32332* 781

As far as the European arrest warrant is concerned, the benefit of general pardon (*indulto*) applies in all cases in which the enforcement of a sentence is subject to Italian law. Therefore, said benefit applies also in the case contemplated by Article 18(r) of Law of 22 April 2005 No 69 implementing EC Framework Decision No 2002/584/JHA , i.e. where the sentence issued in another EU Member State against an Italian citizen is to be served in Italy, following the refusal of Italian authorities to surrender said person.

33. *Corte di Cassazione (plenary session), order 9 September 2009 No 19393* 782

The legal position of a foreigner requesting the issuance of a residence permit for humanitarian reasons is to be qualified as a legal right (*diritto soggettivo*) to be counted among fundamental rights. Therefore, the protection granted by Article 2 of the Constitution bars that said position can be downgraded to the status of legitimate interests (*interessi legittimi*) as a consequence of discretionary assessments to be made by administrative authorities. In fact, said authorities can only be entrusted with the power to ascertain the factual requirements that allow the humanitarian protection, i.e. to exercise a merely technical discretion while jurisdiction over the request aimed at ascertaining the existence of the right to humanitarian protection is for the ordinary courts.

34. *Corte di Cassazione (plenary session), order 10 September 2009 No 19445* 458

Pursuant to Article 5 No 1 of the Brussels Convention of 27 September 1968, Italian courts have jurisdiction over an action for payment both of certain receivables brought against the original debtor by a person that is the assignee of said receivables by virtue of a composition with creditors (*assunzione di un concordato*) pursuant to the so-called Marzano Law and of other transfers of receivables, provided that the assignee is domiciled in Italy. In fact, the relevant payment obligation – which is the obligation in question within the meaning of the aforesaid provision – shall be performed in Italy even if the domicile of the assignor is located elsewhere, provided that this does not cause excessive inconvenience to the debtor.

35. *Corte di Cassazione (plenary session), order 10 September 2009 No 19447* 147

Pursuant to Article 23(1)(a) of EC Regulation No 44/2001 of 22 December 2000, Italian courts have jurisdiction over an action for declaratory relief brought in order to ascertain that nothing is due by an Italian company to an Austrian company, even if the relevant contract has been entered into by tacit acceptance through performance of the same. In fact, Italian jurisdiction is based on a valid clause conferring jurisdiction to Italian courts included in supply orders previously sent by the Italian company during a significant period of time and

accepted and signed by the Austrian company, also by electronic means, which are relevant pursuant to Article 23(2) of said Regulation, in the absence of any element that may justify a presumption of a contrary choice of any party.

36. *Corte di Cassazione, 15 September 2009 No 19839* 785

Pursuant to Article 16(1) of the Treaty on Judicial Assistance and the Recognition and Enforcement of Judgments in Civil Matters between Italy and Brazil, entered into in Rome on 17 October 1989, the service of an appeal to the *Corte di Cassazione* is not proved lacking a receipt signed by the person receiving the document or a certification of the competent authorities, in both cases drafted in accordance with the formal requirements of the requested State. If the person to whom the document shall be served refuses to take delivery of the same, proof of service is given through a declaration signed by the bailiff (*ufficiale giudiziario*) stating the place and date of delivery and the identity of the person to whom the document has been delivered. If the document to be served is transmitted in two copies, proof of actual receipt or service can be given by stating the above mentioned elements on the copy of the document which is returned to the bailiff.

37. *Mantova Tribunal, 24 September 2009* 149

A summary injunction (*decreto ingiuntivo*) that has not been declared enforceable pursuant to Article 647 of the Code of Civil Procedure and has not been notified to the debtor in accordance with the minimum rules set forth by Articles 13 and 14 of EC Regulation No 805/2004 of 21 April 2004 cannot be certified as a European enforcement order pursuant to Article 6 of the same Regulation.

38. *Milan Court of Appeal, 30 September 2009* 786

A Brazilian decision concerning maintenance obligations in favour of a child cannot be recognised in Italy if – pursuant to Article 18(b) of the Treaty on Judicial Assistance and the Recognition and Enforcement of Judgments in Civil Matters entered into in Rome on 17 October 1989 – the document instituting the proceedings has been served to the defendant, a resident of Italy, beyond the term for entering a prompt appearance in the proceedings.

39. *Corte di Cassazione (plenary session), order 1 October 2009 No 21053* 462

For the purposes of determining jurisdiction in matters relating to maintenance obligations pursuant to Article 5 No 2 of the Brussels Convention of 27 September 1968, the expression "matters relating to maintenance" shall be interpreted autonomously and in a broad manner, so as to include maintenance allowances (*assegni di mantenimento*).

Pursuant to Article 5 No 2 of the 1968 Brussels Convention – which is referred to by Article 3(2) of Law of 31 May 1995 No 218 – Italian courts have jurisdiction over a claim for payment of maintenance allowances that the deceased ex-spouse failed to pay, which is brought against the second spouse of the deceased, a resident of the United States as such provision applies to both obligations of maintenance (*mantenimento*) and obligations of support (*alimenti*) provided for by Italian law.

Pursuant to Article 4 [*actually Article 11*] of Law No 218/1995, jurisdiction can be validly contested if it is pleaded on appearance, regardless of whether said pleading has been tardily lodged.

40. *Corte di Cassazione (plenary session), order 5 October 2009 No 21191* 150

Pursuant to Article 5(1)(b), first part of EC Regulation No 44/2001 of 22

December 2000, the main place of delivery in an international sale of goods is that where the obligation that qualifies as characteristic based on economic criteria shall be performed. Said place of delivery shall be the place where the goods are finally delivered, i.e. where the goods are physically (as opposed to legally) delivered to the buyer.

Italian courts do not have jurisdiction over a dispute between an Italian company and a German company if the goods being sold should have been delivered in Germany.

41. *Corte di Cassazione, 16 October 2009 No 22003* 463

Pursuant to Article 21(1) of EC Regulation No 2201/2003 of 27 November 2003, a German judgment on legal separation that is no longer subject to appeal according to the law of the State where it has been issued can be recognised in the other Member States without any proceedings.

Pursuant to Article 28(1) of EC Regulation No 2201/2003, the ancillary orders relating to children included in a German judgment on legal separation shall be considered final and no longer subject to appeal under German law even when such judgment has been appealed to the German Constitutional Court for violation of fundamental rights. Accordingly, said judgment can be enforced in Italy after it has been declared enforceable in Germany on the application of the interested party, provided that it has been served [to the other party].

Pursuant to Article 20(2) of EC Regulation No 2201/2003, the provisional measures for the protection of children issued, pursuant to Article 20(1), by the courts of a Member State different from the Member State whose courts have jurisdiction as to the substance of the matter shall cease to apply when the courts of the latter Member State have taken the final measures they consider appropriate.

A German final decision on legal separation, which includes ancillary orders relating to children, cannot be compared to, and therefore cannot be in contrast with – for the purpose of Articles 22(c) and 23(e) of EC Regulation No 2201/2003 – an Italian non-final judgment on legal separation and with the provisional measures issued in the relevant separation proceedings pending in Italy.

42. *Corte di Cassazione (plenary session), 21 October 2009 No 22236* 469

Since an arbitral award has the nature of a private agreement (*atto di autonomia privata*) implying the waiver of any kind of jurisdiction whether Italian or foreign, the ascertainment of the validity of an arbitral clause providing for foreign arbitration is a question of merits, in respect of which the court having jurisdiction according to the ordinary criteria is competent. Said ascertainment affects the possibility to lodge the claim on the merits (*proponibilità della domanda di merito*).

Italian courts have jurisdiction over an application for pre-trial technical investigation (*accertamento tecnico preventivo*) concerning a dispute that is not subject to the jurisdiction of Italian courts due to an arbitration agreement providing for foreign arbitration. In fact, the lodging of said application implies the waiver of the plea aimed at contesting Italian jurisdiction on the merits, in accordance with the principles arising from Article 4 of Law of 31 May 1995 No 218 on the acceptance of Italian jurisdiction.

43. *Corte di Cassazione (plenary session), 21 October 2009 No 22238* 474

As far as decisions on parental responsibility are concerned, the relocation abroad or the failure to procure the return in Italy of the children of a separated couple does not qualify as wrongful removal if it has been carried out by the parent having custody over the children. Accordingly, the Hague Convention of

25 October 1980 on the Civil Aspects of International Child Abduction does not apply.

Pursuant to Article 9 of EC Regulation No 2201/2003 of 27 November 2003, Italian courts have jurisdiction over an action concerning the rights of access to the children that has been brought within three months from the lawful removal abroad of said children.

Pursuant to Article 10 of EC Regulation No 2201/2003, Italian courts have jurisdiction over matters relating to children who have been brought to Finland by the parent having custody over them, in breach of the separation agreement whereby the spouses excluded that the place of residence of the children – which was agreed to be in Italy – could be changed. Such jurisdiction shall be granted until more than a year has lapsed since the date on which the parent entitled to request the restoration of the rights of access or the return of the children has had knowledge that their residence had been moved abroad and has acted to enforce his/her right.

Pursuant to Article 6 of the Strasbourg Convention of 25 January 1996 on the Exercise of Children's Rights and to Article 155-*sexies* of the Civil Code, a child shall be heard in the proceedings concerning his/her custody, unless this would be manifestly contrary to his/her best interests or he/she does not have sufficient understanding. The absence of the latter requirement shall in any case be evaluated and reasoned in order to justify the fact that the child has not been heard.

44. *Corte di Cassazione (plenary session), order 21 October 2009 No 22239* 481

The reference made by Article 3(2) of Law of 31 May 1995 No 218 to the Brussels Convention of 27 September 1968 applies only with respect to said Convention and not to EC Regulation No 44/2001 of 22 December 2000.

Pursuant to Article 5 No 1 of the 1968 Brussels Convention – which is referred to by Article 3(2) of Law No 218 of 1995 – Italian courts have jurisdiction over an action for payment of the residual price due under a sale and purchase agreement and for damages arising from the breach of the same, brought by the seller, an Italian company, against the buyer, a company with registered office in the Principality of Monaco. In fact, pursuant to Article 57(1) of the Vienna Convention of 11 April 1980, the place of performance of such payment obligation shall be the place of business of the seller which is located in Italy. The above applies even if said obligation is being challenged, since the existence of jurisdiction over a foreigner shall be ascertained based on the allegations made in the statement of claim and consistently with the well-established interpretation of Article 1182(3) of the Civil Code.

45. *Milan Court of Appeal, 27 October 2009* 722

The courts of the Member State in which a company has its seat (i.e., in the present case, Luxembourg) do not have exclusive jurisdiction, pursuant to Article 22 No 2 of EC Regulation No 44/2001 of 22 December 2000, over an action aimed at declaring unenforceable *vis-à-vis* the company's creditors – and, as a consequence, to revoke – the deeds whereby the shareholders of said company have contributed to the latter the ownership of certain real estate located in Italy, since said action does not concern the validity, the nullity or the dissolution of said company. As a consequence Italian courts have jurisdiction if the shareholders named as defendants are domiciled in Italy.

Pursuant to Article 25 of Law of 31 May 1995 No 218, the law applicable to the relevant action paulienne (*azione revocatoria*) is not to be determined with reference to the law of incorporation of the company but to the law applicable to the contract pursuant to which the ownership over the real estate has been

transferred and which is eventually the object of the possible revocation. Therefore, pursuant to Article 4(3) of the Rome Convention of 19 June 1980, the applicable law is the law of the country where the real estate is situated (i.e., in the present case, Italy).

46. *Modena Tribunal, decree 5 November 2009* 985

Pursuant to Article 29(2) of Legislative Decree of 25 July 1998 No 286, the kafalah known by Islamic law may constitute the pre-condition for family reunion of a Moroccan child to an Italian and Moroccan citizen residing in Italy.

47. *Corte di Cassazione (criminal), 26 November 2009 No 45513* 788

Pursuant to Article 10 of the Strasbourg Convention of 21 March 1983 on the Transfer of Sentenced Persons, the enforcement of a sentence issued by the judicial authorities of another State does not prevent the application in Italy of any provision in favour of the sentenced person that is in force in the sentencing State, unless the sentenced person has waived this possibility.

48. *Corte di Cassazione (criminal), 1 December 2009 No 46223* 789

As far as the European arrest warrant is concerned, once the foreign authorities have declared that pursuant to national provisions the sentence against the person to be surrendered has become enforceable, the requested State's authorities cannot re-examine the legal requirements on the basis of which said decision has been rendered in the sentencing State. Furthermore, any evaluation as to how the relevant evidence has been secured – with reference to the principle of fair trial and to compliance with the minimum rights of the person being sentenced – is also beyond the authority of national courts, save for the cases provided for by Article 18 of Law of 22 April 2005 No 69, implementing the EC Framework Decision No 2002/584 on the European arrest warrant.

49. *Corte di Cassazione (criminal), 2 December 2009 No 46444* 1031

The conditions for granting a request for extradition of a mother whose children are less than three years old are satisfied if the requesting State – which is not a Member State of the European Union, and to which, therefore, the special provisions on the European arrest warrant do not apply – provides means for protection in the execution of custodial sentences which, even if not similar to those provided for by Italian law, are nevertheless adequate to protect the psychological and physical integrity of the children as well as of the parent.

50. *Corte di Cassazione, 15 December 2009 No 26252* 1034

In a case where a foreigner is expelled, after his request for a residence permit based on the recognition of the status of refugee has been rejected by the Central Commission for the Recognition of the Status of Refugee because of his violating the order of the local head of police administration (*questore*) to leave the national territory, the failure to appeal against the decision of the Central Commission before the competent Tribunal forecloses the possibility to allege the same reasons when challenging the expulsion order, unless the grounds for such challenge consist in the allegation of a new and different situation of persecution, which was not considered by the competent authority and is alleged as a supervening reason triggering the prohibition from expulsion pursuant to Article 19 of Legislative Decree of 25 July 1998 No 286.

51. *Corte di Cassazione, 15 December 2009 No 26253* 1035

Pursuant to Articles 2 through 5 of Presidential Decree of 16 September

2004 No 303, a foreigner who has entered Italy illegally and has been detained for investigation at the airport of arrival is entitled to file a request for the recognition of the status of political refugee and to remain in Italy until completion of the relevant procedure. Accordingly, the refusal by the airport police to take delivery of said request during the carrying out of the first verifications shall be considered illegitimate, and the courts shall cooperate in the investigation aimed at ascertaining the relevant facts.

52. *Rome Tribunal, order 16 December 2009* 728

In a case concerning the illegal publication on an Internet website of parts of a television programme in violation of the exclusive rights of third parties to use and exploit economically said programme, the harmful event within the meaning of Article 5 No 3 of the Brussels Convention of 27 September 1968, does not occur in the place where the server of the hosting providers is located and, therefore, where the programme in question has been uploaded on said server, but rather in the place where its illegal publication may violate the aforesaid rights to use and exploit economically the programme, i.e. in the territory in which the holder of said exclusive rights exercise the same.

Therefore, pursuant to Article 5 No 3 of the 1968 Brussels Convention, Italian courts have jurisdiction to issue an interim injunction against hosting providers not domiciled in Italy in order to prohibit the violation of the exclusive rights to use and exploit economically a television programme granted to the plaintiff for the Italian territory and exercised by broadcasting such programme via television and via the Internet.

53. *Milan Tribunal, decree 17 December 2009* 987

Pursuant to its Article 1(2), EC Regulation No 1346/2000 of 29 May 2000 does not apply to investment undertakings, which – based on Directive 93/22/EEC of 10 May 1993 on investment services in the securities field and on Directive 2004/39/EC of 21 April 2004 on markets in financial instruments – include undertakings providing investment advice.

Based on the principle of control by the Member State of origin, insolvency proceedings opened against an investment undertaking in the Member State in which said undertaking has its seat (i.e., in this case, an administration procedure opened in England) is automatically effective in Italy.

54. *Corte di Cassazione (plenary session), order 18 December 2009 No 26643* 485

Pursuant to Article 6 No 2 of the Lugano Convention of 16 September 1988, a guarantor may be sued, as a rule, in the courts seised of the original proceedings, even if said courts lack jurisdiction over the action on guarantee. For the above purpose, the distinction between "typical guarantees" (*garanzie proprie*) and "atypical guarantees" (*garanzie improprie*) is irrelevant, but it is necessary that the person starting the action claims the existence of a guarantee given by the guarantor and requests that a decision be issued in its favour and against said guarantor. Accordingly, Italian courts do not have jurisdiction if the plaintiff in the original proceedings has brought an action on guarantee based on a guarantee relationship between the defendant in the original proceedings and the third party, rather than between itself and the third party.

55. *Corte di Cassazione (criminal), 29 December 2009 No 49706* 1032

After the entry into force of the Agreement of 26 October 2004 between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and

development of the Schengen acquis, Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 – which introduces the *ne bis in idem* principle under Community law – shall be applied also in relation to the Swiss Confederation.

56. *Bologna Tribunal, 11 January 2010* 992

A claim for the damages suffered by a relative who has been arrested in Italy, deported to Germany and forced to work there during World War II is not inadmissible (*improponibile)* and/or barred to further proceed (*improcedibile*) pursuant to Article 77(4) of the Peace Treaty of 10 February 1947 and of Article 2(1) of the Bonn Agreement of 2 June 1961, since said provisions apply only to the disputes that they consider pending.

Since, pursuant to Article 62(1), second sentence of Law of 31 May 1995 No 218, the plaintiffs have opted to apply the law of the place in which the event that caused the damages occurred (i.e. the place in which the victim has been arrested), the statute of limitation of the civil tort shall be determined based on Article 2947(3) of the Civil Code, pursuant to which such tort is barred upon expiration of the longer statute of limitation of the corresponding crime.

In a case where a tort qualifies as a war crime such crime is not time-barred pursuant to customary international law, which is referred to by Article 10(1) of the Constitution.

57. *Corte di Cassazione, 12 January 2010 No 253* 488

The use of the term "appeal" in Article 43 of EC Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters does not imply that the action against the decree of the Court of Appeal ruling upon an application for a declaration of enforceability of a foreign judgment shall be brought in accordance with a specific procedural scheme. In fact, the modalities for lodging said appeal are governed by national law. As far as the Italian legal system is concerned, said appeal shall be lodged through a summons to appear at a fixed hearing (*citazione a udienza fissa*), given that it institutes ordinary proceedings (*giudizio di cognizione*).

58. *Lamezia Terme Tribunal, decree 25 January 2010* 734

With reference to the attribution of family name, the prohibition to discriminate on grounds of nationality – which has been laid down by the EC Court of Justice in its decision in the case *Garcia Avello* – constitutes an expression of the constitutional principle of protection of fundamental rights, and therefore applies even in the case of a child holding both the Italian and the Brazilian citizenship. Accordingly, said child has a right to be given a composite family name, i.e. both his father's and his mother's family names.

59. *Corte di Cassazione, 28 January 2010 No 1908* 790

The kafalah contemplated by Islamic law – as regulated by the laws of Morocco – may constitute the pre-condition for family reunion pursuant to Article 29(2) of Legislative Decree of 25 July 1998 No 286.

60. *Corte di Cassazione, 29 January 2010 No 2041* 1037

Pursuant to Article 10 of the Constitution, the time in which a building has been destined for use as a diplomatic seat of a foreign State shall be ascertained for the purposes of determining whether said building can be subject to seizure (*pignoramento*).

61. *Corte di Cassazione (plenary session), order 1 February 2010 No 2224* 738

The fact that a person who has granted a power of attorney *ad litem* lacks the relevant representative powers cannot be objected for the first time during the special proceedings for a preliminary ruling on jurisdiction. In fact in any case, the legal capacity to sue or be sued (*capacità processuale*) of a foreign entity shall be ascertained based on the relevant foreign national law pursuant to Article 25 of Law No 218 of 1995, and the party raising said objection has the burden of proof with respect thereto.

The fact that a party raises a defence on the merits in an opposition against a summary injunction does not imply its acceptance of the Italian jurisdiction, if said defence is subject to the rejection of the exception of lack of jurisdiction.

A clause conferring jurisdiction to English courts – which is contained in a framework confidentiality agreement entered into between an Italian company and English company – is not relevant for the purposes of determining whether Italian courts have jurisdiction pursuant to Article 23 of EC Regulation No 44/2001 of 22 December 2000 over a dispute concerning the breach of the obligation to pay the price under two working orders entered into between the same companies. In fact, the existence of a unitary procedural relationship shall be excluded due to the lack of any express cross-reference between the framework agreement and the two working orders. Similarly, the possible functional link between said agreement and the two orders is not relevant, since said link does not even constitute a criterion for special jurisdiction pursuant to Articles 6 and 7 of said EC Regulation.

Pursuant to Articles 2 and 60 of EC Regulation No 44/2001, Italian courts do not have jurisdiction over an action for breach of the obligation to pay the price under two working orders, which has been brought by an Italian company against an English company. In fact, based on what results from Article 7 of EC Regulation No 2157/2001 of 8 October 2001 on the Statute for a European Company and from Article 3 of EC Regulation No 1346/2000 of 29 May 2000, the statutory seat of the company named as defendant is located in the United Kingdom, and it shall be presumed, absent any proof to the contrary, that the other two factual elements mentioned by Article 60 for the purpose of determining the domicile of a company (i.e. the central administration and principal place of business) are located in the same State. In this respect, the circumstance that a branch of said company is situated in Italy is irrelevant , even if a legal representative with general powers is based at said branch. For the purpose of the aforesaid contrary proof, the court seised shall apply, pursuant to Article 59 of said EC Regulation, the law applicable according to its own conflict-of-law rules, and therefore it shall refer to Article 46 of the Civil Code.

Pursuant to Article 5(1)(b), second hyphen of EC Regulation No 44/2001, Italian courts do not have jurisdiction over an action for breach of the obligation to pay the price under two working orders, which has been brought by an Italian company against an English company, since the relevant contractual relationship – even though it does not qualify as a service contract (*appalto di servizi*) under the relevant provisions of the Civil Code – falls within the autonomous concept of provision of services. Therefore, regard shall be made to the place where the service has been rendered, i.e., in the present case, Austria.

62. *Corte di Cassazione, 11 February 2010 No 3098* 748

The fulfilment of the condition of reciprocity laid down by Article 16 of the Preliminary Provisions to the Civil Code is a factual requirement for the existence of the right of a foreigner, and therefore, if challenged, shall be

proven by the plaintiff. Accordingly, the fulfilment of said condition does not have an impact on jurisdiction.

The proof of the foreign law for the purpose of the condition of reciprocity may be given also through an official deed issued by an authority of the foreign State. In said case, it is not necessary to allege the text of the relevant law provisions.

63. *Corte di Cassazione (plenary session), order 17 February 2010 No 3680* 750

Pursuant to Article 3(1)(a) of EC Regulation No 2201/2003 of 27 November 2003, Italian courts have jurisdiction over an action for legal separation brought by a wife who has been residing in Italy for more than one year against her husband residing in Belgium, if such residence in Italy is effective, i.e. if it is the place where she has established in a lasting manner the permanent or habitual centre of her own interests, regardless of her registered residence (*residenza anagrafica*).

64. *Corte di Cassazione, 17 February 2010 No 3823* 995

In an action for recognition of a Tunisian judgment governed by the Convention between Italy and Tunisia of 15 November 1967, rather than by Law of 31 May 1995 No 218, the court shall verify whether – in addition to the provisions specifically laid down by said Convention – the inviolable rights of defence have been satisfied with reference to the relevant proceedings as a whole. Accordingly, the violation of a procedural rule prevents recognition of said judgment only if it infringes said rights of defence in the proceedings considered as a whole.

65. *Corte di Cassazione, 1 March 2010 No 4868* 754

Legislative Decree of 6 February 2007 No 30 – implementing Directive No 2004/37/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States – shall apply also to the entry of foreign relatives of Italian citizens in Italy.

The entry in Italy of a Moroccan child, given in custody through kafalah to an Italian citizen of Muslim religion and to his wife, is not allowed, since kafalah is not contemplated by Articles 2(1)(b) and 3(2)(a) of Legislative Decree No 30 of 2007. Furthermore, since the kafil is an Italian citizen, an extensive interpretation similar to that adopted with respect to Article 29(1) of Legislative Decree of 25 July 1998 No 286 on family reunions of non-EU citizens cannot be accepted.

66. *Corte di Cassazione (criminal), 3 March 2010 No 8609* 1038

In a case where an international convention (such as the European Convention on Extradition) applies which does not require the existence of serious evidence of guiltiness, extradition shall be granted based solely on the examination of the documents attached to the relevant request. However, said examination shall not be limited to a merely formal control of the same, but shall be conducted with a view of ascertaining whether the reasons for the requested extradition result from such documentation in the light of the procedural rules of the requesting State.

67. *Brescia Juvenile Court, 12 March 2010* 760

Pursuant to Article 44(d) of Law of 4 May 1983 No 184, the adoption under special circumstances of a child, given in custody through kafalah to Italian spouses of Muslim religion, cannot be declared, due to the different legal consequences arising from said adoption and kafalah, respectively.

Pursuant to Article 40 of Law of 31 May 1995 No 218, Italian courts have jurisdiction over a request for adoption under special circumstances of a foreign child made by two Italian spouses.

A foreign decision of kafalah can be recognised in Italy pursuant to Article 66 of Law No 218 of 1995 and it can provide the legal basis for family reunions under Article 29(2) of Legislative Decree of 25 July 1998 No 286.

68. *Constitutional Court, 15 April 2010 No 138* 979

The question of constitutional legitimacy of Articles 93, 96, 98, 107, 108, 143, 143-*bis* and 156-*bis* of the Civil Code for violation of Articles 2, 3, 29 and 117(1) of the Constitution – in relation to the refusal by the registrar general of births, deaths and marriages (*ufficiale di stato civile*) to publish the banns for a marriage between persons of the same sex due to the fact that Italian law does not contemplate such a marriage and to the contrast with the fundamental principles of public policy – is inadmissible and unfounded. In fact, under the Italian legal system marriage is based on the fundamental requirement of sex diversity and Article 117(1) of the Constitution is not violated in relation to the constraints arising from EU law and international obligations – with particular reference to Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 9 of the Charter of Fundamental Rights of the European Union – since said provisions recognise the right to marry and to found a family to persons of different sex, but refer to national laws for the conditions for the exercise of such rights.

69. *Milan Court of Appeal, 26 April 2010* 764

Pursuant to Article 27 No 2 of the Brussels Convention of 27 September 1968, a term of five months for appearance of the defendant seems to be more than sufficient. This consideration is further confirmed by the current technological means of communication, which make it extremely easy to find an attorney abroad and to transmit documents.

70. *Corte di Cassazione (plenary session), order 27 April 2010 No 9965* 1001

Pursuant to Article 5 No 1(a) of EC Regulation No 44/2001 of 22 December 2000, Italian courts have jurisdiction over a dispute relating to a payment under a contractual obligation if – on the basis of the substantive law that applies in accordance with the conflict-of-law rules of the court seised – the place of performance of such obligation is located in Italy, even if the existence or enforceability of the contract on which the dispute is based has been challenged.

The obligation of the owner of a building located in Italy to pay the fees due to an architect for the design of the renovation of said building following to a contract that has been negotiated, entered into and performed in Italy is governed by Italian law as the law of the country with which the contract is most closely connected pursuant to Article 4 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations. Pursuant to Article 1182(3) of the Civil Code, the place of performance of said obligation is the domicile of the creditor at the time in which said fees have become due and payable.

71. *Turin Tribunal, 20 May 2010* 1006

Pursuant to Article 62(1), second sentence of Law of 31 May 1995 No 218, Italian law applies to a dispute arising from a claim for the damages suffered by an Italian ex-soldier who has been arrested in Italy, interned in Germany and forced to work there during World War II, if the plaintiff opts for the law of the State where the event – i.e. the arrest – occurred.

The relevant claim for damages brought against Germany is not

inadmissible (*improponibile)* and/or barred to further proceed (*improcedibile*) pursuant to Article 77(4) of the Peace Treaty of 10 February 1947 or of Article 2(1) of the Bonn Agreement of 2 June 1961, and therefore Italy is not required to indemnify Germany pursuant to Article 2(2) of said Agreement.

Article 10(1) of the Constitution refers to the provision of customary international law which provides that "crimes against humanity" and "war crimes" are imprescriptible; such a provision applies retroactively – pursuant to, *inter alia*, Article 7(2) of the 1950 European Convention on Human Rights – to events occurred during World War II and its effects extend also to the related civil tort, without thus rising any issue of compatibility with Article 25(2) of the Constitution.

The assessment of economic damages shall necessarily be made according to equitable criteria, on the basis of the present value of the average salary of a manual worker at that time, reduced by the amount necessary to maintain war prisoners. Non-economic damages shall also be assessed on an equitable basis, taking into account the length of the detention and the extent to which the rights and freedoms of the plaintiff have been prejudiced.

72. *Genoa Court of Appeal, 29 May 2010* 1019

A decision of a Tribunal ruling that the plaintiff lacks standing (*legittimazione attiva*) cannot implicitly become *res iudicata* (*giudicato implicito*) as to the question of jurisdiction, if it results from said decision that the reasoning of the Tribunal was limited to the question of standing. Therefore, pursuant to Article 11 of Law of 31 May 1995 No 218, the defendant who has entered an appearance can object the lack of jurisdiction of Italian courts in any stage or instance of the proceedings.

Pursuant to Article 4 of Law No 218 of 1995, lack of jurisdiction shall be contested by the defendant in his/her first pleading, regardless of whether the appearance has been entered timely or not. Therefore, the failure to enter an appearance within the term laid down by Article 166 of the Code of Civil Procedure does not imply the forfeiture of said objection.

73. *Corte di Cassazione (plenary session), 1 June 2010 No 13332* 1024

A decree of eligibility for adoption granted by the Juvenile Court pursuant to Article 30 of Law of 4 May 1983 No 184, as subsequently amended, cannot be issued on the basis of any reference to the race of the child to be adopted, and cannot contain any indication as to race of said child, since this would be in contrast with the fundamental rights of the child as recognised by various constitutional and international provisions, which form a complete set of rules. If any similar discriminatory statement is made by the requesting couple, it shall be evaluated by the lower court in the context of the assessment of the eligibility of said couple to international adoption and of the best interest of the child.

EU CASE-LAW

Consumer protection: 5, 6, 7, 14, 18, 19, 21.

Contracts: 2, 3, 15.

EC Regulation No 1346/2000: 10, 22.

EC Regulation No 44/2001: 9, 10, 11, 25, 28, 30, 31.

EC Regulation No 2201/2003: 8, 20.

EU Citizenship: 27.

Freedom of establishment: 3, 13.

Freedom of movement of capitals: 13.

Freedom to provide services: 12, 23.

Judicial proceedings before the Court of Justice: 17, 32.

Liability of Member States: 24.

Prohibition of discrimination: 1.

Successions: 29.

Treaties and general international rules: 15, 16, 26, 30.

1. *Court of Justice, 16 December 2008 case C-524/06* 201

Article 12(1) EC must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.

2. *Court of First Instance, 17 December 2008 case T-174/08* 202

In relation to a company's obligation to refund the sums unduly obtained from the Commission on the basis of a contract granting Community financial assistance, late-payment interest is due – even though it was not awarded in the contract – if it is provided under the law applicable to the contract.- Said law determines also the interest rate, unless the Commission claims the application of a lower rate.

3. *Court of Justice, 22 December 2008 case C-161/07* 544

The national legislation requiring only nationals of the eight new Member States, being members of a partnership or having minority holdings in a limited liability company, to prove that they will not be working as employees by presenting the certificate provided by an office of the labour market or a work permit exemption certificate, represents a not justified restrictive measure on the right of establishment as set out in Article 43 EC.

4. *Court of Justice, 22 December 2008 case C-549/07* 204

The concept of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation (EC) No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, excluding the passengers' right to compensation in the event of cancellation, does not cover a technical problem in an aircraft which leads to the cancellation of a flight, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.

5. *Court of Justice, 23 April 2009 joint cases C-261/07 and C-299/07* 547

Since Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market realizes a complete

harmonization at EU level, it must be interpreted as precluding any national legislation which imposes a general prohibition of commercial practices not included in the exhaustive list of Annex I of the Directive, even if such measures are designed to ensure a higher level of consumer protection.

6. *Court of Justice, 23 April 2009 case C-509/07* 549

As Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit prescribes only minimal harmonisation, it allows Member States to lay down rules which are more favourable to consumers. Therefore, where the supplier is in breach of contract, the customer has an action against the grantor of the credit in order to obtain the termination of the credit agreement and the subsequent reimbursement of the sums already paid even lacking the condition of exclusivity between the supplier and the grantor of credit envisaged by Article 11(2) of the above mentioned Directive, as long as such action is recognized by the law applicable to the contract.

7. *Court of Justice, 4 June 2009 case C-243/08* 170

Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand. The national court is required to examine, of its own motion, even when it is ascertaining its own territorial jurisdiction, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task and, where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that nonapplication.

It is for the national court to determine whether a contractual term, such as a term conferring jurisdiction, satisfies the criteria to be categorised as unfair within the meaning of Article 3(1) of Directive 93/13. In so doing, the national court must take account of the fact that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, may be considered to be unfair.

8. *Court of Justice, 16 July 2009 case C-168/08* 176

Where the court of the Member State addressed must verify, pursuant to Article 64(4) of Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, whether the court of the Member State of origin of a judgment would have had jurisdiction under Article 3(1)(b) of that Regulation, the latter provision precludes the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case.

Where spouses each hold the nationality of the same two Member States, Article 3(1)(b) of Regulation No 2201/2003, precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. On the contrary, the courts of those Member States of which the spouses hold the nationality have

jurisdiction under that provision and the spouses may seise the court of the Member State of their choice.

9. *Court of Justice, 16 July 2009 case C-189/08* 187

In a dispute concerning the damage caused to an undertaking by the delivery of a defective product, the words 'place where the harmful event occurred' within the meaning of Article 5(3) of Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended.

10. *Court of Justice, 10 September 2009 case C-292/08* 501

Since judgments other than those referred to in Article 25(1) of Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, – for the recognition and enforcement of which paragraph 2 of the same Article 25 requires the application of the provisions of the 1968 Brussels Convention 'provided that that Convention is applicable' – are not included in the scope of application of said Regulation, before it can be concluded that the recognition and enforcement provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters are applicable, it is necessary to determine whether such judgments fall within the material scope of Regulation No 44/2001.

Article 1(2)(b) of Regulation No 44/2001, read in conjunction with Article 7(1) of Regulation No 1346/2000, must be interpreted, account being taken of the provisions of Article 4(2)(b) of the latter Regulation, as meaning that it does not apply to an action brought by a seller based on a reservation of title against a purchaser who is insolvent, where the asset covered by the reservation of title is situated in the Member State of the opening of those proceedings at the time of opening of those proceedings against that purchaser.

11. *Court of Justice, 17 September 2009 case C-347/08* 192

The reference in Article 11(2) of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) thereof must be interpreted as meaning that a social security institution, acting as the statutory assignee of the rights of the party directly injured in a motor accident, may not bring an action directly in the courts of its Member State of establishment against the insurer of the person allegedly responsible for the accident, where that insurer is established in another Member State.

12. *Court of Justice, 1 October 2009 case C-219/08* 550

The Belgian provision imposing to workers posted in Belgium who are nationals of non-member States and are employed in the framework of an intra-EU provision of services the obligation to prove that their situation is lawful by any legally permissible means, including by producing a prior declaration by the service provider, is not contrary to Article 49 EC, since it does not exceed what is necessary to avoid abuses of the freedom to provide services.

13. *Court of Justice, 1 October 2009 case C-247/08* 826

The restriction of the scope of 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, resulting from the reference to the sole companies of a Member State made by Article 2(a) in conjunction with point (f) of

the annex to that Directive, is not contrary to provisions on either the freedom of establishment or on the free movement of capital set forth by the Treaty.

14. *Court of Justice, 6 October 2009 case C-40/08* 507

In view of the nature and importance of the public interest underlying the protection which Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts grants to consumers, Article 6 of the Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy. Thus, inasmuch as the national court seised of an action for enforcement of a final arbitration award is required – or has discretion – to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of that Directive, where it has available to it the legal and factual elements necessary for that task. If that is the case, it is for that court to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause.

15. *Court of Justice, 6 October 2009 case C-133/08* 514

The last sentence of Article 4(4) of the 1980 Rome Convention on the law applicable to contractual obligations must be interpreted as meaning that the connecting criterion provided for in the second sentence of Article 4(4) applies to a charter-party, other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.

The second sentence of Article 4(1) of the Convention must be interpreted as meaning that a part of a contract may be governed by a law other than that applied to the rest of the contract only where the object of that part is independent. Therefore, where the connecting criterion applied to a charter-party is that set out in Article 4(4) of the Convention, that criterion must be applied to the whole of the contract, unless the part of the contract relating to carriage is independent of the rest of the contract.

Article 4(5) of the Convention must be construed as meaning that, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in Article 4(2) to (4) of the Convention, it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected.

16. *Court of Justice, 22 October 2009 case C-301/08* 828

The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929 does not form part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC.

17. *Court of Justice, order 20 November 2009 case C-278/09* 552

Pursuant to Articles 68 and 234 EC, the Court of Justice has no jurisdiction on a reference for a preliminary ruling based on Title IV of the Treaty raised by a national judge against whose decisions a judicial remedy under national law is available.

18. *Court of Justice, 2 December 2009 case C-358/08* 830

Article 11 of Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States

concerning liability for defective products must be interpreted as precluding national legislation, which allows the substitution of one defendant for another during proceedings, from being applied in a way which permits a 'producer', within the meaning of Article 3 of that Directive, to be sued, after the expiry of the period prescribed by that Article, as defendant in proceedings brought within that period against another person.

19. *Court of Justice, 17 December 2009 case C-227/08* 833

Article 4 of Directive 85/577/EEC of 20 December 1985, to protect the consumer in respect of contracts negotiated away from business premises, does not preclude a national court from declaring, of its own motion, that a contract falling within the scope of that Directive is void on the ground that the consumer was not informed of his right of cancellation, even though the consumer at no stage pleaded that the contract was void before the competent national courts.

20. *Court of Justice, 23 December 2009 case C-403/09 PPU* 526

Article 20 of Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility must be interpreted in a restrictive way since it is an exception to the system of jurisdiction laid down by the Regulation. Under this provision, the courts of a Member State lacking jurisdiction as to the substance of the matter are entitled to take provisional, including protective, measures only when three cumulative conditions are satisfied, namely that the measures concerned must be urgent, must be taken in respect of persons or assets in the Member State where those courts are situated, and must be provisional. In particular, with reference to a provisional measure concerning parental responsibility, the concept of urgency relates both to the situation of the child and to the impossibility in practice of bringing the application concerning parental responsibility before the court having jurisdiction as to the substance.

A court of a Member State is not allowed to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under Regulation No 2201/2003 as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State. In fact the child's integration into the new environment of the second State to which he was wrongfully removed pursuing Article 2(11) of the same Regulation, while constituting a change in the child's circumstances after the adoption of the first decision, does not imply an urgency situation pursuant to Article 20.

21. *Court of Justice, 14 January 2010 case C-304/08* 1071

While the provisions of the EC Treaty relating to the freedom to provide services are not applicable to activities which are confined in all respects within a single Member State, the application of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market is not conditional on the presence of an external factor.

22. *Court of Justice, 21 January 2010 case C-444/07* 536

Pursuant to Articles 3, 4, 16, 17 and 25 of Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, after the main insolvency proceedings have been opened in a Member State the competent authorities

of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Articles 25(3) and 26 of that regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and, therefore, are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the Regulation is subject are not met.

23. *Court of Justice, 21 January 2010 case C-546/07* 1072

Article 1(1) of the Agreement of 31 January 1990 between the Government of the Federal Republic of Germany and the Government of the Republic of Poland on the posting of workers from Polish undertakings to carry out works contracts, as interpreted in German administrative practice, creates direct discrimination, contrary to Article 49 EC, against service providers established in Member States other than the Federal Republic of Germany which wish to conclude a works contract with a Polish undertaking in order to provide services in Germany.

24. *Court of Justice, 26 January 2010 case C-118/08* 1074

European Union law precludes the application of a rule of a Member State under which an action for damages against the State, alleging a breach of that law by national legislation which has been established by a judgment of the Court of Justice of the European Communities given pursuant to Article 226 EC, can succeed only if the applicant has previously exhausted all domestic remedies for challenging the validity of a harmful administrative measure adopted on the basis of that legislation, when such a rule is not applicable to an action for damages against the State alleging breach of the Constitution by national legislation which has been established by the competent court.

25. *Court of Justice, 25 February 2010 case C-381/08* 792

Where the purpose of contracts is the supply of goods to be manufactured or produced, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced without supplying the materials, and even though the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In accordance with the first indent of Article 5(1)(b) of Regulation No 44/2001, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

26. *Court of Justice, 25 February 2010 case C-386/08* 1078

The rules laid down in the Vienna Convention of 23 May 1969 on the law of the treaties apply to an agreement concluded between a State and an international organisation, in so far as those rules are an expression of general

international customary law. Therefore, pursuant to Article 31 of the Vienna Convention, the EC-Israel Association Agreement of 20 November 1995 must be interpreted in a manner which is consistent with the relevant general international law principles such as that of the relative effect of treaties ('pacta tertiis nec nocent nec prosunt') codified in Article 34 of the Vienna Convention.

27. *Court of Justice, 2 March 2010 case C-135/08* 801

European Union law, and in particular Article 17 EC, does not require a Member State whose nationality has been acquired by deception to refrain from revoking such naturalization even when the person concerned has not recovered the nationality of his Member State of origin, on condition that principle of proportionality is respected.

28. *Court of Justice, 11 March 2010 case C-19/09* 812

Pursuant to the second indent of Article 5(1)(b) of Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, where services are provided in several Member States, the court which has jurisdiction to hear and determine all the claims arising from the contract is the court in whose jurisdiction the place of the main provision of services is situated. For a commercial agency contract, that place is the place of the main provision of services by the agent , as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be established on that basis, the place where the agent is domiciled.

29. *Court of Justice, 15 April 2010 case C-518/08* 819

Since Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art was not intended to have an impact on private international law provisions on successions of the Member States, Article 6(1) of the same Directive, granting those entitled under the author the right to receive royalties on the resale of works after his/her death, does not preclude a provision of national law which reserves the benefit of the resale right to the artist's heirs at law only, to the exclusion of testamentary legatees. Therefore, it is for the national court, for the purposes of applying the national provision transposing Article 6(1), to take due account of all the relevant conflicts of laws rules relating to the transfer on succession of the resale right.

30. *Court of Justice, 4 May 2010 case C-533/08* 1041

Pursuant to Article 71 of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the application of conventions on particular matters cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union. It follows that, under said Article 71, the rules relating to lis pendens and to enforceability set out in Article 31(2) and (3) of the Geneva Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those

provided for by the Regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (*favor executionis*).

The Court of Justice of the European Union does not have jurisdiction, as resulting from Article 267 TFEU, to provide interpretation by way of preliminary rulings of the 1956 Geneva Convention, since such convention is not part of European Union law nor is binding for the EU.

31. *Court of Justice, 20 May 2010 case C-111/09* 1054

In a case where the rules on insurance contained in Section 3 of Chapter II of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters are not complied with, the court seised must declare jurisdiction pursuant to Article 24 if the defendant enters an appearance and does not contest that court's jurisdiction, since entering an appearance in that way amounts to a tacit prorogation of jurisdiction. Having regard to the purpose of the rules on jurisdiction resulting from said Section 3 of that Regulation, which is to offer stronger protection to the party considered to be the weaker party, it is always open to the court seised to ensure that the defendant being sued before it in those circumstances is fully aware of the consequences of his agreement to enter an appearance.

32. *Court of Justice, 22 June 2010 joined cases C-188/10 and C-189/10* 1059

Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free: to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary; to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to European Union law. It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of European Union law.

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The Convention between Italy and Switzerland of 3 January 1933 on Recognition and Enforcement of Judicial Decisions applies to a matrimonial dispute that has been brought first before Italian courts and subsequently before Swiss courts. In fact, such Convention prevails over the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations given that, under Article 18 of the latter, the same Convention

shall not affect bilateral conventions between Contracting States and considering the provisions of its Article 12 on lis pendens.

Pursuant to Article 8 of the 1933 Italian-Swiss Convention, there is no lis pendens between an action for legal separation brought in Italy and a subsequent action for divorce initiated in Switzerland. In fact, the two actions do not have the same object, since the first does not imply, under Italian law, the definitive dissolution of the marriage, which, on the contrary, results from divorce pursuant to Swiss law. Accordingly, the divorce proceedings brought before Swiss courts shall not be suspended and the competent Swiss court may order provisional measures.

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