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1. *Spoleto Tribunal, order of 4 October 2018* 710

* The English summaries of the case-law are made by Dr. Cristina M. Mariottini.

The participation of the debtor in proceedings for the issuance of a European account preservation order amounts to an irregularity of the procedure: pursuant to Article 11 of Regulation (EU) No 655/2014 of 15 May 2014, the party against whom the application is made is not informed of the application for the preservation order, nor is it heard before the order is issued.

The application for stay of proceedings for the issuance of a European account preservation order – lodged by the creditor following the rejection of the opposition to the injunction order issued in his favour, pending the appeal brought by the debtor against the rejection, and pending the decision of the competent territorial Court of Appeal on the application for suspension of the enforceability of the order (which is based solely on the fact that such an appeal has been brought in respect of the underlying claim) – must be rejected. On the one hand, the fact that the request for preservation order was granted can be raised before the court from which the European order is sought in order to ultimately prove that the effectiveness of the enforcement order no longer subsists, with the consequence that the conditions for bringing an enforcement action also no longer subsist. On the other hand, the procedure not only does not contemplate that situation but, on the contrary, in some respects presupposes the issuance of a judicial measure in the part where it expressly provides for the case where the application for a European preservation order is made by the party that is already in possession of an instrument ('judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim') that may justify the adoption of the measure sought. Such a conclusion is supported precisely by the regime of the allegations that the applicant must make in support of his/her request: in fact, if the party invoking such precautionary protection is already in possession of a judicial title, he/she does not have to provide 'sufficient evidence' that his/her application will be granted on the merits, since he/she only has to offer proof of the elements that, for the purposes described above, support the *periculum in mora*; on the other hand, if the creditor does not have a judicial measure recognising the grounds of his/her claim, he or she shall also submit, in addition to the latter requirements, sufficient evidence that the creditor is likely to succeed on the substance of his/her claim against the debtor.

Notwithstanding the existence of *fumus boni iuris*, supplemented by the decision rejecting the opposition to the payment order, the application must be rejected for a European account preservation order which is grounded, insofar as it relates to *periculum in mora*, solely by stating a generic risk that, by the time the creditor is able to have the existing or a future judgment enforced, the debtor may have dissipated, concealed or destroyed his/her assets or have disposed of them under value and make enforcement more difficult, absent any positive evidence as to the real risk of enforcement being made more difficult or even jeopardised. In his/her application, the creditor has in fact referred to the aforementioned decision of rejection only in section 12, which is specifically devoted to submitting the evidence which would corroborate the 'real risk', without there even being any room for the exercise of the powers of inquiry provided for in Article 9 of the Regulation, actionable through the procedures provided for in the domestic law expressly referred to. In fact, (*i*) under the recitals and Article 7 of Regulation (EU) No 655/2014 it is required that 'the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation Order

because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult'; (*ii*) the protection of the debtor cannot be left to the jurisdiction of the court before which the order will be enforced, since the assessment of the preconditions for the application lies solely with the judicial authority seised with the application for the preservation order, and those preconditions cannot be considered to be fulfilled by 'both the permanent refusal of the debtor to comply with the judicial order and the absence of any concrete proposal to pay, even in instalments'. The further argument of the risk for the creditor of a forfeiture of the settlement proposal is also irrelevant, since this cannot come to the expense of either the defence or the economic needs of the addressee of the measure, where, in the balancing of interests and the assessment of the preconditions required by the European legislation, the real risk of a fruitless or compromised enforcement does not arise, since the elements integrating 'situations that concretely endanger, as a direct consequence of the debtor's proven defaulting behaviour, the commercial life of the creditor, irretrievably forced into bankruptcy' can only be taken into account provided there is proof not only of default but also of a risk to the creditor's claims that converges in the potential failure of the enforcement action.

2. *Corte di Cassazione, 22 April 2020 No 8029* 967

The refusal by the civil registrar of the declaration of recognition of a child, born in Italy and conceived through medically assisted procreation techniques, as the child of a woman bound by a civil partnership to the natural mother, is lawful, the mere consent given to heterologous fertilisation being irrelevant in the absence of a biological bond with the child. Since, in the light of the Italian nationality of the two women, this is a purely internal case, Article 42 of Presidential Decree 3 November 2000 No 396 is applicable: such provision, by subordinating recognition of the child's *status* to the absence of obstacles in accordance with the law, makes it possible to exclude its application in cases where, as in the instant case, the constitution of the filiation relationship is hindered by the legal regulation of medically assisted procreation and, in particular, by Article 4(3) of Law 19 February 2004 No 40 on medically assisted procreation, which precludes homosexual couples from resorting to such techniques.

3. *Constitutional Court, 29 May 2020 No 102* 953

In case of conviction of a parent for wrongful removal and retention of a child abroad, the automatic ancillary suspension of parental responsibility for a period predetermined by law, in accordance with Article 574-*bis*, third paragraph, of the Criminal Code, is incompatible with Articles 2, 3, 30 and 31 of the Italian Constitution, interpreted also in the light of the New York Convention on the Rights of the Child of 20 November 1989, the European Convention of 25 January 1996 on the Exercise of Children's Rights, and the Charter of Fundamental Rights of the European Union, which enshrine the principle, fully transposed into the Italian system, according to which, in all decisions concerning a child, the solution that best serves the child's interests must be adopted, regardless of any automatism.

4. *Corte di Cassazione, order of 9 February 2021 No 3165* 1021

On the subject of international air transport, where the carrier is responsible for

the delay in delivery of baggage, the limitation of liability provided under Article 22(2) of the Montreal Convention of 28 May 1999 for the Unification of Certain Rules Relating to International Carriage by Air, ratified and made enforceable in Italy with Law 10 January 2004 No 12, applies. According to such provision, the carrier shall pay compensation up to one thousand special drawing rights per passenger and its liability extends to every type of damage suffered (pecuniary and non-pecuniary), including the outlays for basic necessities and medicines to compensate in the medium term for the failure to deliver baggage in time, to the exclusion only of the further costs indicated under Article 22(6) of the same Convention, attributable to court costs and other expenses incurred in order to obtain compensation in court, which may be settled separately. In such instance, if the flight was operated by several successive carriers and it remains undisputed that the harmful event occurred on the route falling within the control of only one of them, in accordance with Article 36 of the Montreal Convention and Article 1700 of the Civil Code all carriers are jointly and severally liable towards the injured party, while, in internal relations, each of them is liable in proportion to the route falling within its control.

5. *Corte di Cassazione, order of 1 April 2021 No 9057* 96

Provided that, in relation to both compulsory suspension (under Article 7(1) of Law No 218 of 31 May 1995) and optional suspension (under Article 7(3) of the same Law), the order for stay of proceedings is premised on the assessment of identity of actions in a proceeding previously commenced before a different court, the necessary preliminary ruling on jurisdiction pursuant to Article 42 of the Code of Civil Procedure (*regolamento necessario di competenza*, by means of which a court's decision to decline or uphold its jurisdiction may be challenged directly before the *Corte di Cassazione*) is admissible in this context. Such ruling is, in fact, intended as a remedy offered to the party to verify the legitimacy of a measure which, by affecting the duration of the proceedings, may hinder the protection of the right claimed in court. While, in the first case, the court must ascertain that there is identity between the cases pending before the Italian and the foreign court, in the case of optional suspension the court's review is limited to the completeness, correctness and logic of the arguments.

The action for the payment of the price of goods brought by an Israeli company against an Italian company – which filed a counterclaim for a declaration of non-performance and for set-off of the price against the counterclaim for damages – brought subsequently to an action brought in Israel by the same plaintiff company against the same defendant and another party, seeking compensation for damages arising from the improper performance of the contract and the negative assessment of any credit claims of the defendant, must be suspended on the ground of *lis pendens*. This is the case pursuant to both Article 7(1) of Law 218 of 1995, given the identity of the cause of action (*causa petendi*) and the relief sought (*petitum*) in relation to the claim for damages before the foreign court, regardless of the partial identity of the parties, and Article 7(3) of the same Law, given the impact that the decision of the Israeli court has on the position of the creditors. In fact, in accordance with Article 7, interpreted *vis-à-vis* Article 64(3) of the same Law, the notion of *lis pendens* entails, in addition to the identity of the parties, the identity of the practical results pursued, irrespective of the immediate *petitum* of the

individual claims and the title specifically relied upon. Against this background, the Italian court must ascertain the date of the commencement of the proceedings in Italy on the basis of the procedure applicable to those proceedings and the time of the commencement of the parallel proceedings abroad, in the light of the relevant law, so as to be able to assess which of the two proceedings was introduced first according to the respective procedural rules: in particular, according to the *lex loci*, the moment of the filing of the statement of claims determines the pendency of the litigation before the Israeli court, which assesses the admissibility of the document and arranges the procedural steps for the establishment of the cross-examination, while the Italian proceedings must be considered to have been introduced with the filing of the petition for the injunction.

6. *Rome Tribunal (company division), 5 May 2021* 105

Pursuant to Article 4(2) of Law No 218 of 31 May 1995, to be interpreted in the light of Article 25(2) of Regulation (EU) No 1215/2012, Italian courts do not have jurisdiction over an action for the compensation of damages for breach of contract resulting from the arbitrary closure of two Internet pages made available to the Italian plaintiff company by the two foreign defendant companies. This follows from the presence of a clause prorogating the jurisdiction of the United States District Court for the Northern District of California or of a court located in San Mateo County in the general terms and conditions of the contract signed by the plaintiff company by means of a click at the time of registration and opening of the account. On the one hand, with reference to the aforementioned Article 25, the written form includes any communication by electronic means which allows a durable record of the agreement; on the other hand, the requirement of the written form *ad substantiam* and the evidentiary effect provided for by Article 2702 of the Civil Code (*forma scritta ad probationem*) must be considered validly satisfied when the provisions of Article 20 of Legislative Decree No 82 of 7 March 2005 (which comprise the Digital Administration Code and regulate – in accordance with Regulation (EU) No 910/2014 of 23 July 2014 (eIDAS Regulation) – the types of electronic signatures and the conditions necessary for an electronic document to meet the above-mentioned formal requirements) are complied with. Against this backdrop, specific approval in writing – and therefore for a double signature pursuant to Article 1341(2) of the Civil Code – is not necessary. Italian courts do not have alternative jurisdiction over the dispute at hand since, pursuant to the aforementioned Article 25 of Regulation (EU) No 1215/2012, the express prorogation of jurisdiction is exclusive, unless otherwise agreed by the parties, and is also effective with regard to any subordinate or alternative claims to the main claim.

7. *Corte di Cassazione, order of 10 May 2021 No 12226* 978

Article 16 of the Preliminary Provisions to the Civil Code, in the part where it subjects the exercise of civil rights by a foreigner to the condition of reciprocity, must be interpreted in a constitutionally oriented manner in the light of the principle set out in Article 2 of the Italian Constitution, which ensures full protection of the inviolable rights of the person. It follows that it is always possible for a foreigner, the heir of a Moroccan citizen who died in Italy following a traffic accident, to ask the Italian court, regardless of any condition

of reciprocity, for compensation for the damage, pecuniary or otherwise, derived from the infringement of inviolable rights of the person, such as the right to health and parental or family relations, whenever such compensation, regardless of the occurrence in Italy of the event giving rise to it, is governed by Italian law, based on the connecting factors which make Italian law applicable.

8. *Milan Court of Appeal, 8 June 2021* 141

In proceedings for the nullity of an arbitration award rendered in Italy between an Italian company, plaintiff, and two foreign companies, defendants, the referral to the court seised in the rescission phase ensues from the declaration of nullity of the final award pursuant to Article 829(1) No 11 of the Code of Civil Procedure: in fact, since the foreign party has its *de facto* seat in Italy, the rescission phase is not precluded pursuant to Article 830(2) of the Code of Civil Procedure. The *de facto* seat requirement may be considered satisfied by any company seat where there is a general representative with full powers of attorney for the ordinary management of the company.

9. *Rome Court of Appeal, 24 June 2021* 142

Pursuant to Articles 64 and 65 of Law No 218 of 31 May 1995, a Romanian judgment upholding the application for disavowal of paternity made by a Romanian citizen, who moved to Italy, against her husband, also a Romanian citizen, recorded in the Italian civil-*status* registries as the father of the applicant's minor child, born, during their marriage, from the mother's cohabitation with an Italian citizen, is eligible for recognition. Although the Romanian court order (*i*) did not take account of the expiry of the limitation period laid down in Article 244 of the Italian Civil Code, (*ii*) was not issued in the context of a proceedings where the child was represented by the special curator (as required by Italian law where there is a conflict of interests between the mother and the child), and (*iii*) is based, contrary to Article 235 of the Italian Civil Code, on the mother's declaration alone, no conflict with public policy can be discerned. In fact, rather than relying on the infringement of provisions that uphold a fundamental principle established on the basis of the child's overriding interest in the confirmation of his family *status*, these objections rely on the infringement of provisions by means of which the national legislature exercised its discretion in a given matter or *vis-à-vis* the proof of paternity. The assessment of compatibility with public policy is premised exclusively on the effects that the foreign act is intended to produce in the Italian legal system, to the exclusion of the conformity with domestic law of the foreign law on which the decision is based. In fact, on the one hand no review on the merits of the measure whose recognition is sought is permitted; on the other hand, the notion of public policy must be inferred from the fundamental and inalienable values shared by the international community and enshrined in the constitutional provisions, as well as from the other principles and rules which, although not included in the fundamental Charter, inform the entire legal system as a reflection of the legal ethical foundation of a system at a given historical moment.

10. *Corte di Cassazione, order of 30 June 2021 No 18602* 982

Pursuant to Article 3 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, in order for the removal or retention of a child to be considered wrongful, it is necessary that they have taken place in breach of custody rights, arising directly 'by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State' in which the child is habitually resident, and furthermore that those rights are actually exercised. The decree of the Family Court (*Tribunale per i Minorenni*) refusing an application for return to Belgium presented by a Belgian national in respect of his minor daughter, retained in Italy by her mother without the father's consent, on the ground that the child had her main residence in Italy with her mother, who had sole custody of the daughter by virtue of a decision of the *Tribunale di Monza* (previously seised by the mother in matters of parental responsibility), is unlawful in the part where it does not give any relevance to the agreement subsequently reached between the parents in the course of the legal proceedings instituted in Belgium by the father (following the similar Italian proceedings referred to above) to regulate the child's custody and maintenance: this results from both the earlier legal proceedings instituted in Italy by the mother (which, having a function entirely superimposable on the subject-matter of the agreement in question, had to be regarded as superseded by it) and the relevance attributed in the decree, for the purposes limiting its effectiveness, to the woman's merely subjective assessments, devoid of legal weight. On the contrary, the agreement in question, which took place in the context of judicial proceedings before the Brussels Tribunal, had to and must be assessed in terms of its objective content and binding effect. That agreement – which concerned not only the conditions for custody and the exercise of parental responsibility, but also the determination of the child's habitual residence and the fact that such habitual residence could not be changed without the consent of the other parent – was still in force between the parties when the child, brought to Italy by the mother with the father's consent, was retained there against the will of the father, who shared custody with the mother. It follows that it was not possible to legitimately derogate from the content of such agreement and from the agreements over custody rights and, in particular, to move the child's residence from Belgium, as expressly provided in the agreements, absent the consent of the other parent. Therefore, in accordance with Article 3 of the 1980 Hague Convention, the breach of the agreement and of the father's custody right enshrined therein amounts to a case of child wrongful removal: therefore, the order to return the child to Belgium may be refused only subject to the conditions set out in Article 13 of the Convention, consisting either in the failure to exercise custody rights at the time of removal or retention or in grave risk that the child's return would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

11. *Corte di Cassazione, order of 6 July 2021 No 19042* 391

In accordance with the principle of non-discrimination enshrined in Articles 18 and 21 TFEU, as interpreted by the Court of Justice in its judgment of 27 March 2014 in Case C-322/13 *Ruffer*, the rules on the language of the proceedings before the courts of the Region of Trentino-Alto Adige set out in

Articles 20 to 27 and subsequent amendments of Presidential Decree 15 July 1988 No 574, which introduce the principle of bilingualism, apply to the civil proceedings brought before the Bolzano Tribunal by an Austrian national, not resident in that province, with a summons in German. The conduction in Italian of the proceedings in the first and second instances, absent a request by the plaintiff for a translation of the documents and the subsequent service of the summons for resumption following the judgment of the Court of Cassation, constitute a waiver of the right to have the documents translated into one's own language, an option provided for in Article 20 of Presidential Decree No 574/1988. On the other hand, neither The Hague Convention of 1 March 1954 on civil procedure nor Article 4 of the Convention between the Italian Republic and the Republic of Austria of 30 June 1975, supplementing The Hague Convention, on civil procedure are relevant in this context, since Regulation (EC) No 1393/2007 of 13 November 2007 is applicable, instead.

12. *Milan Tribunal (company division), 20 July 2021* 143

In an action seeking the declaration that the production, promotion and marketing of its products in the European Union is not unlawful, simultaneously brought pursuant to Regulation (EU) No 1215/2012 of 12 December 2012 (also referred to in Articles 122 and 124 of Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark) by a company established in Italy against two companies domiciled in Italy and Sweden, respectively, Italian courts have jurisdiction over both the defendant established in Italy and the Swedish company. With regard to, in particular, the Swedish defendant, the jurisdiction of the Italian courts is established in accordance with Article 8(1) of Regulation No 1215/2012 which, in case of multiple defendants, allows the joinder of a party domiciled in another EU Member State before the court of the domicile of one of those defendants, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The jurisdiction of Italian courts is also founded on Article 7(2) of the Regulation No 1215/2012 according to which a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict before the courts for the place where the harmful event occurred or may occur and the scope of which also includes negative declaratory actions over liability in tort, delict or quasi-delict.

13. *Corte di Cassazione, order of 23 July 2021 No 21233* 315

Pursuant to Article 34(1) of Regulation (EC) No 44/2001 of 22 December 2000, applicable *ratione temporis*, a Romanian judgment ordering the payment of a sum of money by way of indemnity is eligible for recognition, even though the party against whom recognition is sought was sued in the main proceedings after the commencement of the pre-trial proceedings: in fact, not every failure to comply with a provision of foreign procedural law amounts to a violation of the right of defence and it has not been established, in the instant case, that the party has suffered any actual violation of those rights so as to make it necessary to ascertain whether that violation is contrary to procedural public policy. Pursuant to the same provision, a judgment delivered at the appeal stage declaring the inadmissibility of the appeal, brought by the party

against whom recognition is sought, on the ground of non-payment of the relevant court fee, may also be recognised in Italy: it is not contrary to Italian public policy to provide for the payment of a fee as a condition for the admissibility of the court application, without it appearing in any way in the present case (also in view of the lack of any indication of the amount of such fee) that the payment precluded or seriously limited the appeal. In fact, according to the principle established in the jurisprudence of the European Court of Human Rights, a system of judicial fees is incompatible with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, irrespective of whether the payment of such a fee constitutes a condition for the admissibility of the action, (*i*) where the imposition of a particularly high fee not justified by the circumstances of the case compels the applicant to discontinue the action on the sole ground that they are not in a position to advance the costs of the proceedings, or (*ii*) where the amount of the fee is so high that it absorbs the benefit which the applicant could theoretically obtain if the proceedings were successful.

Article 67(1) of Law 31 May 1995 No 218 (and not Article 33 of Regulation (EC) No 44/2001, which postulates that the interested party seeks recognition), is applicable to the action seeking non-recognition of that judgment. Therefore, the action is governed by Article 30 of Legislative Decree No 150 of 1 September 2011, referred to in Article 67(2) of Law No 218/1995.

14. *Corte di Cassazione (plenary session), order of 28 July 2021 No 21641* 323

Pursuant to Article 111(8) of the Italian Constitution, an appeal on the grounds of jurisdiction is admissible in Cassation alleging the Council of State's failure to refer the validity of an EU decision and directive to the Court of Justice of the European Union for a preliminary ruling, because the grievance, involving the exclusive jurisdiction of the Court of Justice to decide on the validity of EU acts of secondary law, excludes the jurisdiction of the national courts (both of the courts on the merits and of the courts of last instance) to decide on the validity of the EU act. However, pursuant to the same provision and to Article 267(1)(b) TFEU, the appeal is unfounded if the administrative Court of Appeal has excluded, in a reasoned opinion, the existence of the conditions that would support the invalidity of the acts challenged before it and has also consciously motivated the reasons that excluded the need for a reference for a preliminary ruling on validity, in relation to its interpretation of the EU framework. In fact, that decision does not imply an incursion into the functions reserved to the Court of Justice as concerns the invalidity of EU acts, aimed at preventing an EU act from being reviewed as to its validity by a national court.

Pursuant to Article 111(8) of the Italian Constitution, on the other hand, an appeal in Cassation on grounds of jurisdiction is not admissible where the Council of State fails to refer a question of interpretation to the Court of Justice for a preliminary ruling, since the Council of State's decision to not refer a question of interpretation to the Court of Justice is not flawed by excess of jurisdictional power and cannot therefore be challenged on the ground that it infringes the external limit of jurisdiction in relation to European Union law. The power of review that the aforementioned rule entrusts to the Court of Cassation does not include the review of the administrative

court's hermeneutic choices, which may lead to errors *in iudicando* or *in procedendo* on the grounds that they are contrary to European Union law.

15. *Corte di Cassazione (criminal division), 3 August 2021 No 30228* 145

Italian courts have jurisdiction over the exercise of powers of arrest and investigation by Italian authorities on board of a vessel flying the Dutch flag and situated on the high seas, suspected of involvement in the illegal trafficking of narcotics, when authorisation was sent via email by the competent Dutch authority. Article 17(3) and (4) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on 20 December 1988 and implemented in Italy with Law No 328 of 5 November 1990 – which subjects the exercise of those powers to the prior authorisation of the flag State, if different from that of the investigating authority – must be interpreted as meaning that consent may be given without any specific formality, provided it is attributable to the authority designated by the flag State.

16. *Corte di Cassazione, order of 23 August 2021 No 23315* 624

With regard to international child abduction, pursuant to Article 7(3) of Law 15 January 1994 No 64, implementing The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in the Italian legal system, 'the court shall decide by decree within thirty days from the date of receipt of the request' submitted through the Central Authority in accordance with Articles 8 and 21 of the Convention. The provision establishes a merely ordinary term, which is therefore exempt from the rules laid down in Article 153 of the Code of Civil Procedure, since there is no provision that provides for the nullity of any ruling that may be made (or, in any event, sanctions with forfeiture of the measure adopted) after the expiry of that time limit. The same principle is applicable also to the time limit laid down in Regulation (EC) No 2201/2003 of 27 November 2003 which – in setting forth provisions that supplement those provided in the Convention and that are intended to take precedence where the rules of the Regulation and those of the Convention govern the same subject-matter – provides, in the second paragraph of Article 11(3), that 'the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged'. In fact, the second paragraph of Article 11(3), in addition to the fact that it does not provide for any sanctions in the event of failure to comply with the time limit, is without prejudice to the first paragraph of the same provision, which – in providing that 'A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application' – requires the use of 'the most expeditious procedures available under national law', represented in this case by the procedure introduced by the law implementing the Convention.

Pursuant to Article 11(2) of Regulation (EC) No 2201/2003 – according to which, within the meaning of Articles 12 and 13 of the 1980 Hague Convention, the child's right to be heard must be ensured provided the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views – hearing the child is not only mandatory where he or she has reached the age (twelve years) beyond which the law mandates that the child be heard, but even below that age it may not be left to the

unchallengeable discretion of the court. The principle established by the Court of Cassation with reference to proceedings concerning parental responsibility – according to which the lower court's departure from this requirement is subject to a specific and substantiated explanation in which the court gives account of the child's lack of discernment or of the reasons why it considers the hearing manifestly superfluous or contrary to the child's interest – must be considered applicable also to the matter in question.

Pursuant to Article 3(c) of the Strasbourg Convention of 25 January 1996 on the Exercise of Children's Rights, the child has the right to be informed of the possible consequences that his or her opinion would entail in practice and of the possible consequences of any decision (such right is also more succinctly reiterated in Article 336-*bis*, third paragraph, of the Civil Code, according to which the child must be informed 'of the nature of the proceedings and of the effects of the hearing'). Such requirement – insofar as it informs the very purpose of the hearing as aimed at enabling the child to express his or her views in proceedings concerning him or her, and as an element of primary importance in the assessment of the child's interest – cannot be satisfied by the mere insertion of a routine formula in the court's report. To the contrary, the fact that such requirement was satisfied must be apparent from the interview conducted by the court with the child, so that any claim alleging that such requirement was not satisfied cannot be lodged without enclosing the content of the report.

With regard to the child's opposition, relevant for the purposes of Article 13 of the 1980 Hague Convention, the hearing of the child – if the child is considered capable of discernment – does not allow (insofar as its purpose is to acquire elements of assessment as to whether the risk of remaining exposed, by the fact of repatriation, to psychological harm, or in any event of being in an intolerable situation, is well-founded) to attribute an exclusive obstructive (*i.e.*, binding) effect to the objections expressed by the child with regard to his or her return to the country of origin. In fact, for the purposes of forming its own conviction as to the existence of psychological harm, the court may take into account the child's opinion as an autonomous and sufficient cause of derogation from the general principle of immediate return. Recognition of the binding effect of the will expressed by the child would, moreover, be at odds with the subject-matter of the proceedings on the application for return (which is not the determination of the best possible accommodation for the child) so that the application may be refused, in the child's best interests, only in the presence of one of the grounds provided in Articles 12, 13 and 20 of the Convention. Such grounds do not include any disadvantage stemming from the weighing and balancing of the elements that characterise the situation if such disadvantage does not rise to the level of a real risk, arising from the return, of exposure to physical or psychological harm or to an otherwise intolerable situation. In this framework, Article 13(1)(b) of the Convention does not allow the court, which is requested to issue an order of return to the State of residence of a child wrongfully retained by a parent, to assess disadvantages connected with the intended return that do not reach the degree of physical or psychological harm or of an otherwise intolerable situation for the child, since these, and only these, are the elements considered by the Convention to be relevant and an obstacle to return, the assessment of these elements then constituting a factual investigation, reserved to the court on

the merits and subject to review by the court of last instance only for inconsistency or illogicality of the reasoning. Consequently, the decision of the Family Court – which heard the case within a year of the child's transfer to Italy and rejected an application (lodged by the father of a child born in Poland in 2010 and transferred to Italy with his mother's family in March 2018) seeking the child's return to Poland – is consistent with the above-mentioned principles on the interpretation of Article 13 of the 1980 Hague Convention, notably in the part where the decision relies on Article 13(1)(b) of the Convention noting that the child had expressed strong opposition to returning to Poland, as well as in the part where the decision relies on Article 13(2) observing that a forced separation from his mother, his siblings and the new network of relations established in Italy would expose the child to serious psychological harm. In particular, the twofold assessment thus made by the court is indicative of the court's concurrent and complementary weighing and balancing of the circumstances that amount to objections within the meaning of the abovementioned provisions.

Lastly, the assessment required for the purposes of issuing the return order must be based not on a comparison between the situation in which the child is in Italy and that in which the child would be if he lived in Poland, but on the balance between the parent's right of access and the harm to which the child would be exposed in the event of return. In fact, the 1980 Hague Convention clearly distinguishes, in Article 5, the rights of custody (which include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence) from the rights of access (which include the right to take a child for a limited period of time to a place other than the child's habitual residence) and provides for different protection for the two situations, ordering the immediate return of the child to the State of habitual residence only in the case of wrongful removal or retention, which occurs only in the event of a breach of the right of custody or guardianship. Where, on the other hand, the transfer prevents only the exercise of rights of access, Article 21 of the Convention allows the other parent only to urge the Central Authority to take all necessary steps to remove, as far as possible, any obstacle to the exercise of those rights, without prejudice, of course, to the possibility of lodging an application with the Family Court seeking a review of the custody arrangement in the light of the new circumstance of the transfer of the child's residence. While it is true that where, as in the present case, the custodial parent chooses a new residence that is particularly distant, the transfer may make the exercise of rights of access particularly difficult, such inconvenience cannot be regarded as a sufficient ground for a return order, since it would entail the need for the custodial parent to return to his or her original place of residence, unduly affecting the latter's freedom to establish his or her residence in the place that he or she considers as more convenient.

17. *Corte di Cassazione, 23 August 2021 No 23319* 331

Within the meaning of Articles 64 *et seq* of Law 31 May 1995 No 218, the notion of public policy, as a set of founding values of the legal system at a given historical moment, requires an assessment of the compatibility of the foreign act or measure with the Italian legal system. Such assessment is conducted in light of the fundamental principles of the Italian Constitution and of the principles enshrined in international and supranational sources, such as

the founding treaties of the European Union, the Charter of Fundamental Rights of the European Union, and the European Convention on Human Rights, as well as in light of the way in which those principles have been transposed in the regulation of individual institutions and the interpretation thereof provided by constitutional and ordinary jurisprudence. Although the ascertainment of the biological and genetic truth of an individual does not constitute a value of absolute constitutional importance – such as to elude any balancing with the other interests involved, in particular with the child's interest in the preservation of the *status filiationis* – the prohibition of surrogacy set out at Article 12(6) of Law 19 February 2004 No 40 marks the limit beyond which the principle of personal responsibility, based on the consent given to the practice of surrogacy, ceases to operate and the *favor veritatis*, which warrants the prevalence of genetic and biological identity, takes preeminence.

Apart from the hypotheses in which surrogacy is prohibited and absent any elements contrary to public policy, a birth certificate drawn up abroad concerning a foreign child, the child of a foreign biological mother and an Italian intended mother, born following the use of heterologous medically assisted procreation techniques, is legitimately transcribed in Italy. On the one hand, the absence of a genetic or biological link with the child does not preclude recognition of the filial relationship with an Italian national who has given his consent to the use of medically assisted procreation techniques not permitted under Italian law. On the other hand, the limitations laid down by Law No 40/2004 do not amount to principles of international public policy; rather, they are an expression of the margin of appreciation available to the legislature in defining the requirements for access to such practices, the identification of which, having a binding effect in the domestic legal system, is not an obstacle to the production of effects by acts or measures validly drawn up under foreign law and governed by the relevant provisions.

The procedure for rectification set out at Article 95 of Presidential Decree 3 November 2000 No 396 is applicable to the request made by the Public Prosecutor for cancellation of the registration already carried out pursuant to Articles 15 and 17 of Presidential Decree No 396/2000 per the application made by the interested parties through the diplomatic authority. In fact, the Public Prosecutor's request relies on the allegation that the registration does not comport with Articles 15 and 17 of Presidential Decree No 396/2000 (which, providing for the registration only of birth declarations relating to Italian citizens born abroad, exclude such transcription if the child lacks any connections with the Italian legal system, since the child cannot be considered to be the offspring of an Italian citizen) and is grounded on a discrepancy between the factual situation, as it should be according to those provisions, and the situation recorded in the register of birth certificates, caused by an error allegedly made at the time of registration. Therefore, such request does not give rise to a dispute as to *status* (in which the Public Prosecutor's Office has, moreover, only the capacity of necessary party, without being authorised to initiate it). Moreover, the fact that the registration of the birth certificate was carried out without any objections entails that the interested parties were not required to initiate the procedure set out at Article 67 of Law No 218/1995, referred to by Article 68 of the same Law for public acts received abroad, and considered applicable also in the case of

refusal by the registrar to register a foreign court decision establishing the filiation relationship between a child born abroad and an Italian citizen.

18. *Rome Tribunal, 26 August 2021* 392

Pursuant to Article 19 of Regulation (EC) No 2201/2003 of 27 November 2003, Italian courts have jurisdiction over the action for legal separation of spouses who are Italian nationals and habitually resident in Italy and France, respectively, in the event of *lis pendens* with the divorce proceedings subsequently lodged in France. In fact, the applicant habitually resided in Italy for more than six months prior to the action and Italy is also the last place of habitual residence of the spouses. Consequently, Italian courts have jurisdiction also over the action for divorce, in so far as such action is inextricably linked to the action for separation, as well as over the wife's maintenance action, which is ancillary thereto, within the meaning of Article 3(c) of Regulation (EC) No 4/2009 of 18 December 2008 and Article 3(a) of the same Regulation by reason of the defendant's habitual residence in Italy. Conversely, Italian courts do not have jurisdiction either in respect of the claim relating to parental responsibility under Article 8 of Regulation No 2201/2003 (the children being habitually resident in France and in the absence of acceptance of such jurisdiction by both spouses in accordance with Article 12 of the same Regulation) nor with regard to the child maintenance claim on the ground that such claim is ancillary to the action for parental responsibility under Article 3(d) of Regulation No 4/2009, the respondent creditor having brought that claim only in the alternative, in the event that Italian courts established jurisdiction over the action for parental responsibility. As concerns parental responsibility, Italian courts also lack jurisdiction for the adoption of *interim* measures, given that Article 20 of Regulation No 2201/2003 allows the courts of a Member State, even if they do not have jurisdiction as to the substance of the matter, to adopt provisional or protective measures provided for by domestic law, only in relation to persons present in that State.

Pursuant to Article 8(c) of Regulation (EU) No 1259/2010 of 20 December 2010, Italian law applies to the ruling on *status*, since both spouses are Italian nationals. Pursuant to Article 7 of The Hague Protocol of 23 November 2007, referred to in Article 15 of Regulation No 4/2009, subject to the express request of the spouses Italian law may apply to the wife's maintenance claim as the law applicable for the purposes of a specific procedure.

19. *Florence Tribunal, 27 August 2021* 396

In a dispute between two spouses, in relation to which, first, proceedings for the dissolution of the marriage are brought before a United Kingdom court and, then, divorce proceedings are brought before an Italian court, the latter – provided it has jurisdiction in accordance with Regulation (EC) No 2201/2003 of 27 November 2003 (whose Article 19(3) stipulates that, for jurisdiction to be regarded as established, the court shall not have declined jurisdiction of its own motion or on a timely motion made by a party) – must consider itself to be the court first seised and reject the application for a stay of proceedings under Article 19(1) of the same Regulation where the application for legal separation between the same spouses was lodged in Italy before the divorce proceedings were commenced in the United Kingdom and the separation proceedings are still pending, even if for matters other than the determination

of *status*. In fact, the European legislature treats legal separation and divorce proceedings as a unitary process: such an approach underpins (although this is not directly relevant to the question at issue) Article 5 of the Regulation, according to which the court of the Member State which has given the judgment on legal separation also has jurisdiction to convert that judgment into a divorce judgment where provided by the law of that State.

20. *Padua Tribunal, 8 September 2021* 402

Pursuant to Article 5 of The Hague Protocol of 23 November 2007, Italian law is applicable to the application for a divorce settlement lodged against a former husband (a British national) by his former wife (an Italian national) who has requested the application of the law of the place of the spouses' last common habitual residence, on the premise that this law has a closer connection with the marriage. The nationality of the former spouses, the place of celebration of the marriage, the place of birth and nationality of any children born from the marriage, and the place of separation and divorce proceedings are all relevant elements on which to assess the intensity of the connection of the marriage with a given law.

21. *Corte di Cassazione, order of 9 September 2021 No 24408* 342

In an action seeking compensation for pecuniary and non-pecuniary damage resulting from a breach of the provisions that regulate safety in the workplace and a declaration of civil contractual and non-contractual liability in relation to an employment contract which arose, was performed and was terminated in Algeria, Italian (and not Algerian) law is applicable, lacking the necessary allegations for the applicability of the foreign law, such assessment being based, in accordance with Article 6(2) of the Rome Convention of 19 June 1980, on the place where the service is rendered or on the place where the contract of employment is entered into – provided, as in the instant case, the parties did not elect to choose the law governing their relationship. In fact, the burden of specifying which is the different rule or principle of foreign law actually applicable lies on the party objecting to the application of Italian law. In relation to the cases governed in their entirety by Article 14 of Law 31 May 1995 No 218, only once the party has satisfied this burden does the court – including the Court of Cassation – have the duty to identify, also of its own motion and by any means, the relevant foreign provisions, such assessment being based on an indication by the party concerned at least of the rule that the party alleges should not be applied together with the (different) rule that it considers applicable.

Since under Article 16 of the Rome Convention of 1980 the parameters for conformity with international public policy, which sets a limit to the application of foreign law, must be found in the protection (common to the various legal systems) of fundamental rights or in the set of fundamental values of the system at a given historical moment (and must therefore comport with the different forms in which international cooperation is expressed), on the subject of employment relationships established, performed and terminated abroad, the notion of 'public policy' can be inferred firstly from the system of protections provided at a level higher than that of primary legislation: it follows that reference must be made to the protection of employment as guaranteed by the Italian Constitution (and notably Articles 1, 4 and 35

thereof) and, after the entry into force of the Lisbon Treaty, to the guarantees provided to fundamental rights by the Nice Charter, elevated to the level of the founding treaties of the European Union by Article 6 TEU.

22. *Corte di Cassazione, order of 16 September 2021 No 25064* 355

Pursuant to Article 64(b) of Law 31 May 1995 No 218, an order for the payment of a sum of money issued by the Royal Court of the Island of Guernsey is eligible for recognition in Italy even if preceded by a freezing order – an injunction issued by the same court in *ex parte* proceedings, in accordance to which the debtor was prevented from using their assets, as well as an obligation to inform the plaintiff of the location of the ten most valuable assets of the debtor's property, which in turn was accompanied by a contempt of court order, which enjoined the debtor from failing to comply with the freezing order on penalty of personal imprisonment, fine or seizure of their property. Such an injunction does not violate the essential rights of defence so as to constitute a ground for refusal of recognition on the ground of procedural public policy, since such a violation, which can only be found in exceptional cases of non-compliance with fundamental principles of the requested State, does not arise from any failure to comply with a provision of foreign procedural law protecting the party's participation in the proceedings. To the contrary, it only arises when it is manifest and disproportionate and it has led to an infringement of the rights of defence in relation to the entire proceedings, in conflict with the fundamental principles guaranteeing the right to act and to resist in court. Mere differences between a *sequestro conservativo* (in accordance with Article 671 of the Code of Civil Procedure) and a freezing order do not amount to such a violation. On the one hand, attachment measures can be modulated in a different manner, provided that the equality of arms is substantially respected – in the instant case, the order was revocable and modifiable at the request of the interested party, who could react to the measures used by the creditor. On the other hand, the attachment measure assisted by the contempt of court order (as a means of indirect coercion aimed at encouraging compliance with the court order) is not fundamentally incompatible with the Italian legal system – which also provides for indirect coercive measures, including assisted by the criminal sanctions – on the grounds that the attachment measure is linked to the threat of a sanction capable of affecting the personal freedom of the addressee of the injunction.

23. *Corte di Cassazione, order of 16 September 2021 No 25067* 364

Pursuant to Articles 34(1) and 45 of Regulation (EC) No 44/2001 of 22 December 2000, applicable *ratione temporis*, a Spanish monetary judgment of first instance issued in the context of an employment relationship between the parties is eligible for recognition in Italy even though Article 230 of *Ley 36/2011 de 10 de octubre, reguladora de la jurisdicción social (LJS)*, entitled *Consignación de cantidad* makes the lodging of an appeal conditional on the deposit of the sum ordered at first instance or on a first-call security for the same amount. For the purposes of the assessment as to whether there has been a violation of procedural public policy, the rights of defence do not constitute an absolute prerogative and, rather, may be subject, within certain limits, to restrictions, in particular where the judgment has been issued against a person who has, in any event, had the opportunity to participate actively in the

proceedings. With reference to the above-mentioned procedural device provided in accordance with Spanish law: (*i*) the rule is aimed at favouring the immediate execution of the judgment, once it has become final, so as to avoid an excessive lengthening of the time needed to satisfy the creditor-worker's rights, which is in line with the principle of substantive equality established in accordance with Article 3 of the Italian Constitution; (*ii*) the Italian Constitution does not protect the right to appeal in civil proceedings nor does the European Convention on Human Rights: in fact, Article 2 of Protocol No 7 to the Convention states the right to appeal in criminal proceedings but not in civil proceedings; therefore, it would not be contrary to procedural public policy to radically exclude the right to appeal and, in the instant case, *a fortiori* it would not be contrary to procedural public policy to make the lodging of the appeal subject to the above-mentioned device; (*iii*) to be lawful, a restriction on access to justice must, according to the jurisprudence of the European Court of Human Rights, have a legitimate aim, ensure that the very essence of the right is not impaired and be proportionate: in the instant case, the restriction pursues the legitimate aim of ensuring concrete satisfaction to the judgment creditor in the event that the appeal is unsuccessful, particularly in an area such as that of employment claims, and it is proportionate, all the more since the admissibility of the appeal is guaranteed by the provision of a security, which is a much less onerous onus than the payment of the sum.

24. *Regional Administrative Court for Lazio, section I-ter, 16 September 2021 No 9810* 368

Pursuant to Article 9 of Law 5 February 1992 No 91, where the refusal of citizenship by naturalisation is based on reasons relating to the security of the Italian Republic, the measure is sufficiently reasoned provided it conveys the logical reasoning followed by the administration in adopting the act, since it is not necessary for all the sources and established facts on the basis of which the negative opinion was given to be expressly indicated. Consequently, in view of the maximum degree of alert *vis-à-vis* the threat of terrorist infiltration among migrants arriving by sea or across land borders, the refusal of citizenship to a foreigner who is even potentially involved, on a circumstantial basis, in organisations close to terrorism is adequately motivated. In fact, these assessments are performed by the competent intelligence agencies and may be conveyed with synthetic formulas, which, far from being merely apodictic, pursue the objective of avoiding the disclosure of information that may compromise ongoing intelligence activities, hence safeguarding the safety of those who conducted the investigations.

25. *Corte di Cassazione (plenary session), order of 17 September 2021 No 25163* 117

Regulation (EU) No 1215/2012 – and not Regulation (EC) No 1346/2000 of 29 May 2000 – governs an action brought by the administrator in the insolvency of a *de facto* company set up by natural persons domiciled in Italy, as well as in the insolvency of those persons as partners with unlimited liability, against a Maltese company, in its capacity as trustee of certain trusts set up by the defaulting individuals, against the latter as settlers, together with their spouses and children and against other foreign entities involved in various capacities in those trusts, seeking, principally, a declaration of the absolute simulation of the trusts (or, in the alternative, of their relative simulation,

nullity and ineffectiveness) and an order that the defendants return to the administration the assets transferred to the trustee, since the instant action does not arise directly from the insolvency proceedings and is not closely connected with them. Pursuant to Article 8(1) of Regulation (EU) No 1215/2012, Italian courts have jurisdiction over this action: on the one hand, the main claim for absolute simulation gives rise to *lis pendens* between all the participants in the fraudulent agreement, thus prompting, between the claims brought against the various defendants, a connection so close that (as provided at Article 8 of Regulation (EU) No 1215/2012) 'it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'; on the other hand, among the joint defendants are the settlors of the contested trusts, all of whom are domiciled in Italy.

26. *Corte di Cassazione (plenary session), order of 30 September 2021 No 26654* 123

Pursuant to Article 25 of Regulation (EU) No 1215/2012, in an action brought by a company domiciled in Italy, seeking a declaration of the discharge of a voluntary mortgage on a property situated in Italy to secure the repayment of a loan – subject to a finding of breach of the obligations assumed, in the context of a composite contractual relationship (Long Term Agreement and Seasonal Contracts), by the lenders domiciled in England and Sweden – on the grounds of exclusive prorogation clauses in favour of the English and Welsh courts, Italian courts have jurisdiction only over the claim for discharge of the mortgage, since the exclusive jurisdiction conferred by Article 24(1) of Regulation No 1215/2012 prevails over the extended jurisdiction by virtue of the interests it is intended to protect. On the other hand, Italian courts do not have jurisdiction over the establishment of breach of contract, since the jurisdiction clauses prevail over the jurisdiction established in accordance with Article 8(4) of Regulation No 1215/2012 pursuant to which, in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, jurisdiction may be established in the court of the Member State in which the property is situated.

The Italian court cannot make an incidental ruling on the contractual claims brought by the plaintiff, since the cancellation of the registration of the voluntary mortgage can take place only after ascertaining the breach of contract and settling the resulting contractual damage, in order to offset the restitutive obligation, and this can be done, according to the provisions of Article 2884 of the Italian Civil Code, only by virtue of a judgment which has become final or other definitive measure, since it is possible to suspend the proceedings under way in Italy until the decision by another court, with the effect of *res judicata*, on a preliminary issue. This can be done, according to Article 2884 of the Italian Civil Code, only by virtue of a judgment which has become final or of some other definitive measure, since it is possible to suspend the proceedings under way in Italy until the decision of another court, with the effect of *res judicata*, on a preliminary question.

The indication of the jurisdiction of the court of Milan in the document granting the mortgage has no bearing on the determination of jurisdiction over contractual claims, since it is a clause on domestic jurisdiction which refers only to that document.

27. *Corte di Cassazione, 18 October 2021 No 28573* 632

Service of a payment injunction against the Federal Republic of Brazil, as guarantor for the consideration of the design of a railway link, performed by serving the document only on the central Brazilian authority, *i.e.* the Federal Ministry of Justice (whereas the Federative Republic of Brazil, the addressee of the service, remained outside the service procedure), is non-existent (and must therefore be regarded as not having taken place) and not void. Pursuant to Articles 4 and 16 of the Treaty on Judicial Assistance and the Recognition and Enforcement of Judgments in Civil Matters between the Italian Republic and the Federal Republic of Brazil of 17 October 1989, enacted in Italy with Law 18 August 1993 No 336 (to which Article 142 of the Code of Civil Procedure on the service of a document on a person not domiciled in Brazil, must be served, on the subject of service on a person who is neither resident nor domiciled in the Republic, attributes the value of a primary source), the signed receipt of the actual addressee and the certificate issued by the competent Brazilian official (provided for by Article 16(1) of the same Treaty), from which the delivery of the document or any refusal to accept it can be inferred, are still subject to deposit. It follows that, once the payment injunction has been deemed as non-existent, it is ineffective and the presumption of abandonment of the title is consolidated. Such presumption precludes the assessment of the foundation of the claim brought before the court, unlike in the cases of nullity or irregularity of service which, by excluding that presumption, pursuant to Article 650 of the Code of Civil Procedure place on the defendant the burden to file a belated objection proving that it did not have timely knowledge of the injunction, with the result of allowing, in the event that the objection is sustained, the hearing of the case on the merits.

28. *Corte di Cassazione, order of 21 October 2021 No 29429* 129

In a case of opposition (pursuant to Article 840 of the Italian Code of Civil Procedure) to the recognition in Italy of arbitral awards rendered by an Arbitration Board set up by the Singapore Arbitration Center, any suspension of proceedings due to the pending appeal against the award before the courts of the State where the award was made is governed neither by Article 295 of the Code of Civil Procedure nor by Article 7(3) of Law No 218 of 31 May 1995, but by the special rule consisting of the combined provisions of paragraphs 3 No 5 and 4 of Article 840 of the Code of Civil Procedure. Against this backdrop, in order to decide whether to suspend the proceedings, the court must make an assessment of mere opportunity, devoid of prejudicial nature and, as such, not subject to be reviewed as a question of law. The fact that such awards have been rendered against an entity subject to insolvency proceedings is not sufficient to prevent their recognition and enforcement in Italy on the grounds that they are contrary to public policy, pursuant to Article 5(2)(b) of the New York Convention of 10 June 1958, both because this requirement must be verified with exclusive regard to the operative part of the arbitral award (and not also to its motivation or enforcement) and because the principle of *par condicio creditorum*, which secures fair and equal distribution of available property among the creditor and is laid out by the domestic rules of insolvency law, is not an expression of public policy.

29. *Corte di Cassazione (plenary session), 22 October 2021 No 29556* 148

Pursuant to Articles I and IX(4) of the London Agreement of 19 June 1951 between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, pursuant to the customary rule on restricted immunity, and pursuant to the interpretative declaration made by Italy when acceding to the New York Convention of 2 December 2004 on Jurisdictional Immunities of States and their Property and Article 26 thereof, Italian courts have jurisdiction over the action brought by an Italian national employed at the Communications Station of the U.S. Navy Command at Sigonella (Italy), seeking reinstatement in his post and payment of his wages and contributions. First, the London Agreement is directly binding not only on NATO but also on States which are party to it and whose armed forces are in the territory of another contracting party in the North Atlantic Treaty area for reasons connected with their service. Second, the application provided for by that Agreement of the 'legislation in force in the State of stay' with regard to the employment relationship of civilian personnel of the State of stay recruited locally by those armed forces for manpower requirements and resident there (so-called personnel with 'local *status*') is not to be understood as referring solely to the substantive rules applicable to the employment relationship, but also to the rules of jurisdiction concerning the disputes which may arise therefrom, by reason of the legitimate waiver of immunity from jurisdiction effected by the parties to the Agreement. Third, unlike the 2004 New York Convention (which does not provide the discretional criteria for establishing whether and when an employment service is carried out iure *imperii* or *iure gestionis*), in the London Agreement, which expressly endorses in this matter the *lex specialis derogat legi generali* principle, the cause of the contract of employment of such civil servants is typified *ab origine* in the satisfaction of the purely material needs of the armed forces, in respect of which the jurisdiction of the State of stay does not imply interference with the prerogatives and subjectivity of the State of employment, even when, as in the instant case, the relief sought is not purely monetary.

30. *Venice Court of Appeal, order of 27 October 2021* 372

Pursuant to Article 17 of the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters, the Court of Appeal, seised by a commissioner appointed by a District Court in the United States of America seeking authorisation to take witness evidence ordered by the US court, must assess the absence of any conflict between the manner of taking evidence – governed by the procedural rules in force for the US court and in compliance with Federal Rule of Civil Procedure No 30 ('Depositions by oral examination in force in the United States') and the relevant principles in force in the Italian legal system. The admission of this manner of taking of evidence is not precluded by the fact that it is performed by the commissioner appointed by the District Court: in fact, this comports with Article 21 of the Convention and the commissioner has been authorised and delegated to do so. Whereas this method of taking witness evidence is not provided in the Italian Code of Civil Procedure, other forms of proceedings permit nonetheless that the questioning of witnesses be carried out by the parties to the trial themselves under the supervision of the judge or by a person delegated by the judge, provided that the testimony takes place only on the specific matters indicated; that the witnesses, already identified, take an oath in accordance

with US law; and that the taking of evidence takes place in an adversarial proceeding and it be transcribed or video-recorded.

31. *Corte di Cassazione (plenary session), 5 November 2021 No 31963* 639

Pursuant to Article 67 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Regulation (EU) No 1215/2012 of 12 December 2012 applies to proceedings brought before 31 December 2020 (date on which the transitional period provided for in Article 126 of that Agreement ended) over a set of contractual and non-contractual claims brought by an English company, assignee of the overall credit of a deceased person against, respectively, the deceased's son domiciled in Italy, the San Marino bank to which the latter had pledged – in an allegedly unlawful manner – his father's credits as collateral for a credit granted by the bank to a company which was subsequently declared bankrupt, and the Italian company controlling the bank. In those proceedings, where the first-instance decision – which ruled solely on jurisdiction, denying jurisdiction on the ground of the existence, in the bank account contract originally concluded between the transferor and one of the parties summoned by the transferee, of a choice of court clause in favour of San Marino courts – was challenged with regard to the ruling on the existence of a link of subordination between the proposed claims, such a challenge is capable of excluding finality of the decision (*res judicata*) and of requiring the court of second instance to rule on the question of jurisdiction, since this question was expressly raised in the grounds for appeal. In fact, the court, including the court of last instance, may perform of its own motion the exact characterisation of the relationship (*nomen iuris*, *causa petendi*, and *petitum*) or of the relationship(s) involved in the proceedings, and infer the elements identifying jurisdiction from the factual material acquired. Against this background, the characterisation of the claim performed by the court of first instance for the purpose of assessing whether the aforementioned choice of court clause is applicable is indicative only of the reasoning followed by the court in order to affirm the lack of jurisdiction: however, it does not limit the review of the Court of Appeal, which remains anchored to the examination of all the elements that constitute the complex legal relationship between the parties. Pursuant to Article 8(1) of Regulation (EU) No 1215/2012 – to be interpreted restrictively in order to limit the phenomenon of forum shopping that could arise in the event of an accumulation of claims against a plurality of defendants linked by a 'weak' connection – Italian courts have jurisdiction over that dispute, since the separation of contractual claims from non-contractual claims against all the defendant parties, deemed to have cooperated in an active or omissive manner in the production of the wrongful act, could lead to incompatible decisions. In fact, the activities in question are alleged to be connected by a close functional link on the part of all the defendants, and are characterised by a unity of purpose (the alleged loss of large sums of money deposited in a bank account in the name of the assignor) and of operative event (to be identified in the withdrawal from the bank account of the funds intended to constitute a pledge in favour of the San Marino bank, as guarantor of a company which subsequently went bankrupt).

32. *Corte di Cassazione, order of 9 November 2021 No 32766* 151

Pursuant to Article 16(2) of Legislative Decree No 25 of 28 January 2008 and Articles 79(1)-(2) and 94(2) of Presidential Decree No 115 of 20 May 2002, in order to be admitted to legal aid in connection with proceedings aimed at obtaining subsidiary protection, a national of a non-EU State, in the event that it is not feasible for the petitioner to submit the certification issued by the competent consular authority attesting the veracity of the petitioner's income earned abroad, may submit – at any time, including during the appeal against the rejection of the application, since the entire procedure is characterised by the absence of preclusive terms – a substitute declaration. Moreover, such unfeasibility shall be regarded as proper even when it is not absolute: in fact, demonstrating such unfeasibility entails a proof which is by its very nature incompatible with a procedure intended to ensure the petitioner's right to defense, leaving out of account all cases of failure on the part of the requested State, even if caused by reasons of mere delay, in contrast with the very rationale of the legislation requiring the timeliness of the procedure in question. This, however, does not affect the court's power to examine the reliability of the substitute declaration and to reject the application where there is intense, exact and consistent circumstantial evidence of the availability of economic resources inconsistent with those declared.

33. *Corte di Cassazione (plenary session), 17 November 2021 No 35110* 373

Without prejudice to the applicability of Italian law to a foreign child born and habitually resident in Italy, present in the territory of the State and for whom an Italian court is seised to issue a decision on adoption (or a decision on a preliminary measure, such as the declaration on the state of abandonment and the declaration of adoptability) pursuant to Article 37-*bis* of Law 4 May 1983 No 184 and Article 38(1) last part of Law 31 May 1995 No 218 or considering the declaration of adoptability as an institution for the protection of minors which is regulated by the law of the child's habitual residence in accordance with Article 42 of Law No 218/1995, which refers to the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants – Italian courts have jurisdiction to issue the child-protection measure, pursuant to Article 40 of Law No 218/1995 as well as pursuant to Article 42 of the same Law (which also refers to the 1961 Hague Convention).

The declaration of adoptability of a child constitutes an extreme remedy adopted subject to the ascertainment of the irreversible non-recoverability of parental responsibility, in the presence of serious facts that are indicative of the state of the child's moral and material abandonment in accordance with Article 8 of Law No 184/1983, which must be demonstrated in concrete terms, and not on the basis of summary judgments of parental incapacity, regardless of whether formulated by experts in the field, that are not based on precise factual elements. Therefore, pursuant to Article 8 of the European Convention on Human Rights, Article 7 of the Charter of Fundamental Rights of the European Union and Article 18 of the Istanbul Convention of 11 May 2011, the ruling on the child's state of abandonment cannot be based solely on the state of physical and psychological subjection of one of the parents as a result of the repeated and grave violence endured at the hands of the other parent.

34. *Corte di Cassazione, order of 22 November 2021 No 35784* 384

Pursuant to Article 5(1)(b) of Regulation (EC) No 44/2001 of 22 December 2000, Italian courts do not have jurisdiction over an action for the payment of goods sold and destined for Germany. On the subject of the international sale of goods, the place of delivery is to be identified as the place where the characteristic service is to be performed; against this background, the place of principal delivery is to be identified as the place where it is agreed that the service is to be performed on the basis of economic criteria, *i.e.*, the place of final delivery of the goods where the goods become materially, and not merely legally, available to the buyer. In this context, the provisions laid down in Regulation No 44/2001 are deemed to prevail over the provisions of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG): notably, the provisions of the Regulation prevail over Article 31 of the Convention concerning the place where the carrier, if any, has received the goods, and Article 57 concerning the determination of the place of payment of the price to the seller. Such Articles are in fact to be construed as containing a provision capable of regulating the parties' obligations but not jurisdiction.

35. *Corte di Cassazione, order of 22 November 2021 No 35841* 644

In proceedings brought before the Family Court seeking the repatriation to Slovakia of her daughter, transferred in Italy by her father – with whom she had lived in Italy since her birth – after a brief stay of the whole family in Slovakia, and for the purpose of establishing whether there was international abduction of the child, a transfer of the child's habitual residence to Slovakia within the meaning of Article 3 of The Hague Convention of 25 October 1980 and of Regulation (EC) No 2201/2003 of 27 November 2003 is not supported, by reason of both the objective brevity of the stay in Slovakia and, above all, of the fact that the transfer to Slovakia constituted a mere attempt at reconciliation between the parents: as such, the transfer was an 'open-ended' solution and therefore, in itself, temporary, becoming definitive only after an effective reconciliation or a prolonged and repeated attempt. Pursuant to the aforementioned provisions, in order to ascertain a child's 'habitual residence' it is necessary to take into account and assess all the elements that the case may present (in case of doubt, it is then necessary to ascertain which, in the alternative, is to be considered the 'more stable' residence) in the light of (absent other and, in factual terms, prevailing indications) the two guiding factors that according to the case-law of the Court of Cassation and the Court of Justice of the European Union play – in particular, in the event of a physical removal of the child – a very important role. Such guiding factors are, namely: on the one hand, the assessment of the intent that, in the specific case, underlies the removal of the child from his or her habitual residence, *i.e.*, of the 'intents' and 'reasons' that specifically led the holder of parental responsibility to decide to remove the child; on the other hand, the ascertainment of the characteristics of the child's removal, and namely that the removal must have actually occurred and that, in the new place, the child is carrying out – at least, in principle – his or her habitual daily life. In practice, these factors must be balanced against eachother: notably, the longer the child's actual stay in a given place is, the less important the reasons that brought the child to that place are. The finding of housing in Slovakia, the child's enrolment in a Slovak

school (with preliminary and instrumental registration of the child with the Register of Italians living abroad – AIRE), the cooperation provided by the maternal grandparents are all facts compatible – individually and as a whole – with a transfer of the child that was only temporary and aimed merely at a reconciliation attempt between the parents, whereas the child's alleged integration in the Slovak country is the result of a mere assertion in the contested decision of the Family Court, which is in no way supported by appropriate procedural findings: those elements, taken as a whole, do not amount to a valid presumption pursuant to Article 2729 of the Civil Code, according to which presumptions are admissible only provided they are serious, precise and consistent ('*gravi, precise e concordanti*').

36. *Corte di Cassazione (plenary session), order of 24 November 2021 No 36371* 387

The Montreal Convention of 28 May 1999 does not regulate jurisdiction over claims, brought against an airline not domiciled in a Member State, seeking the flat-rate and standardised charges in the event of, *inter alia*, a long flight delay in accordance with Articles 5 and 7 of Regulation (EC) No 261/2004 of 11 February 2004 – applicable, pursuant to Article 3(1)(b) thereof, to passengers departing from an airport situated in a Member State. In fact, the scope of the Montreal Convention and of its rule on jurisdiction (Article 33) are limited to actions for damages. Given that, pursuant to the second indent of Article 7(1)(b) of Regulation (EU) No 1215/2012 of 12 December 2012 (which, by virtue of the reference in Article 3(2) of Law 31 May 1995 No 218 to the Brussels Convention of 27 September 1968, replaced Regulation (EC) No 44/2001), jurisdiction is vested in the court of the place of performance of the obligation and, more precisely with reference to the contract of carriage, in the place where the service was or should have been provided under the contract, Italian courts do not have jurisdiction when the provision of the air service began at the airport of Barcelona and none of the stopovers, as well as the arrival, occurred in Italy.

37. *Corte di Cassazione (plenary session), order of 24 November 2021 No 36374* 135

In an action relating to two exclusive distribution contracts brought by Italian distribution companies against a company based in the Czech Republic for the latter's unlawful withdrawal from such relationships, Italian courts do not have jurisdiction in light of the foreign arbitration clause contained in the general terms and conditions of the contract proposed by only one of the contracting parties, absent the specific approval required by Article 1341(2) of the Italian Civil Code. In fact, pursuant to Article 57 of Law No 218 of 31 May 1995 contractual obligations 'shall in any event be governed by the Rome Convention of 19 June 1980': Article 3(1) of that Convention provides that the contract 'shall be governed by the law chosen by the parties', in this case that of the Czech Republic, and not by Article 1341 of the Italian Civil Code.

A preliminary reference on jurisdiction (*regolamento di giurisdizione*) pursuant to Article 41 of the Italian Code of Civil Procedure is admissible in the presence of a foreign arbitration clause. In fact, arbitration has a jurisdictional nature (as may be inferred from the overall reading of Law No 25 of 5 January 1994 and Legislative Decree No 40 of 2 February 2006) and the existence of an arbitration clause is among the procedural challenges that may be brought against jurisdiction (the lack of which can be raised at any stage and level of

the proceedings provided that the defendant has not expressly or tacitly accepted Italian jurisdiction and, therefore, only if the defendant has challengedjurisdiction in its first act of defence). The fact that the court ordered the trial to continue without a stay, inviting the parties to deposit the original contract, is immaterial since it is not equivalent to having taken a decision which, to some extent, affirms or denies, even implicitly, jurisdiction; hence, no preclusive effect arises from such order.

38. *Bergamo Tribunal, 9 December 2021* 403

In an action seeking compensation for flight delays brought, pursuant to 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, against an Irish airline by the assignee of the passenger's claim, Italian courts have jurisdiction in view of the place of arrival (Bergamo) of the flight in respect of which the claim was made: this derives from the fact that, for the purposes of Article 7(1)(b), second indent, of Regulation (EU) No 1215/2012 of 12 December 2012, both the place of departure and the place of arrival of the aircraft must be regarded as places of performance of the services under contract. In fact, where there is, at the same time, an agreement to prorogate jurisdiction and the assignment to a debt-collection company of the air passengers' right to monetary compensation resulting from the application of Regulation No 261/2004, the choice of court clause is enforceable against the assignee only if, under the law of the State whose court was conferred jurisdiction under the clause, the assignee succeeds into all the rights and obligations of the assignor. Moreover, the provision in the general conditions of carriage drawn up by an air carrier operating in a number of Member States for exclusive jurisdiction of the court in which that carrier has its principal place of business in respect of all disputes arising from contracts concluded with the generality of passengers is one of the agreements which may lead to an imbalance in the rights and obligations of the parties under the contract: therefore, it must be included in the category of clauses which, by having the object or effect of abolishing or limiting the exercise of legal remedies by the consumer referred to in paragraph 1(q) of Annex I to Directive 93/13/EEC of 5 April 1993, must be regarded as unfair and consequently non-binding within the meaning of Article 3(1) of that Directive as regards both the passengers-consumers and the professionals who are assignees of their credit.

39. *Corte di Cassazione, order of 10 December 2021 No 39391* 650

Pursuant to Articles 64(g) and 67 of Law 31 May 1995 No 218, the judgment delivered by the Federal District Court of New York, in which the Islamic Republic of Iran and other Iranian public bodies and entities were ordered to pay damages to the relatives of some of the U.S. victims of the terrorist attacks of 11 September 2001 on the basis of Articles 1605(a) and 1605(A) of the Foreign Sovereign Immunities Act ('FSIA'), is eligible for recognition in Italy. The terrorism exception contained in the latter provision is based on a mitigation of the burden of proof applicable in cases, such as the present case, in which the plaintiff or the victim is a U.S. citizen and the State allegedly responsible for the offence is classified as a sponsor of terrorism in accordance with U.S. legislation: hence, according to this provision the Italian court is only

required to verify, in the context of the proceedings, the compatibility with the principles of public policy of the effects that such judgment is intended to produce in the Italian legal system, to the exclusion of any review of the legal soundness of the solution adopted by the foreign authority. Pursuant to Article 64(a) of Law No 218/1995 and the rule on restricted immunity from jurisdiction, the judgment in question is eligible for recognition in Italy. On the one hand, the first provision requires the Italian court to verify 'whether' the jurisdiction of the court of origin is in keeping with the principles on jurisdiction in the Italian legal system, which is apparent in the present case from the circumstance that the FSIA establishes jurisdiction in the case of damage resulting from death or injury caused by acts of terrorism. However, the provision does not mandate the Italian court to examine 'how' the foreign judgment came to affirm that jurisdiction of the court of origin existed over the claim brought, any assessment of the content of the FSIA being therefore irrelevant. On the other hand, the judgment is eligible for recognition in Italy because the immunity granted to States by international law does not apply in the presence of conduct of such gravity as to be configured (according to the allegations) as State crimes (*delicta imperii*) or even as crimes against humanity which, insofar as they are detrimental to the universal values of respect for human dignity that transcend the interests of individual State communities, mark the breaking point of the tolerable exercise of any sovereignty. Pursuant to Article 64(g) of Law No 218/1995, the judgement in question can, in principle, be recognised in Italy even if it contains an order to pay punitive damages: in the Italian legal system, civil liability is not only assigned the task of restoring the patrimonial sphere of the injured party, since the deterrent function and the punitive function of civil liability are also internal to the system, provided, however, that the aforesaid judgment was rendered in the foreign legal system on the basis of rules guaranteeing the typicality of the judicial orders, their foreseeability, and their quantitative limits.

40. *Corte di Cassazione, order of 13 December 2021 No 39421* 1024

The claim for compensation for damages arising from the failure to implement Directives 75/362/EEC, 75/363/EEC and 82/76/EEC concerning the remuneration payable to doctors admitted to university specialisation courses must be dismissed. On the one hand, the claims in question are time-barred, since such claim is time-barred within ten years from the date of entry into force (27 October 1999) of Law 19 October 1999 No 370, Article 11 of which recognised the right to a study grant only in favour of those doctors who, among those admitted to university specialisation courses between 1983 and 1991, were beneficiaries of irrevocable decisions delivered by the administrative court, thereby making the residual subjective breach definitive. On the other hand, the different quantification of the remuneration, and its different regime, subsequently determined by the State with Legislative Decree No 368/1999, implemented as from the academic year 2006-2007, cannot be relevant for this purpose.

The application for a reference to the Court of Justice of the European Union for a preliminary ruling asking 'whether, under European Union law, a legal remedy may be regarded as effective before the legal nature of the action capable of being brought is defined, with the consequent effect on limitation periods, before the person who is the subject of the proceedings is identified

and before the national court having jurisdiction to hear the claim is identified' must also be declared manifestly unfounded. In fact, as from the date on which Law No 370/1999 entered into force, no provisions of national law prevented the appellants from bringing proceedings for compensation for damages caused by the late implementation of the Directives. Moreover, there could be no doubt as to which party (the State) was liable for such damages, and any uncertainty as to the identification of the court with jurisdiction to hear the claim could not prevent the running of the limitation period, since any error could be remedied by means of a preliminary reference on jurisdiction (*regolamento di giurisdizione*).

41. *Corte di Cassazione, order of 13 December 2021 No 39766* 990

In the matter of international child abduction, the assessment of the application for return does not concern the merits of the dispute as to the best possible accommodation for the child, so that such an application may be rejected, in the child's best interests, only in the presence of one of the obstacles set out in Articles 12, 13 and 20 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which do not include any comparative counter-indications. In particular, Article 13(b) of the Convention requires the court which is requested to issue an order for the return to the State of residence of a child wrongfully removed or retained by a parent to adhere to a criterion of strict interpretation of the scope of the prohibitory condition and does not allow it to give weight to mere psychological trauma or to the mere moral suffering caused by the separation from the abducting parent nor to assess inconveniences connected with the prospective return that do not reach the degree of physical or psychological risk or actual intolerability on the part of the same child, since these, and only these, are the elements considered by the aforementioned Convention to be relevant and preclude the child's return. Consequently, in the face of an application for return to Brazil submitted by the father more than a year after the child's transfer to Italy, the court of first instance correctly proceeded to hear the child, both in order to assess his possible opposition to return and his integration in his new environment, and to verify whether the specific normative element preventing the application for return, provided for by Article 12(2) of the same Convention for cases of physical or psychological risk or actual intolerability of the situation for the child, was met, for the hypothesis of submitting an application for return after one year, arguing that, in this case, there was no real opposition to the child's return to Brazil (where he had led a normal life for seven years, free of traumatic or intolerable elements, preserving parental affection and friendships, as well as a good relationship with his father) and, therefore, excluding the existence of a situation of integration in Italy such as to constitute a condition preventing the child's return to Brazil.

With regard to the mother's capacity as sole custodian, which derives from the divorce decree previously issued by the competent Brazilian court, in principle the removal abroad or the failure to return to Italy of minors who are the children of separated parents cannot be qualified as wrongful removal from the other parent when the removal is carried out by the custodian, with the consequence that the aforementioned 1980 Hague Convention is inapplicable. Nevertheless, in the present case the court of first instance found that the child

custody proceedings (probably a revision of the custody arrangements, the child's parents having been divorced for some time), initiated at the father's request (when the mother had expressed her wish to move to Florida with her son without obtaining the father's consent), were still pending and that, in any case, as part of those proceedings, an order prohibiting the child's expatriation had been issued (a measure of which the mother could not have been unaware) and, subsequently, temporary custody of the child had been assigned to the father, with an order for the child's immediate return.

In relation to the proceedings for the return of a child to the custodian, provided for by Law of 15 January 1994 No 64, ratifying and executing, *inter alia*, the 1980 Hague Convention, in the absence of a rule providing for the intervention of the child as a party to the proceedings, the need to integrate the adversarial process also in respect of the child, subject to the appointment of a special curator, must be excluded, both because – even taking into account the evolution of the legal system that has led to the extension of the cases in which the child may be a party to the proceedings – the capacity of discernment and the provision of the right to be heard do not give rise to the right to be a party to the proceedings, as long as the legislature has not expressly conferred this right, and because the failure to provide for the child's participation in the proceedings in question, as a party, is justified by its incompatibility with the characteristics of urgency and provisionality that characterise the relevant measure. Consequently, since in the present case there was no need to appoint a special curator, it was correctly not disputed that the child, aged eight, was heard.

Finally, the grievance relating to the court of first instance's decision, for the purposes of establishing the conditions precluding the issuance of the return order under Article 13 of the 1980 Hague Convention, not to take further information or to order a court-appointed expert's report is inadmissible, inasmuch as there is no violation of the law or of the grounds of the decision.

42. *Corte di Cassazione, order of 17 December 2021 No 40548* 995

Pursuant to Article 7(2) of Regulation (EU) No 1215/2012 of 12 December 2012, according to which a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, before the courts for the place where the harmful event occurred or may occur – to be identified in the place where the damage occurred or, alternatively, at the plaintiff's choice, in the place where the event giving rise to that damage occurred – Italian courts have jurisdiction over an action for damages resulting from the publication by a Swedish company on Swedish websites of statements and news intended to discredit the commercial reputation of an Italian company. In the instant case, it was not established that the allegedly damaging publications were, in fact, confined to the Swedish territory; to the contrary, they were accessible and retrievable in Italy, as well. The language used for the communications (in this case, Swedish) is irrelevant, only the place of dissemination being relevant. Furthermore, the prorogation of jurisdiction in favour of the Swedish courts in respect of all disputes relating to a series of successive contracts, which govern an essentially unitary relationship, is not relevant within the meaning of Article 25 of Regulation No 1215/2012: in fact, the prorogation clause cannot extend to non-contractual claims for damages arising from the dissemination of defamatory information, in respect

of which the existence of a contractual relationship between the parties is a merely factual circumstance relating to the context in which the defendant Swedish company is alleged to have engaged in the defamatory conduct. Moreover, the prorogation clause, contained in a contract which was the subject of an assignment, cannot be invoked in the dispute which took place after the assignment, since one of the original parties, no longer being a contracting party, is free from the contractual commitments previously entered into. Finally, Article 31 of Regulation No 1215/2012 does not apply, since there is no preliminary relationship between the subject-matter of the Swedish company's termination of the tender contracts brought before the Swedish court – in whose case, moreover, the transferee company, and not the transferor plaintiff company, is involved – and the subject-matter of the action for damages to its reputation pending before the Italian court.

43. *Corte di Cassazione, 27 December 2021 No 41686* 998

In the presence of an incomplete evidentiary framework, the court on the merits is obliged to use every means and activate its powers of information in order to clarify whether the documentation produced is sufficient to certify the applicant's descent from an Italian parent *vis-à-vis* a Brazilian national's request to be recognised as having Italian nationality *iure sanguinis* on his mother's side (the applicant's mother being the descendent of an Italian national who emigrated to Brazil and settled there), in consideration of the fact that the *status* of national constitutes an essential quality of the person, with characteristics of absoluteness, originality, inalienability and imprescriptibility, which make it justiciable at any time. The inherent constitutional nature associated to nationality justifies and makes it mandatory for the deciding authority to carry out an investigation independently, since it is not possible to burden the appellant with the entire onus of the investigation, also within the meaning of Article 115 of the Code of Civil Procedure.

In relation to such application, the public policy limitation, set out in Article 16 of Law 31 May 1995 No 218, requires the court to lay out the reasons that render inapplicable Brazilian law (which would otherwise be applicable pursuant to Article 33 of Law 218/1995) to govern the recognition of a natural child, since the court may not omit to give reasons in that regard. This limitation must be assessed in the light of the fundamental principles set out in the Italian Constitution and those enshrined in international and supranational sources, and also in the light of the manner in which these principles have been embodied in the laws regulating these individual institutions and the interpretation provided thereof by the jurisprudence of the Constitutional Court and of the courts on the merits, whose activity of synthesis and reconstruction shape the living law, which cannot be disregarded in the determination of the notion of public policy, as a set of founding values of the legal system at a given historical moment.

44. *Corte di Cassazione, order of 29 December 2021 No 41930* 1002

Pursuant to Article 42 of Law 31 May 1995 No 218, in relation to the establishment of a guardianship in favour of a minor child, an Albanian national, present in Italy because entrusted to his maternal aunt and her husband living there, by means of a unilateral declaration made by his parents in Albania, before a notary who authenticated their signatures, the jurisdiction

and applicable law in matters of child protection are governed by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, made enforceable in Italy by Law 18 June 2015 No 1012, and also signed by Albania, which acceded to it on 18 May 2006, ratifying it by a law that entered into force on 1 April 2007. In the light of that Convention, Italian courts have jurisdiction, both in accordance with Articles 1, 2 and 5, which provide, as a general principle, that the authority of the Contracting State in which the child is habitually resident has jurisdiction in matters of the protection of the minor, in view of the tenor of the notarial declaration of the parents, confirmed by the findings of the social services report, which refers to a transfer to Italy of the child that is 'not temporary', and in accordance with Article 11, by virtue of which, in all cases of urgency, the authorities of each Contracting State on whose territory the child or the property belonging to him or her is located have jurisdiction to take the necessary measures of protection, given that the condition of the child, present in Italy without the persons exercising parental responsibility, makes urgent intervention necessary.

Pursuant to Article 15(1) of the 1996 Hague Convention – in accordance to which the exercise of the jurisdiction conferred onto them by the provisions of Chapter II, the authorities of the Contracting States shall apply their own law – the applicable law in both cases is the *lex fori*, although by virtue of paragraph 2 of the same provision the application of the law of another State with which the situation has a substantial connection is exceptionally permitted 'in so far as the protection of the person or the property of the child requires'.

As regards the qualification of the *status* of a foreign child present in Italy in the light of the applicable Italian law, the wording of Article 2 of Law 7 April 2017 No 47, concerning 'Provisions on measures for the protection of unaccompanied foreign children' and subsequent amendments, requires, in order to exclude that a foreign child be characterised as 'unaccompanied', not only that the child be on the national territory duly assisted by persons who take care of him in all respects, but also that there be persons on the national territory who can legitimately exercise parental responsibility over them. Otherwise, lacking even one of the above-mentioned requirements (in particular, the ability to exercise legal representation), the child must be considered as 'unaccompanied', as confirmed by the legislature's use in the wording of Article 2 of the conjunction 'and' between the words 'assistance' and 'representation'. It follows that the category of unaccompanied foreign children also includes minors *de facto* entrusted by their parents residing abroad to a relative who is able to take care of them in Italy, which is the situation of the Albanian minor in the instant case, who, although assisted and cohabiting with his mother's sister, is on Italian territory without any person who can legitimately represent him and exercise parental responsibility over him, since the notarial act of custody signed by the child's parents does not constitute a delegation of parental responsibility valid under Albanian law, but merely a *de facto* situation by virtue of which the child has entered Italy, with the consent of his parents residing in Albania.

In the context of the conflict of jurisdiction for the establishment of a guardianship in favour of the aforementioned child, the territorially competent family court, and not of the ordinary court acting as guardianship court, has

jurisdiction: in fact, the aforementioned Law No 47/2017 (supplemented, as regards the rules of jurisdiction, with the amendments set out in Legislative Decree of 22 December 2017 No 220 to the aim of avoiding the jurisdictional 'double track' (i.e. family court and guardianship court), which is considered an unnecessary and harmful procedural complication) clearly intended to entrust the protection of unaccompanied foreign children entirely to the specialised court.

45. *Milan Court of Appeal, 29 December 2021* 658

Pursuant to Article 3(2) of Law 31 May 1995 No 218 and its reference to the Brussels Convention of 27 September 1968 and subsequent amendments – whether to the Convention itself or, as seems preferable, to the Regulations that replaced it, on the basis of their applicability *ratione temporis* – Italian courts do not have jurisdiction over a warranty action brought against a company based in Hong Kong, independently of the main proceedings in which the plaintiff company is sued before the same court for compensation for damage suffered by tourists during a trip organised by it. On the one hand, in the absence of any indemnity agreement, and since jurisdiction must be founded on the substantive relationship between the guarantor and the guaranteed party in which the action for an improper guarantee is based and founded, *i.e.*, in the present case, on the contract for the provision of services concluded between the parties, the contractual forum under Article 7(1) of Regulation (EU) No 1215/2012 of 12 December 2012 is not applicable. This would also be the case if Article 5(1) of the 1968 Brussels Convention were to be taken into account, since the place of performance of the services covered by the contract is outside the European Union. On the other hand, neither Article 8(2) of Regulation No 1215/2012, which is a special provision and is meant to be narrowly interpreted, nor Article 6(2) of the Convention – provisions which, despite the differences in the wording of the Italian versions, are equivalent, as is also apparent from an examination of the texts in different languages, as well as from systematic and teleological interpretation – allow the defendant in the main proceedings to sue a third guarantor before the same court in a different and separate procedure, in derogation from the general rules on jurisdiction. It is irrelevant that the Italian court before which the main proceedings are brought may exclude the third party joinder on the basis of Article 269 of the Code of Civil Procedure: the domestic provision cannot lead to a different interpretation of the international provisions, and not even an interpretation of the provisions in the light of the right to effective judicial protection and due process of law (Article 47 of the Charter of Fundamental Rights of the European Union, Article 6 of the European Convention on Human Rights and Articles 24 and 111 of the Italian Constitution) allows a different conclusion, considering that, in the present case, denying Italian jurisdiction is not tantamount to denying any judicial protection. Similarly, for the purposes of determining jurisdiction, in the absence of specific allegations, arguments based on the remoteness or alleged exoticity of the *forum rei* or the *forum contractus* must be rejected, just as the distinction between proper and improper warranty. The reference to Article 43 of the Tourism Code (Legislative Decree 23 May 2011 No 79 and subsequent amendments) is equally irrelevant, since the provision governs exclusively the relations between tourists and the plaintiff company and is, in any case, a rule of substantive law.

46. *Corte di Cassazione (plenary session), order of 14 January 2022 No 1083* 715

Requests for referral to the Court of Justice of the European Union in accordance with Article 267 TFEU and to the Italian Constitutional Court on questions of compatibility with European Union law and of constitutionality concerning the domestic legislation on the age at which a justice of the peace may cease to hold office and, more generally, on the *status* and working conditions of honorary magistrates are inadmissible. On the one hand, they are inadmissible in accordance with both Article 41 of the Code of Civil Procedure and Article 10 of the Code of Administrative Procedure on the ground of lack of interest in bringing proceedings, absent any factual or legal element that might cast doubt on the jurisdiction of the court seised and given that none of the parties, including the original appellant in the original proceedings *a quo*, disputes the correctness of the preliminary ruling on jurisdiction (*regolamento di giurisdizione*) with which they are brought. On the other hand, they are inadmissible because the questions raised do not affect the allocation of jurisdiction and, rather, concern the substance of the dispute.

47. *Corte di Cassazione, order of 20 January 2022 No 1826* 1113

A creditor's claim brought against a trust, in the context of an injunction which was subsequently withdrawn at the trustee's request, must be rejected on the basis of the trust's lack of legal standing. Pursuant to Article 2 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition, the term trust 'refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose': therefore, according to settled case-law, a trust does not have legal personality and is consequently devoid of legal standing. The creation of a trust does not give rise to a new legal entity, but only to a separate estate, administered by the trustee in the interest of one or more beneficiaries and destined for a predetermined purpose. Therefore, the trustee is the sole party of reference in relations with third parties, not as the legal representative of the trust but as the one who exclusively disposes of the assets and legal relationships conferred into the trust itself. Similarly, the attribution of legal personality to the trust cannot be inferred from the legislature's attribution, in Article 73 of Presidential Decree No 917/1973, of tax subjectivity for corporate income tax (IRES) purposes: in fact, the legislature can dispose of tax subjectivity independently of other forms of subjectivity. Therefore, Article 73 cannot be read in the sense that the legislature has attributed legal personality to trusts, nor in the sense that courts can attribute legal personality to centres of interests and relations that are not given such attribution under the law (since such attribution is the prerogative of the legislature alone).

48. *Corte di Cassazione, order of 2 February 2022 No 3255* 670

Article V of the 1958 New York Convention – which introduces a mechanism for the recognition and enforcement of foreign arbitral awards enacted in Italy at Articles 839-840 of the Italian Code of Civil Procedure – does not leave the requested court any margin of review on the merits of the arbitral award, so that the requested court may only perform an extrinsic review of the operative part of the award. In performing such activity, the court may rely on the reasoning and expositive part of the award; however, its activity may never

result in the review of the award on the merits. Therefore, an arbitral award issued in Sweden against the Republic of Kazakhstan is eligible for recognition in Italy if it is alleged that it was obtained by means of fraudulent and criminally relevant conduct, which only became known after the award was issued. In this framework, the recognition and enforcement of the award does not entail an infringement of substantive public policy, since a violation of public policy cannot be assessed on the basis of a reading of the operative part, but only from a comparison of the content of the award with preliminary findings unknown to the arbitration panel, which would necessarily require a review of the merits of the arbitral decision by means of an invasive review somewhat akin to that of a revocation challenge. Nor is the recognition and enforcement of the award contrary to procedural public policy if it is claimed that the arbitral award was obtained by means of false evidence, the falsity of which was discovered only after the arbitration process was concluded but was not apparent from a final judgment, as long as the award cannot have violated the parties' rights of defence or the adversarial principle by not taking into account circumstances that were unknown to the arbitral tribunal because the party concerned failed to submit them to it.

49. *Corte di Cassazione, 8 February 2022 No 3952* 678

Regulation (EU) No 1215/2012 of 12 December 2012 does not apply to proceedings brought before the Italian data protection authority (*Garante per la protezione dei dati personali*) seeking the removal, from the results of Internet searches carried out by means of a search engine, of certain URLs linking the name of a person to a legal matter allegedly now extraneous to the right to report news, seeking to determine whether that authority has the power to issue the measures which, in accordance to Italian law, it is entitled to adopt also in relation to a foreign person operating outside the national territory. The provisions by which the Member States implemented Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which are applicable *ratione temporis*, apply instead. In particular, an Italian company providing support services to the operator of an Irish search engine may be regarded as an 'establishment' within the meaning of Article 4(1)(a) of that Directive, by virtue of which the provisions by which a Member State implements that Directive apply whenever data processing is carried out in the context of the activities of an establishment located on the territory of that State. The interpretation given on this point by the Court of Justice of the European Union is also relevant, according to which a processing operation may be said to be carried out 'in the context of the activities' of an establishment even where that establishment is solely intended to ensure, in that Member State, the promotion and sale of the advertising space offered by the search engine, since the activities of the operator of that search engine and those of its establishment located in the Member State concerned are, in such a case, inextricably linked. Consequently, the national provisions governing the activity of the Italian data protection authority apply not only in respect of data controllers established in Italy, but also in respect of a foreign data controller who carries on, through a permanent establishment located in Italy, an actual and real activity (even a minimal one) in the context of which the processing is carried out. This is the case even where the subsidiary, of which

the data controller avails itself, is responsible solely for the sale of advertising space and for other marketing activities.

50. *Corte di Cassazione, order of 2 March 2022 No 6909* 1017

The application for family reunification, pursuant to Article 29 of Legislative Decree 25 July 1998 No 286, of a non-EU citizen minor, entrusted in the care of two Italian spouses on the basis of a customary adoption order issued by a Ghanaian court, must be granted, since the principle of the primacy of the child's best interests, expressly affirmed in Article 3 of the New York Convention on the Rights of the Child of 24 November 1989 and reaffirmed in Article 24 of the Charter of Fundamental Rights of the European Union, must also be applied in matters of internal immigration regulations, as provided by Article 28(3) of Legislative Decree No 286/1998, according to which '[i]n all administrative and judicial proceedings aimed at implementing the right to family unity and concerning minors, the child's best interests must be taken into consideration as a priority'. Whether the Ghanaian order is contrary to public policy in matters of adoption, as a result of the failure to ascertain beforehand the child's state of abandonment, is not relevant where the issue is not the capacity of the foreign measure to produce direct legal effects in the Italian legal system but, rather, its suitability to act as a factual prerequisite for the administrative measure of family reunification and thus to properly invest the foster parents with the duties of material and affective care for the child, without, on the other hand, the need to establish between them a filiation bond compatible with our legal system. Moreover, the applicant's request for reunification is also meritorious in accordance with Article 29(2) of Legislative Decree No 286/1998, which, for this purpose, equates 'minors adopted or entrusted or subject to guardianship' to one's own children.

51. *Corte di Cassazione, order of 7 March 2022 No 7280* 717

As also clarified by the 2015 'Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation', with regard to the interpretation of sources of European Union law the recitals set out in a Regulation serve the function of explaining the reasons for the legislation and complement its 'concise statement of reasons'. However, they do not have a normative content.

52. *Corte di Cassazione, order of 7 March 2022 No 7415* 718

The rules against discrimination on grounds of sex in access to goods and services (including the conclusion of a lease) set out in Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, and implemented in Italy by Legislative Decree 6 November 2007 No 196, must be understood as extending to cases where the person complaining of discrimination is a transgender person, insofar as gender identity is included in sex identity. It follows that the scope of application of the Directive cannot be limited only to discrimination on the basis of the belonging to one or the other sex of origin: to the contrary, it must also be applied in the context of discrimination originating in the gender reassignment of the person concerned.

53. *Corte di Cassazione (plenary session), 16 March 2022 No 8600* 719

Italian courts do not have jurisdiction over the dispute seeking a declaration of absolute lack of power of the Italian Government, its organs and other legal entities delegated by it to impose and collect in the so-called 'Free Territory of Trieste' taxes and other tax revenues, with the sole exception of those pertaining to its civil administration, with which such Government would have been entrusted on a fiduciary basis by the applicable international rules. In fact, such action is aimed at excluding the very sovereignty of the Italian State over a portion of its territory. Consequently – even in case the action was supported, in theory, by positive law – it conveys claims that cannot be brought before any courts, since it does not involve the decision over a right or a legitimate interest. To the contrary, it involves a review of the constitutional configuration of the State, calling into question the very redefinition of the State's territorial borders or, in any case, their structure. As such, it entails an intrusion into the sphere of attribution of other State powers.

Pursuant to the principle of effectiveness of international law, the so-called 'Free Territory of Trieste' belongs to the Italian State. Its establishment was envisaged in accordance with Article [21] of the Paris Treaty of 10 February 1947. However, in fact it never came into existence, also due to the 'express' [*rectius*: 'tacit'] repeal of this provision by the London Memorandum of 5 October 1954, the Helsinki Agreements of 1 August 1975, and the Osimo Treaty of 10 November 1975.

54. *Naples Tribunal, order of 18 March 2022* 690

The objection to enforcement under Article 615 of the Code of Civil Procedure for lack of title in relation to an expropriation procedure instituted on the basis of an English judgment of 30 October 2014 containing an order to pay a sum of money without the judgment creditor having obtained and attached a declaration of enforceability under Article 38 *et seq* of Regulation (EC) No 44/2001 of 22 December 2000 must be upheld, despite the fact that the application for a declaration of enforceability was previously rejected by the competent Court of Appeal on the grounds that the mechanism governed by Regulation (EC) No 44/2001 was superseded by the subsequent Regulation (EU) No 1215/2012 of 12 December 2012, with the result that there was no need to obtain the enforceability of the foreign judgment. On the one hand, pursuant to Articles 80, 81 and 66 of Regulation (EU) No 1215/2012, the former rules 'continue to apply to judgments given in legal proceedings instituted... before 10 January 2015' and the enforceable judgment was delivered on the outcome of an application lodged with the court before the date identified in Article 66. On the other hand, the procedure for the decision on the application for enforceability provided for by Regulation No 44/2001 is aimed at ascertaining the conditions for enforceability and the non-existence of the grounds for refusal contemplated by that Regulation, and falls within the scope of the jurisdiction on the merits. Against this background, acknowledging the possibility of 'enforcing' the foreign judgment even in the absence of a prior declaration of enforceability by the Court of Appeal would entail a distortion of that system. Moreover, the decision rejecting the application for a declaration of enforceability pursuant to Article 38 *et seq* of Regulation (EC) No 44/2001, expressly motivated with a 'no need to adjudicate' due to the applicability of Regulation (EU) No 1215/2012, cannot be considered as

binding between the parties for the purposes of *res judicata*. On the one hand, it is a decision rejecting the application; on the other hand, the *ex parte* nature of the procedure laid down by Regulation (EC) No 44/2001 implies that – apart from the question of a possible burden of appeal under Article 43(1) of the same Regulation – the rejection decree would not affect the possibility of resubmitting the application (Article 640(3) of the Code of Civil Procedure). In contrast, the United Kingdom's withdrawal from the European Union is irrelevant, since Article 67(2)(a) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community provides that – in the United Kingdom and the Member States of the European Union in situations involving the United Kingdom – the recognition and enforcement of judgments and judicial decisions will continue to be subject to Regulation (EU) No 1215/2012 where those measures are taken in actions brought before the end of the transition period (ending on 31 December 2020). Similarly, Regulation (EC) No 805/2004 of 21 April 2004 is also irrelevant since the disputed title is not a title for an uncontested claim.

55. *Constitutional Court, 28 March 2022 No 79* 610

Insofar as it excludes, *via* its reference to Article 300(2) of the Civil Code, the establishment of civil relationships between the adoptee in special cases and the relatives of the adopting party, Article 55 of Law 4 May 1983 No 184 is unconstitutional for conflict with Articles 3, 31 and 117(1) of the Italian Constitution, the latter in relation to Article 8 of the European Convention on Human Rights (ECHR). In fact, the rule produces the effect of depriving the child of the network of personal and patrimonial protections deriving from the legal recognition of parental ties, which the legislature, implementing Articles 30 and 31 of the Constitution, intended to guarantee to all children on equal terms, so that all children may grow up in a solid environment protected by family ties. Consequently, Article 55 of Law No 184/1983 adversely affects the child in the identity that he or she derives from the insertion in the adoptive parent's family environment and, therefore, from partaking in that new network of relations which contribute to permanently build his or her personal identity. Hence, the provision conflicts with Article 8 ECHR for violation of the right to both family life and personal identity.

56. *Corte di Cassazione (plenary session), order of 29 April 2022 No 13594* 696

Pursuant to Article 25(1)(a) of Regulation (EU) No 1215/2012 of 12 December 2012, Italian courts do not have jurisdiction over an action brought by an Italian company against a German company for payment of consideration and damages for loss of profit resulting from the termination of a supply contract concluded by the mere acceptance, by the Italian supplier, of purchase orders issued by the company incorporated under German law, which expressly referred to the annexed general contractual terms and conditions, including a jurisdiction clause exclusively in favour of the German court. According to the consolidated interpretation of the Court of Justice of the European Union, the written form requirement laid down by that provision entails that the clause conferring jurisdiction be the subject of an agreement between the parties, clearly and precisely expressed. Such requirement is therefore satisfied in the present case, since the general conditions can be considered as accepted

by the seller together with the purchase orders forming part of the contractual proposal.

57. *Corte di Cassazione (plenary session), 27 May 2022 No 17244* 702

In an action over a contract for the sale and installation of an industrial plant and a guarantee contract brought by the Italian selling and ordering company against a purchasing and beneficiary company based in Algeria, which has not filed an appearance, and against the guarantor bank based in Italy to ascertain whether the plant is working properly and for compensation for the damage caused by the unlawful enforcement of the guarantee, the second defendant being based in Italy, Italian courts have jurisdiction pursuant to Article 6 of the Brussels Convention of 27 September 1968 – the application of which, in matters covered by the Convention itself, is referred to in Article 3(2) of Law 31 May 1995 No 218 –, notwithstanding the foreign arbitration clause contained in the contract of sale. In the event that the defendant who signed the arbitration agreement has not filed an appearance, the court cannot declare of its own motion that there is no Italian jurisdiction. On the one hand, Article 11 of Law No 218/1995, according to which the lack of jurisdiction of the national court 'shall be ascertained by the court of its own motion... if the defendant is in default of appearance', does not contain a specific reference to the hypothesis that such lack of jurisdiction is based on a foreign arbitration agreement. On the other hand, Article II(3) of the New York Convention of 10 June 1958 expressly provides that the parties may be referred to arbitrators by the court only at the request of one of the parties. This rule expressly refers to both domestic and foreign arbitrations (see Article I(1) of the same Convention) and responds to a well-established principle in the Italian legal system according to which the basis for any arbitration is to be found in the free will of the parties, which only allows derogation from the precept contained in Article 102 of the Italian Constitution, amounting to one of the possible ways of disposing, also in a negative sense, of the right referred to in Article 24(1) of the Italian Constitution. It follows that the possibility of identifying the source of arbitration in an authoritative will is excluded and that the rule in Article 806 of the Code of Civil Procedure exemplifies a general principle of the entire legal system, guaranteed under the Constitution.

58. *Corte di Cassazione (plenary session), order of 28 June 2022 No 20633* 707

The rejection of an application by which, in the context of an action for opposition to an ex parte injunction, the opposing party requested, pursuant to Article 649 of the Code of Civil Procedure, the stay of the enforceability of the opposing decree on the ground of the *prima facie* unfounded nature of the challenge against jurisdiction raised by the opposing party, does not preclude the admissibility of the reference for a preliminary ruling on jurisdiction (*regolamento di giurisdizione*) subsequently proposed by the latter pursuant to Article 41 of the Code of Civil Procedure, being sufficient that the reference be made, as in the present case, during the pendency of the proceedings.

Pursuant to the first indent of Article 7(1)(b) of Regulation (EU) No 1215/2012 of 12 December 2012, Italian courts do not have jurisdiction over an action brought by an Italian company against an English company for payment of the balance of the price of goods sold by the former to the latter and made available, to the carrier hired by the latter, at the seller's premises in Italy

for carriage to the United Kingdom, where it is not established that the parties have arranged, by means of a clear and unequivocal agreement, that the place of delivery of the goods is in Italy. The existence of such an agreement cannot be inferred from the inclusion of the 'ex works' clause in the seller's invoices. In fact, such invoices are documents of unilateral formation and origin. Furthermore, it is not possible to derogate from the factual criterion of the general jurisdiction of the final place of destination of the goods absent an express and clear acceptance of such a clause and, therefore, of the formation of an unequivocal agreement on the point which, in the present case, does not appear to be inferable – unequivocally – even from all the other documents submitted in the proceedings. Moreover, the purpose of the 'ex works' clause is not to affect the determination of jurisdiction: to the contrary, it is to regulate the transfer of risks and to make the buyer bear the cost of transport.

In declaring the lack of jurisdiction of the Italian courts as the result of a reference for a preliminary ruling on jurisdiction lodged in the pendency of an opposition to an *ex parte* injunction, the Court of Cassation, in plenary session, shall declare the *ex parte* injunction null.

EU CASE LAW (*)

Access to justice: 12, 25.
Competition: 35.
Consumer protection: 5, 8.
Contracts: 3, 6, 7.
Co-operation in criminal matters: 10.
EC Regulation No 1346/2000: 13, 39.
EC Regulation No 44/2001: 41.
EC Regulation No 1206/2001: 29.
EC Regulation No 2201/2003: 28, 40, 45.
EC Regulation No 864/2007: 47
EC Regulation No 593/2008: 13, 27, 46.
EU Regulation No 650/2012: 22, 30, 31.
EU Regulation No 1215/2012: 8, 15, 16, 18, 20, 26, 29, 32, 36, 37, 42, 44.
European Union citizenship: 43.
European Union law: 1, 9, 21, 14, 19, 34, 38.
Freedom of movement of workers: 17.
Freedom to provide services: 11, 23.
Intellectual property rights: 47.
Liability of Member States: 24.
Prohibition of discrimination: 2, 4, 45.
Treaties and general international rules: 33.

1. *Court of Justice, 4 March 2020 case C-34/19, Telecom Italia s.p.a. v. Ministero dello Sviluppo Economico and Ministero dell'Economia e delle Finanze* 416

EU law must be interpreted as not requiring a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy an infringement of a provision of EU law, without prejudice to the possibility for the parties concerned of rendering the State liable in order to obtain legal protection of their rights under EU law.

2. *Court of Justice, 23 April 2020 case C-507/18, NH v. Associazione Avvocatura per i diritti LGBTI – Rete Lenford* 167

Directive 2000/78/EC must be interpreted as not precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that Directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that Directive, against that category of persons and it is not possible to identify an injured party *(see also paras 60-65).*

* The paragraphs added in parenthesis in italics refer to the Court's reasoning in those parts recognized as relevant for private international law aspects.

3. *Court of Justice, 30 April 2020 case C-584/18, D.Z. v. Blue Air – Airline Management Solutions SRL* 169

Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, in particular Article 2(j) thereof, must be interpreted as meaning that, where an air carrier denies boarding to a passenger on the ground that he or she has presented inadequate travel documentation, such denied boarding does not, in itself, deprive the passenger in question from protection under that Regulation. In the event of challenge by that passenger, it is for the competent court to assess, based on the circumstances of the case, whether or not such denied boarding is reasonably justified in the light of that provision.

Regulation No 261/2004, in particular Article 15 thereof, must be interpreted as precluding a clause applicable to passengers, included in the standard terms, published in advance, relating to the operation or provision of services by an air carrier, which limits or excludes the air carrier's liability in the event of denied boarding for reasons relating to the allegedly inadequate nature of a passenger's travel documentation, thus depriving that passenger of any right to compensation he or she may have.

4. *Court of Justice, 11 June 2020 case C-581/18, RB v. TÜV Rheinland LGA Products GmbH and Allianz IARD S.A.* 167

The first paragraph of Article 18 TFEU must be interpreted as meaning that it is not applicable to a clause, stipulated in a contract concluded between an insurance company and a manufacturer of medical devices, limiting the geographical extent of the insurance coverage against civil liability arising from those devices to harm that has occurred in the territory of a single Member State, since such a situation does not fall, as EU law currently stands, within the scope of application of EU law.

5. *Court of Justice, 25 June 2020 case C-380/19, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. Deutsche Apotheker- und Ärztebank eG* 168

Article 13(1) and (2) of Directive 2013/11/EU on consumer alternative dispute resolution and repealing Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on ADR) are to be interpreted as meaning that a trader who provides in an accessible manner on his website the general terms and conditions of sales or service contracts, but concludes no contracts with consumers via that website, must provide in his general terms and conditions information about the ADR entity or ADR entities by which that trader is covered, when that trader commits to or is obliged to use that entity or those entities to resolve disputes with consumers. It is not sufficient in that respect that the trader either provides that information in other documents accessible on his website, or under other tabs thereof, or provides that information to the consumer in a separate document from the general terms and conditions, upon conclusion of the contract subject to those general terms and conditions.

6. *Court of Justice, 9 July 2020 case C-86/19, SL v. Vueling Airlines SA* 169

Article 17(2) of the Convention for the Unification of Certain Rules for In-

ternational Carriage by Air, concluded in Montreal on 28 May 1999, read in conjunction with Article 22(2) of that Convention, must be interpreted as meaning that the sum provided for in that latter provision as the limit of the air carrier's liability in the event of destruction, loss and delay of, or of damage to, checked baggage which has not been the subject of a special declaration of interest in delivery constitutes a maximum amount of compensation which the passenger concerned does not enjoy automatically and at a fixed rate. Consequently, it is for the national court to determine, within that limit, the amount of compensation payable to that passenger in the light of the circumstances of the case.

7. *Court of Justice, 3 September 2020 case C-356/19, Delfly sp. Z o.o. v. Smartwings Poland sp. Z o.o., formerly Travel Service Polska sp. Z o.o.* 420

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, and repealing Regulation (EEC) No 295/91, and in particular Article 7(1) thereof, is to be interpreted as meaning that passengers whose flights have been cancelled or subject to a long delay or their legal successors may demand payment of the amount of the compensation referred to in that provision in the national currency of their place of residence, so that that provision precludes a Member State's legislation or case-law which results in the dismissal of an action brought for that purpose by such passengers or their legal successors on the sole ground that the claim was expressed in that national currency.

8. *Court of Justice, 18 November 2020 case C-519/19, Ryanair DAC v. Delay-Fix* 159

Article 25 of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in order to contest the jurisdiction of a court to hear and determine an action brought for compensation under 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, a jurisdiction clause incorporated in a contract of carriage concluded between a passenger and that airline cannot be enforced by the airline against a collection agency to which the passenger has assigned the claim, unless, under the legislation of the Member State whose courts are designated in that clause, that collection agency is the successor to all the initial contracting party's rights and obligations, which it is for the referring court to determine. Where appropriate, such a clause, incorporated, without having been subject to an individual negotiation, in a contract concluded between a consumer, that is to say, the air passenger, and a seller or supplier, that is to say, the airline, and which confers exclusive jurisdiction on the courts which have jurisdiction over the territory in which that airline is based, must be considered as being unfair within the meaning of Article 3(1) of Directive 93/13/EEC on unfair terms in consumer contracts *(see also paras 38-42, 43-47, 49-52, 53-57, 61).*

9. *Court of Justice, 2 March 2021 case C-824/18, A.B. and others v. Krajowa Rada Sadownictwa* 740

Where amendments are made to the national legal system which, first, deprive

a national court of its jurisdiction to rule in the first and last instance on appeals lodged by candidates for positions as judges at a court such as the Sad Najwyzszy (Supreme Court, Poland) against decisions of a body such as the Krajowa Rada Sadownictwa (National Council of the Judiciary, Poland) not to put forward their application, but to put forward that of other candidates to the President of the Republic of Poland for appointment to such positions, which, secondly, declare such appeals to be discontinued by operation of law while they are still pending, ruling out the possibility of their being continued or lodged again, and which, thirdly, in so doing, deprive such a national court of the possibility of obtaining an answer to the questions that it has referred to the Court for a preliminary ruling:

Articles 267 TFEU and 4(3) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put to it by that court and of precluding any possibility of a national court repeating in the future questions similar to those questions;

the second subparagraph of Article 19(1) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed, by the President of the Republic of Poland, on the basis of those decisions of the Krajowa Rada Sadownictwa (National Council of the Judiciary), to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

Where it is proved that those articles have been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made.

The second subparagraph of Article 19(1) TEU must be interpreted as precluding provisions amending the state of national law in force under which:

notwithstanding the fact that a candidate for a position as judge at a court such as the Sad Najwyzszy (Supreme Court) lodges an appeal against the decision of a body such as the Krajowa Rada Sadownictwa (National Council of the Judiciary) not to accept his or her application, but to put forward that of other candidates to the President of the Republic of Poland, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic of Poland and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant's situation for the purposes

of any assignment of the position concerned, and, moreover, such an appeal may not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made, where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those provisions are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed, by the President of the Republic of Poland, on the basis of the decisions of the Krajowa Rada Sadownictwa (National Council of the Judiciary), to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

Where it is proved that the second subparagraph of Article 19(1) TEU has been infringed, the principle of primacy of EU law must be interpreted as requiring the referring court to disapply those provisions and to apply instead the national provisions previously in force while itself exercising the judicial review envisaged by those latter provisions.

10. *Court of Justice, 17 March 2021 case C-488/19, Arrest Warrant against J.R.* 737

Articles 1(1) and 8(1)(c) of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA, must be interpreted as meaning that a European arrest warrant may be issued on the basis of a judicial decision of the issuing Member State ordering the execution, in that Member State, of a sentence imposed by a court of a third State where, pursuant to a bilateral agreement between those States, the judgment in question has been recognised by a decision of a court of the issuing Member State. However, the issuing of the European arrest warrant is subject to the condition, first, that a custodial sentence of at least four months has been imposed on the requested person and, second, that the procedure leading to the adoption in the third State of the judgment recognised subsequently in the issuing Member State has complied with fundamental rights and, in particular, the obligations arising under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union *(see also paras. 46-47)*.

11. *Court of Justice, 15 April 2021 case C-786/19, The North of England P & I Association Ltd v. Bundeszentralamt für Steuern* 739

The first subparagraph of Article 46(2) of Directive 92/49/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC ('third non-life insurance Directive'), read together with the second indent of Article 2(d) of Directive 88/357/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, must be interpreted as meaning that, where insurance contracts concern the provision of cover for various risks linked to the operation of sea-going vessels

which are entered in the shipping register maintained by a Member State but which fly the flag of another Member State or of a third State under a temporary flagging-out authorisation, the State that must be considered to be the 'Member State of registration' of the ship concerned and therefore, to be 'the Member State where the risk is situated', within the meaning of those provisions, holding the exclusive power to tax premiums paid with respect to those insurance contracts, is the Member State which maintains the shipping register in which the primary purpose of entering that ship is to prove ownership of that ship.

12. *Court of Justice, 20 April 2021 case C-896/19, Repubblika v. Il-Prim Ministru, WY intervening* 1049

The second subparagraph of Article 19(1) TEU must be interpreted as meaning that it may be applied in a case in which a national court is seised of an action provided for by national law and seeking a ruling on the conformity with EU law of national provisions governing the procedure for the appointment of members of the judiciary of the Member State to which that court belongs. Article 47 of the Charter of Fundamental Rights of the European Union must be duly taken into consideration for the purposes of interpreting that provision.

The second subparagraph of Article 19(1) TEU must be interpreted as not precluding national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body responsible for, *inter alia*, assessing candidates for judicial office and giving an opinion to that Prime Minister.

13. *Court of Justice, 22 April 2021 case C-73/20, ZM, in his capacity as liquidator in the insolvency of Oeltrans Befrachtungsgesellschaft mbH v. E.A. Frerichs* 153

Article 13 of Council Regulation (EC) No 1346/2000 on insolvency proceedings and Article 12(1)(b) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) must be interpreted as meaning that the law applicable to the contract under the latter Regulation also governs the payment made by a third party in performance of a contracting party's contractual payment obligation where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors *(see also paras 22-26, 31-33, 35-39).*

14. *Court of Justice, 29 April 2021 case C-504/19, Banco de Portugal and others v. VR.* 416

Article 3(2) and Article 32 of Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding-up of credit institutions, read in the light of the principle of legal certainty and of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding recognition, without further conditions, in legal proceedings on the merits pending in a Member State other than the home Member State relating to a liability which a credit institution had been relieved of by a first reorganisation measure seeking to transfer back, with retroactive effect at a date prior to the opening of such proceedings, that liability to that credit institution, where such recognition has the result that the credit institution

to which the liabilities had been transferred by the first measure can no longer be sued, with retroactive effect, the purposes of those proceedings, thereby calling into question judicial decisions already adopted in favour of the applicant who is the subject of those same proceedings *(see also paras. 33-36, 37-45, 46-49, 50-63, 66).*

15. *Court of Justice, 12 May 2021 case C-709/19, Vereniging van Effectenbezitters v. BP plc* 161

Article 7(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the direct occurrence in an investment account of purely financial loss resulting from investment decisions taken as a result of information which is easily accessible worldwide but inaccurate, incomplete or misleading from an international listed company does not allow the attribution of international jurisdiction, on the basis of the place of the occurrence of the damage, to a court of the Member State in which the bank or investment firm in which the account is held has its registered office, where that firm was not subject to statutory reporting obligations in that Member State *(see also paras 28-29, 32-35).*

16. *Court of Justice, 20 May 2021 case C-913/19, CNP spólka z ograniczona odpowiedzialnoscia v. Gefion Insurance A/S* 162

Article 13(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, read in conjunction with Article 10 thereof, must be interpreted as not applying in the case of a dispute between, on the one hand, a business which has acquired a claim originally held by an injured party against a civil liability insurance undertaking and, on the other hand, that same civil liability insurance undertaking, so that it does not preclude jurisdiction to hear and determine such a dispute from being founded on Article 7(2) or Article 7(5) of that Regulation, as appropriate.

Article 7(5) of Regulation No 1215/2012 must be interpreted as meaning that an undertaking which adjusts losses in the context of motor liability insurance in one Member State pursuant to a contract concluded with an insurance undertaking established in another Member State, in the name and on behalf of that undertaking, must be regarded as being a branch, agency or other establishment, within the meaning of that provision, where that undertaking: has the appearance of permanency, such as an extension of the insurance undertaking; and has a management and is materially equipped to negotiate business with third parties, so that they do not have to deal directly with the insurance undertaking *(see also paras 32-36, 37-40, 43-46, 52-60).*

17. *Court of Justice, 3 June 2021 case C-784/19, Team Power Europe EOOD v. Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite – Varna* 737

Article 14(2) of Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems must be interpreted as meaning that a temporary-work agency established in a Member State must, in order for it to be considered that it 'normally carries out its activities', within the meaning of Article 12(1) of the same Regulation, in that Member State, carry out a significant part of its

activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State *(see also paras. 58-67).*

18. *Court of Justice, 3 June 2021 case C-280/20, ZN v. Generalno konsulstvo na Republika Bulgaria v grad Valensia, Kralstvo Ispania* 165

Article 5(1) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, read in conjunction with recital 3 of that Regulation, must be interpreted as meaning that it applies for the purposes of determining the international jurisdiction of the courts of a Member State to hear and rule on a dispute between an employee from a Member State who does not carry out duties involving the exercise of public powers and a consular authority of that Member State situated in the territory of another Member State *(see also paras 26-29, 30-32, 34-39).*

19. *Court of Justice, 15 June 2021 case C-645/19, Facebook Ireland Ltd. and others v. Gegevensbeschermingsautoriteit* 742

Articles 55(1), 56 to 58 and 60 to 66 of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), read together with Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a supervisory authority of a Member State which, under the national legislation adopted in order to transpose Article 58(5) of that Regulation, has the power to bring any alleged infringement of that Regulation to the attention of a court of that Member State and, where necessary, to initiate or engage in legal proceedings, may exercise that power in relation to an instance of cross-border data processing even though it is not the 'lead supervisory authority', within the meaning of Article 56(1) of that Regulation, with respect to that data processing, provided that that power is exercised in one of the situations where Regulation No 2016/679 confers on that supervisory authority a competence to adopt a decision finding that such processing is in breach of the rules contained in that Regulation and that the cooperation and consistency procedures laid down by that Regulation are respected.

Article 58(5) of Regulation No 2016/679 must be interpreted as meaning that, in the event of cross-border data processing, it is not a prerequisite for the exercise of the power of a supervisory authority of a Member State, other than the lead supervisory authority, to initiate or engage in legal proceedings, within the meaning of that provision, that the controller or processor with respect to the cross-border processing of personal data against whom such proceedings are brought has a main establishment or another establishment on the territory of that Member State.

Article 58(5) of Regulation No 2016/679 must be interpreted as meaning that the power of a supervisory authority of a Member State, other than the lead supervisory authority, to bring any alleged infringement of that Regulation to the attention of a court of that Member State and, where appropriate, to initiate or engage in legal proceedings, within the meaning of that provision, may be exercised both with respect to the main establishment of the controller

which is located in that authority's own Member State and with respect to another establishment of that controller, provided that the object of the legal proceedings is a processing of data carried out in the context of the activities of that establishment and that that authority is competent to exercise that power, in accordance with the terms of the answer to the first question referred.

Article 58(5) of Regulation No 2016/679 must be interpreted as meaning that, where a supervisory authority of a Member State which is not the 'lead supervisory authority', within the meaning of Article 56(1) of that Regulation, has brought a legal action, the object of which is an instance of cross-border processing of personal data, before 25 May 2018, that is, before the date when that Regulation became applicable, that action may, from the perspective of EU law, be continued on the basis of the provisions of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which remains applicable in relation to infringements of the rules laid down in that Directive committed up to the date when that Directive was repealed. That action may, in addition, be brought by that authority with respect to infringements committed after that date, on the basis of Article 58(5) of Regulation No 2016/679, provided that that action is brought in one of the situations where, exceptionally, that Regulation confers on a supervisory authority of a Member State which is not the 'lead supervisory authority' a competence to adopt a decision finding that the processing of data in question is in breach of the rules contained in that Regulation with respect to the protection of the rights of natural persons as regards the processing of personal data, and that the cooperation and consistency procedures laid down by that Regulation are respected, which it is for the referring court to determine.

Article 58(5) of Regulation No 2016/679 must be interpreted as meaning that that provision has direct effect, with the result that a national supervisory authority may rely on that provision in order to bring or continue a legal action against private parties, even where that provision has not been specifically implemented in the legislation of the Member State concerned (*see also paras. 47-53, 57-60, 63-69, 75, 80-84, 90-96*).

20. *Court of Justice, 17 June 2021 case C-800/19, Mittelbayerischer Verlag KG v. SM* 412

Article 7(2) of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the courts of the place in which the centre of interests of a person claiming that his or her personality rights have been infringed by content published online on a website is situated have jurisdiction to hear, in respect of the entirety of the alleged damage, an action for damages brought by that person only if that content contains objective and verifiable elements which make it possible to identify, directly or indirectly, that person as an individual *(see also paras. 25-28, 31-33, 34-39, 42-46)*.

21. *Court of Justice, 22 June 2021 case 439/19, B v. Latvijas Republikas Saeima* 741

The principle of primacy of EU law must be interpreted as precluding the constitutional court of a Member State, before which a complaint has been

brought challenging national legislation that proves, in the light of a preliminary ruling given by the Court of Justice, to be incompatible with EU law, from deciding, in accordance with the principle of legal certainty, that the legal effects of that legislation be maintained until the date of delivery of the judgment by which it rules finally on that constitutional complaint.

22. *Court of Justice, 1 July 2021 case C-301/20, UE and HC v. Vorarlberger Landesund Hypothekenbank AG, intervening party: Estate of VJ* 157

Article 70(3) of Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession must be interpreted as meaning that a certified copy of the European Certificate of Succession, bearing the words 'unlimited duration', is valid for a period of six months from the date of issue and produces its effects, within the meaning of Article 69 of that Regulation, if it was valid when it was presented to the competent authority.

Article 65(1) of Regulation No 650/2012, read in conjunction with Article 69(3) of that Regulation, must be interpreted as meaning that the effects of the European Certificate of Succession are produced with respect to all persons who are named therein, even if they have not themselves requested that it be issued *(see also paras. 22-25, 27-29, 30-36, 39-44).*

23. *Court of Justice, 8 July 2021 case C-428/19, OL and others v. Rapidsped Fuvarozási és Szállítmányozási Zrt* 414

Article 3(1) and Article 6 of Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, read in conjunction with Article 5 of that Directive, must be interpreted as requiring that a breach, by an employer established in one Member State, of another Member State's provisions concerning minimum wage, may be relied on against that employer by workers posted from the first Member State, before a court of that State, if that court has jurisdiction.

The second subparagraph of Article 3(7) of Directive 96/71/EC must be interpreted as meaning that a daily allowance, the amount of which varies according to the duration of the worker's posting, constitutes an allowance specific to the posting and is part of the minimum wage, unless it is paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board or lodging, or unless it corresponds to an allowance which alters the relationship between the service provided by the worker, on the one hand, and the consideration which he or she receives in return, on the other *(see also paras. 40-45).*

24. *Court of Justice, 8 July 2021 case C-120/20, Koleje Mazowieckie – KM sp. z. o.o. v. Skarb Panstwa – Minister Infrastruktury i Budownictwa obecnie Minister Infrastruktury i Prezes Urzedu Transportu Kolejowego and others* 1049

EU law must be interpreted as not precluding national civil liability law from making the right of individuals to obtain compensation for damage suffered as a result of an infringement of EU law by a Member State subject to less stringent conditions than those laid down by EU law.

25. *Court of Justice, 15 July 2021 case C-791/19, European Commission, supported by Kingdom of Belgium, Kingdom of Denmark, Kingdom of the Netherlands, Republic of Finland and Kingdom of Sweden, v. Republic of Poland* 1050

The Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU:

by failing to guarantee the independence and impartiality of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sad Najwyzszy (Supreme Court, Poland), which is responsible for reviewing decisions issued in disciplinary proceedings against judges;

by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts;

by conferring on the President of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sad Najwyzszy (Supreme Court) the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal 'established by law';

by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time, and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect on the course of the disciplinary proceedings and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel and, therefore, by failing to guarantee respect for the rights of defence of accused judges of the ordinary courts,

By allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union to be restricted by the possibility of triggering disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under Article 267(2) and (3) TFEU.

26. *Court of Justice, 15 July 2021 case C-30/20, RH v. AB Volvo and others* 730

Article 7(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, within the market affected by collusive arrangements on the fixing and increase in the prices of goods, either the court within whose jurisdiction the undertaking claiming to be harmed purchased the goods affected by those arrangements or, in the case of purchases made by that undertaking in several places, the court within whose jurisdiction that undertaking's registered office is situated, has international and territorial jurisdiction, in terms of the place where the damage occurred, over an action for compensation for the damage caused by those arrangements contrary to Article 101 TFEU *(see also paras. 31-43)*.

27. *Court of Justice, 15 July 2021 joined cases C-152/20 and C-218/20, DG and others v. SC Gruber Logistics SRL and Sindicatul Lucratorilor din Transporturi, TD v. SC Samidani Trans SRL* 408

Article 8(1) of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) must be interpreted as meaning that, where the law governing the individual employment contract has been

chosen by the parties to that contract, and that law differs from the law applicable pursuant to paragraphs 2, 3 or 4 of that Article, the application of the latter law must be excluded with the exception of 'provisions that cannot be derogated from by agreement' under that law within the meaning of Article 8(1) of that Regulation, provisions that can, in principle, include rules on the minimum wage.

Article 8 of Regulation No 593/2008 must be interpreted as meaning that: first, the parties to an individual employment contract are to be regarded as being free to choose the law applicable to that contract even if the contractual provisions are supplemented by national labour law pursuant to a national provision, provided that the national provision in question does not require the parties to choose national law as the law applicable to the contract, and secondly, the parties to an individual employment contract are to be regarded as being, in principle, free to choose the law applicable to that contract even if the contractual clause concerning that choice is drafted by the employer, with the employee merely accepting it.

28. *Court of Justice, 2 August 2021 case C-262/21 PPU, A v. B* 154

Article 2(11) of Council Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility must be interpreted as meaning that it cannot constitute wrongful removal or wrongful retention, within the meaning of that provision, the situation in which one of the parents, without the agreement of the other parent, is led to take the child from the State of habitual residence to another Member State in execution of a transfer decision taken by the first Member State on the basis of Regulation (EU) No 604/2013 (Dublin III Regulation), and then to remain in the second Member State after the transfer decision has been annulled, without the authorities of the first Member State having decided to take charge of the transferred persons or to authorize them to stay *(see also paras. 36-38, 40-52).*

29. *Court of Justice, 9 September 2021 joined cases C-208/20 and C-256/20, «Toplofikatsia Sofia» EAD and others and «Toplofikatsia Sofia» EAD* 407

Article 1(1)(a) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters must be interpreted as meaning that it does not apply to a situation where the court of a Member State seeks the address, in another Member State, of a person on whom a judicial decision is to be served.

Article 5(1) of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not precluding an order for payment against a debtor from becoming enforceable, and as not obliging the court to annul such an order *(see also paras. 24-28, 35-39).*

30. *Court of Justice, 9 September 2021 case C-277/20, UM v. HW, in the quality of administrator of the estate of ZL and others* 409

Article 3(1)(b) of Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and

enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession must be interpreted as meaning that a contract under which a person provides for the future transfer, on death, of ownership of immovable property belonging to him or her to other parties to the contract is an agreement as to succession within the meaning of that provision.

Article 83(2) of Regulation No 650/2012 must be interpreted as meaning that it does not apply to the examination of the validity of a choice of applicable law, made before 17 August 2015, to govern only an agreement as to succession within the meaning of Article 3(1)(b) of that Regulation, in respect of a particular asset of the deceased, and not the latter's succession as a whole *(see also paras. 29, 34-36, 40).*

31. *Court of Justice, 9 September 2021 case C-422/20, RK v. CR* 410

Article 7(a) of Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession must be interpreted as meaning that, in order for there to have been a declining of jurisdiction, within the meaning of Article 6(a) of that Regulation, in favour of the courts of the Member State whose law was chosen by the deceased, it is not necessary for the court previously seised to have expressly declined jurisdiction, but that intention must be unequivocally apparent from the decision that it delivered in that regard.

Article 6(a), Article 7(a) and Article 39 of Regulation No 650/2012 must be interpreted as meaning that the court of the Member State seised following a declining of jurisdiction is not competent to examine whether the conditions set out in those provisions were satisfied in order for the court previously seised to decline jurisdiction.

Article 6(a) and Article 7(a) of Regulation No 650/2012 must be interpreted as meaning that the rules of jurisdiction set out in those provisions also apply in the event that, in his or her will, drawn up before 17 August 2015, the deceased had not chosen the law applicable to the succession, and that the designation of that law can be inferred from Article 83(4) of that Regulation alone *(see also paras. 31-36, 39-41, 49, 58).*

32. *Court of Justice, order of 21 September 2021 case C-30/21, Nemzeti Útdíjfizetési Szolgáltató Zrt. v. NW* 731

Article 1(1) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the concept of 'civil and commercial matters', within the meaning of that provision, covers an action to recover, through legal proceedings, a charge relating to the use of a toll road, brought by a company authorised in accordance with the law, which classifies the relationship arising from that usage as being governed by private law *(see also paras. 25, 29-34).*

33. *Court of Justice, 30 September 2021 case C-296/20, Commerzbank AG v. E.O.* 722

Article 15(1)(c) of the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the conclusion of which was approved on behalf of the European Community by Council Decision 2009/430/EC, must be interpreted as meaning that that provision determines jurisdiction where the parties to a consumer contract – the consumer and the professional counterparty – were, at the time that contract was concluded, domiciled in the same State bound by that Convention, and where an international element in the legal relationship emerged only after that contract was concluded, on account of the subsequent transfer of the consumer's domicile to another State bound by that Convention *(see also paras. 33, 35-37, 41-44, 49-60).*

34. *Court of Justice, 6 October 2021 case C-487/19, W.Z., Prokurator Generalny zastepowany przez Prokurature Krajowa and others intervening.* 1048

The second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law must be interpreted as meaning that a national court seised of an application for recusal as an adjunct to an action by which a judge holding office in a court that may be called upon to interpret and apply EU law challenges a decision to transfer him or her without his or her consent, must – where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law – declare to be null and void an order by which a court, ruling at last instance and comprising a single judge, has dismissed that action, if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (*i*) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (*ii*) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.

35. *Court of Justice, 6 October 2021 case C-882/19, Sumal SL v. Mercedes Benz Trucks España SL* 1046

Article 101(1) TFEU must be interpreted as meaning that the victim of an anticompetitive practice by an undertaking may bring an action for damages, without distinction, either against a parent company who has been punished by the Commission for that practice in a decision or against a subsidiary of that company which is not referred to in that decision, where those companies together constitute a single economic unit. The subsidiary company concerned must be able effectively to rely on its rights of the defence in order to show that it does not belong to that undertaking and, where no decision has been adopted by the Commission under Article 101 TFEU, it is also entitled to dispute the very existence of the conduct alleged to amount to an infringement.

Article 101(1) TFEU must be interpreted as precluding a national law which provides for the possibility of imputing liability for one company's conduct to

another company only in circumstances where the second company controls the first company *(see also paras. 37-38, 41-47).*

36. *Court of Justice, 6 October 2021 case C-581/20, Skarb Panstwa Rzeczypospolitej Polskiej reprezentowany przez Generalnego Dyrektora Dróg Krajowych i Autostrad v. TOTO – Costruzioni Generali s.p.a. and others* 732

Article 1(1) of Regulation (EU) No 1215/2012 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an application for provisional, including protective, measures initiated and continued, according to common law rules, before a court of a Member State, concerning the payment of contractual penalties agreed for the performance of a contract for public expressway building concluded as the result of a procurement procedure, under which the contracting party is a public authority, falls within the notion of 'civil and commercial matters' according to the same provision.

Article 35 of Regulation No 1215/2012 must be interpreted as meaning that the court of a Member State seised of an application for provisional, including protective, measures is not obliged to declare that it lacks jurisdiction, when the court of another Member State, having jurisdiction as to the substance of the case, has already given a ruling on an application between the same parties with identical subject matter and cause of action.

Article 35 of Regulation No 1215/2012 must be interpreted as meaning that an application for provisional, including protective, measures must be scrutinized in the light of the law of the Member State of the court seised and is not contrary to national legislation which does not provide for an action to obtain interim protective measures in pecuniary claim proceedings against a State or a public authority *(see also paras. 29-31, 34-36, 38-46, 50-52, 55-61, 63-69).*

37. *Court of Justice, 21 October 2021 case C-393/20, T.B. and others v. G. I. A/S* 735

Article 13(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, read in conjunction with Article 11(1)(b) of the same Regulation, must be interpreted as meaning that it cannot be relied on by a company in consideration for services that it provided to a party directly injured in a road accident in connection with the damage caused, has acquired a claim for compensation, but does not carry out the professional activity of recovering insurance indemnity claims against insurance companies and who brought an action, in the court for the place where it is established, against the third-party liability insurer of the party responsible for that accident.

Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that it may be relied on by a professional who has acquired, under an assignment agreement, a claim from a party injured in a road accident in order to bring a civil-liability action before a court of the Member State in which the accident occurred against the insurer of the party responsible for that accident, which insurer has its seat in a Member State other than the Member State in which the accident occurred, provided that the conditions for the application of this provision are met, which it is for the referring court to determine *(see also paras. 29-30, 32-33, 35-43, 46-47, 54).*

38. *Court of Justice, 26 October 2021 case C-109/20, Republic of Poland v. PL Holding Sàrl* 1049

Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an *ad hoc* arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those Articles.

39. *Court of Justice, 25 November 2021 case C-25/20, NK, acting as liquidator in the insolvency of Alpine BAU GmbH, intervening party: Alpine BAU GmbH, Salzburg – Celje Branch, in liquidation* 724

Article 32(2) of Regulation (EC) 1346/2000 on insolvency proceedings, read in conjunction with Articles 4 and 28 of that Regulation, must be interpreted as meaning that the lodging, in secondary insolvency proceedings, of claims already submitted in the main insolvency proceedings by the liquidator in those proceedings is subject to the provisions relating to time limits for the lodging of claims and to the consequences of lodging such claims out of time, laid down by the law of the State of the opening of those secondary proceedings *(see also paras. 28-33, 35-42).*

40. *Court of Justice, 25 November 2021 case C-289/20, IB v. FA* 726

Article 3(1)(a) of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that a spouse who divides his or her time between two Member States may have his or her habitual residence in only one of those Member States, with the result that only the courts of the Member State in which that habitual residence is situated have jurisdiction to rule on the application for the dissolution of matrimonial ties *(see also paras. 25-26, 31-32, 34-35, 38-62).*

41. *Court of Justice, 9 December 2021 case C-242/20, HRVATSKE ŠUME d.o.o., Zagreb, successor in title to HRVATSKE ŠUME javno poduzece za gospodarenje šumama i šumskim zemljištima u Republici Hrvatskoj p.o., Zagreb v. BP Europa SE, successor in title to Deutsche BP AG, in turn successor in title to The Burmah Oil (Deutschland) GmbH* 1028

Article 22(5) of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action for restitution based on unjust enrichment does not come within the exclusive jurisdiction provided for by that provision, even though it was brought on account of the expiry of the time limit within which restitution of sums unduly paid in enforcement proceedings may be claimed in the context of the same enforcement proceedings.

Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that an action for restitution based on unjust enrichment does not fall within the scope of the ground of jurisdiction laid down in that provision *(see also paras. 22, 30-32, 34-37, 42-60).*

42. *Court of Justice, 9 December 2021 case C-708/20, BT v. Seguros Catalana Occidente and others* 1039

Article 13(3) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the event of a direct action brought by the injured person against an insurer in accordance with Article 13(2) thereof, the court of the Member State in which that person is domiciled cannot also assume jurisdiction, on the basis of Article 13(3) thereof, to rule on a claim for compensation brought at the same time by that person against the policyholder or the insured who is domiciled in another Member State and who has not been challenged by the insurer *(see also paras. 24-25, 27, 29-38).*

43. *Court of Justice, 14 December 2021 case C-490/20, V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'* 1043

Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 4(3) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by his or her national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States *(see also paras. 42-52,54-65, 68-69).*

44. *Court of Justice, 21 December 2021 case C-251/20, Gtflix Tv v. DR* 1040

Article 7(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a person who, considering that his or her rights have been infringed by the dissemination of disparaging comments concerning him or her on the internet, seeks not only the rectification of the information and the removal of the content placed online concerning him or her but also compensation for the damage resulting from that placement may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seised, even though those courts do not have jurisdiction to rule on the application for rectification and removal *(see also paras. 24-27, 29-43).*

45. *Court of Justice, 10 February 2022 case C-522/20, OE v. VY* 1031

The principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, must be interpreted as not precluding a situation in which the jurisdiction of the courts of the Member State in the territory of which the habitual residence of the applicant is located, as provided for in the sixth

indent of Article 3(1)(a) of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that Regulation on the ground that the person concerned is a national of that Member State *(see also paras. 19-22, 25-27, 29-42).*

46. *Court of Justice, 10 February 2022 case C-595/20, UE v. ShareWood Switzerland AG and others* 1036

Article 6(4)(c) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations ('Rome I') must be interpreted as meaning that a contract of sale, including a lease agreement and a service agreement, relating to trees planted on leased land for the sole purpose of being harvested for profit, does not constitute a 'contract relating to a right in rem in immovable property or a tenancy of immovable property' within the meaning of that provision *(see also paras. 17, 20-39).*

47. *Court of Justice, 3 March 2022 case C-421/20, Acacia s.r.l. v. Bayerische Motoren Werke AG* 1034

Articles 88(2) and 89(1)(d) of Regulation (EC) No 6/2002 on Community designs, and Article 8(2) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('Rome II') must be interpreted as meaning that the Community design courts before which an action for infringement pursuant to Article 82(5) of Regulation No 6/2002 is brought concerning acts of infringement committed or threatened within a single Member State must examine the claims supplementary to that action, seeking the award of damages, the submission of information, documents and accounts and the handing over of the infringing products with a view to their being destroyed, on the basis of the law of the Member State in which the acts allegedly infringing the Community design relied upon are committed or are threatened, which is the same, in the circumstances of an action brought pursuant to that Article 82(5), as the law of the Member State in which those courts are situated *(see also paras. 30-33, 35-51).*

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