

# INDEX

## ARTICLES

R. BARATTA, Towards the "Communitarisation" of Fundamental Principles of Family Law .....	573
S. BARIATTI, Choice-of-law Rules on Non-Contractual Obligations and EC Conflicts of Laws .....	5
S.M. CARBONE, The International and Specific Features of Maritime Law Sources in the Third Millennium .....	889
G. CARELLA, Choice-of-law Rules on Non-Contractual Obligations Arising out of an Act other than Tort or Delict in the "Rome II" Proposal .....	25
M. FALLON, The New Belgian Private International Law Code: Following the Path of the Italian Law Ten Years Later (in French) .....	315
F. MOSCONI, New Forms of Cohabitation in European and EC Law .....	305
F. MUNARI, L. SCHIANO DI PEPE, Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law and the Case for Pursuing Effective Legal Uniformity (in English) .....	607
L. PICCHIO FORLATI, Connecting Factors and Applicable Rules vis-à-vis the Protection of Human Rights in Europe (in French) .....	907
R.J. WEINTRAUB, Rome II and the Tension between Predictability and Flexibility (in English) .....	561

## REVIEWS

E.M. MAGRONE, The Right of Access under EC Regulation No 2201/2003 .....	339
A. PASQUERO, Mutual Recognition of Judicial Decisions in Criminal Matters: European Arrest Warrant vs. U.S. Rendition .....	959
S. POLI, G. BIAGIONI, Recent Developments in Environmental Torts in the European Union: Aspects of Substantive Law and Private International Law .....	643
V. SANGIOVANNI, The Application of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in Germany .....	41

## SHORTER ARTICLES, NOTES AND COMMENTS

A. CARLEVARIS, Violation of Fundamental Defence Rights in Foreign Proceedings and Fair Hearing in the Proceedings for Recognition of Foreign Judgments ...	1017
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L. FUMAGALLI, The Legalisation Abroad of the Document Appointing a Representative <i>ad litem</i> for Proceedings before Italian Courts .....	69
F. LAVIANI, The Notion of <i>lis pendens</i> in EC Regulation No 44/2001 and Regular Service .....	79
P. MANZINI, The <i>Nulla Poena</i> Principle in the Case-Law of the International Criminal Tribunal for the Former Yugoslavia .....	679
F. MARONGIU BUONAIUTI, Maintenance Obligations, Matrimonial Property and <i>Lis Pendens</i> under "Brussels I" and "Brussels II" Regulations * .....	699
A.A. MENICOCCHI, Argentina's Private International Law Rules concerning Companies Formed Abroad (in English) .....	1035
B. NASCIMBENE, Recents Proposals on the Aquisition and Re-aquisition of the Italian Citizenship by Persons of Italian Origin Resident in Slovenia and Croatia .....	371
M.J.A. OYARZÁBAL, The Review of the Agreement between Italy and Argentina on Nationality .....	101
G. PIZZOLANTE, The Impact of EC Law on the Determination of the Law Applicable to Consumers Contracts .....	377
E. SAVARESE, On the Recognition of Foreign Provisional Measures in Family Matters	723
P. VENTURI, Some Remarks on the Plaintiff's Residence as Head of Jurisdiction ...	997

#### CASES IN ITALIAN COURTS

*Adoption*: 12.

*Civil proceedings*: 16, 28, 35, 40, 45, 49.

*Contracts*: 66, 67, 69, 71, 78.

*Companies*: 56.

*Criminal law*: 7.

*Criminal proceedings*: 18, 47, 52.

*Divorce*: 35.

*EC Regulation No 1346/2000*: 51, 56, 74.

*EC Regulation No 1347/2000*: 3, 38.

*EC Regulation No 1348/2000*: 45.

*EC Regulation No 44/2001*: 3, 45, 57.

*European Community Law*: 46, 48, 60, 61, 62.

*Filiation*: 64.

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\* See Italian Index, p. 1252.

*Foreigner*: 8, 9, 14, 20, 22, 23, 25, 27, 36, 37, 44, 47, 59, 69.

*Foreign judgments and administrative acts*: 17, 31, 43, 51, 53, 80.

*Foreign law*: 10, 13, 16.

*International abduction of children*: 19, 26, 34, 50, 77.

*Jurisdiction*: 1, 2, 3, 4, 5, 6, 10, 15, 21, 24, 29, 30, 32, 33, 38, 41, 42, 45, 54, 55, 56, 57, 63, 65, 68, 70, 72, 73, 74, 75, 76, 79.

*Marriage*: 80.

*Matrimonial property*: 43.

*Nationality*: 39.

*Personality rights*: 46, 61.

*Public policy*: 43, 67, 78, 80.

*Treaties and general international rules*: 1, 2, 4, 6, 10, 19, 24, 26, 27, 28, 32, 33, 34, 36, 42, 50, 54, 55, 58, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73, 75, 76, 77, 79.

1. *Milan Tribunal, order 11 March 2003* ..... 1102

Based on a principle of general international law on the immunity of foreign States from jurisdiction, which is enforceable in the Italian legal system by virtue of Article 10 of the Constitution, a petition for interim relief aimed at guaranteeing the payment of bonds issued by the State of Argentina is barred. In fact, while the issue of said bonds and their placement on the international markets constitute commercial activities, the subsequent suspension of the related payments was implemented through acts adopted by the State of Argentina in the exercise of its sovereign powers and, as such, cannot be challenged before Italian courts.

The State of Argentina did not waive its immunity in advance, not only because the trust deed or fiscal agency agreement related to said bonds contains a provision conferring jurisdiction on foreign courts, but also because said waiver would not have any value with respect to wholly exceptional defaults, which are due to sovereign acts subsequently issued in a situation of national emergency.

2. *Rome Tribunal, order 31 March 2003* ..... 1102

Based on a principle of general international law on the immunity of foreign States from jurisdiction, which is enforceable in the Italian legal system by virtue of Article 10 of the Constitution, a petition for interim relief aimed at guaranteeing the payment of bonds issued by the State of Argentina is barred. In fact, while the issue of said bonds and their placement on the international markets constitute commercial activities, the subsequent suspension of the related payments was implemented through acts adopted by the State of Argentina in the exercise of its sovereign powers and, as such, cannot be challenged before Italian courts.

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3. *Firenze Tribunal, decree 20 May 2003* ..... 737
- An application to vary the economic conditions of a legal separation falls within the scope of application of the EC Regulation No 1347/2000 of 29 May 2000.
- Given the difference between maintenance (*mantenimento*) and support (*alimenti*), a question concerning the variation of maintenance orders is not a matter relating to maintenance (*materia di obbligazioni alimentari*) within the meaning of Article 5 No 2 of the EC Regulation No 44/2001 of 29 December 2000.
- Pursuant to Article 2, first paragraph of the EC Regulation No 1347/2000, Italian courts have jurisdiction if the spouses were last habitually resident in Italy and one of them still resides there.
- Pursuant to Article 11, second paragraph of the EC Regulation No 1347/2000, proceedings pending in Italy concerning the variation of the conditions of a legal separation cannot be stayed due to the fact that proceedings concerning the dissolution of the marriage and ancillary economic provisions between the same parties are pending before an English court, if the Italian court is the court first seised.
4. *Rome Tribunal, order 19 June 2003* ..... 1102
- Based on a principle of general international law on the immunity of foreign States from jurisdiction, which is enforceable in the Italian legal system by virtue of Article 10 of the Constitution, a petition for interim relief aimed at guaranteeing the payment of bonds issued by the State of Argentina is barred. In fact, while the issue of said bonds and their placement on the international markets constitute commercial activities, the subsequent suspension of the related payments was implemented through acts adopted by the State of Argentina in the exercise of its sovereign powers and, as such, cannot be challenged before Italian courts.
- The State of Argentina did not waive its immunity in advance, not only because the trust deed or fiscal agency agreement related to said bonds contains a provision conferring jurisdiction on foreign courts, but also because said waiver would not have any value with respect to wholly exceptional defaults, which are due to sovereign acts subsequently issued in a situation of national emergency.
5. *Corte di Cassazione (plenary session), order 27 June 2003 No 10293* ..... 454
- Pursuant to Article 147 of the Bankruptcy Law, Italian courts have jurisdiction to extend the bankruptcy of a company having its registered office in Italy, which has been declared insolvent by an Italian court, to its shareholder with unlimited liability, even though said shareholder is resident abroad.
6. *Rome Tribunal, order 16 July 2003* ..... 1102
- Based on a principle of general international law on the immunity of foreign States from jurisdiction, which is enforceable in the Italian legal system by virtue of Article 10 of the Constitution, a petition for interim relief aimed at guaranteeing the payment of bonds issued by the State of Argentina is barred. In fact, while the issue of said bonds and their placement on the international markets constitute commercial activities, the subsequent suspension of the related payments was implemented through acts adopted by the State of Argentina in the exercise of its sovereign powers and, as such, cannot be challenged before Italian courts.
- The State of Argentina did not waive its immunity in advance, not only because the trust deed or fiscal agency agreement related to said bonds contains

a provision conferring jurisdiction on foreign courts, but also because said waiver would not have any value with respect to wholly exceptional defaults, which are due to sovereign acts subsequently issued in a situation of national emergency.

7. *Corte di Cassazione (criminal), 7 August 2003 No 33543* ..... 455
- The provision laid down by Article 1080, second paragraph of the Navigation Code, whereby the criminal provisions contained in the Navigation Code do not apply to crew members and passengers of foreign ships or aircraft, does not apply where a fact constituting a crime under Italian law has been committed in Italian territorial waters, in violation of the provisions of marine safety laid down by the international conventions most commonly applied.
8. *Corte di Cassazione, 27 August 2003 No 12540* ..... 456
- A marriage between an Italian citizen and a non-EU citizen cannot have immediate effects on a dispute previously arisen in relation to an expulsion order issued by the Prefect against said non-EU citizen. In fact, the prohibition on expelling a foreigner living with his/her Italian spouse, which is laid down by Article 19, second paragraph, *litt. (c)* of the Legislative Decree of 25 July 1998 No 286, applies only if the two spouses actually live together. This is a factual circumstance that cannot be verified in proceedings before the *Corte di Cassazione*.
9. *Corte di Cassazione (criminal), 23 October 2003 No 40299* ..... 457
- It is not required that a removal order issued by the local head of police administration (*questore*) pursuant to Article 14, paragraph 5-*bis* of the Legislative Decree of 25 July 1998 No 286, as amended by the Law of 30 July 2002 No 189, specify the grounds on which it has been issued, if the issue of said order is legally inevitable due to the verified, objective impossibility of receiving a non-EU citizen against whom an expulsion order has been issued at the closest centre of temporary stay and assistance pursuant to Article 14, first paragraph of said Legislative Decree.
10. *Corte di Cassazione, 11 December 2003 No 18935* ..... 169
- Pursuant to Article 72 of the Law of 31 May 1995 No 218, Article 14 of said Law – according to which the contents of the foreign law must be ascertained by the court on its own motion – does not apply in case of an appeal against the determination of bankruptcy liabilities (*opposizione allo stato passivo*), if the request for allowing the claim in question against the bankruptcy estate was filed before said Law entered into force.
11. *Vicenza Tribunal, order 11 December 2003* ..... 1102
- Based on a principle of general international law on the immunity of foreign States from jurisdiction, which is enforceable in the Italian legal system by virtue of Article 10 of the Constitution, a petition for interim relief aimed at guaranteeing the payment of bonds issued by the State of Argentina is barred. In fact, while the issue of said bonds and their placement on the international markets constitute commercial activities, the subsequent suspension of the related payments was implemented through acts adopted by the State of Argentina in the exercise of its sovereign powers and, as such, cannot be challenged before Italian courts.
- The State of Argentina did not waive its immunity in advance, not only because the trust deed or fiscal agency agreement related to said bonds contains a provision conferring jurisdiction on foreign courts, but also because said waiver

would not have any value with respect to wholly exceptional defaults, which are due to sovereign acts subsequently issued in a situation of national emergency.

12. *Constitutional Court, 23 December 2003 No 371* ..... 171  
 Article 72 of the Legislative Decree of 26 March 2001 No 151 on the protection and support of maternity and paternity is constitutionally illegitimate, insofar as it does not provide that, in case of international adoption, the maternity allowance must be granted also to professionals adopting a child older than six years.
13. *Corte di Cassazione, 9 January 2004 No 111* ..... 172  
 As provided for by Article 72 of the Law of 31 May 1995 No 218, Article 14 of said Law applies only to proceedings initiated after said Law entered into force. As a consequence, if a party to any proceedings initiated prior to that time invokes the application of a foreign law, said party must specify which law is applicable and provide all necessary documentation.
14. *Corte di Cassazione, 9 January 2004 No 122* ..... 458  
 The appeal against an *in camera* decree through which the Tribunal, as a solo judge, has ruled, pursuant to Article 30, sixth paragraph of the Legislative Decree of 25 July 1998 No 286, on the appeal of a non-EU citizen against the refusal to issue an authorisation to family reunion and other administrative orders relating to the right to family unity, shall be lodged, pursuant to Article 739, first paragraph of the Code of Civil Procedure, before the Court of Appeal rather than before the Tribunal as a collegiate body.
15. *Corte di Cassazione, 16 January 2004 No 544* ..... 1109  
 The objective criterion laid down by Article 832 of the Code of Civil Procedure – whereby an arbitration is international if a substantial part (*parte rilevante*) of the obligations must be performed abroad – shall be interpreted as referring to a significant part of said obligations, without requiring that said part be the preponderant or main one.
16. *Corte di Cassazione, 21 January 2004 No 886* ..... 173  
 In case of an appeal before the *Corte di Cassazione* for violation of law where the appellant challenges the application of Italian law alleging that a foreign law is applicable, the appellant has the burden to indicate at least the provisions and principles of the foreign law which have allegedly been violated.
17. *Corte di Cassazione, 23 January 2004 No 1155* ..... 174  
 Article 41, second paragraph of the Law of 31 May 1995 No 218 on the recognition of foreign decisions on adoption specifies that its provisions are without prejudice to the provisions of special laws, including those contained in Article 29 et seq. of the Law of 31 December 1998 No 476.
18. *Corte di Cassazione (criminal), 4 February 2004 No 4344* ..... 460  
 In a situation involving the provisional arrest of a foreign citizen in view of his extradition, which arrest has been made by the Italian criminal investigation police based on a warrant issued by a foreign judicial authority, the authority to confirm the arrest belongs to the President of the Court of Appeal pursuant to Article 716, third paragraph of the Criminal Code. When deciding upon the confirmation of the arrest, the President shall not verify the existence of the conditions for the issue of a judgment ordering the extradition, as this

verification shall be made by the Court of Appeal during the subsequent phase of the proceedings.

19. *Corte di Cassazione, 10 February 2004 No 2474* ..... 810  
 After it has been ascertained that the removal of a child constitutes a breach of the rights of custody pursuant to Articles 3, 4 and 5 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the decree of the Juvenile Court ordering the return of said child is immediately enforceable pursuant to Article 7, fourth paragraph of the Law of 15 January 1994 No 64.
20. *Corte di Cassazione, 12 February 2004 No 2685* ..... 461  
 The fact that a non-EU citizen lives with his brother-in-law, who is also a non-EU citizen and has a regular residence permit based on his marriage to an Italian citizen, is not sufficient for Article 19, second paragraph, *litt. (c)* of the Legislative Decree of 25 July 1998 No 286 to apply. In fact, said provision prohibits the expulsion of foreign citizens “*living with relatives within the fourth degree of kinship or with the spouse being Italian citizens*”. Even if it were considered applicable to foreigners living with in-laws within the second degree, said provision also requires that the persons indicated in it (i.e. the relatives within the fourth degree of kinship or the spouse) be Italian citizens.
21. *Corte di Cassazione (plenary session), 18 February 2004 No 3164* ..... 175  
 Pursuant to Article 4, No 3 of the Code of Civil Procedure, an Italian court has jurisdiction over an action against a foreigner which – due to a link between the parties, within the meaning of Article 33 of the Code of Civil Procedure (*connessione soggettiva*) – is related to another action pending before said court. This is the case if an employer and another person, who allegedly is the actual employer, are named as defendants in an action for the payment by them, on a joint and several basis, of an employee’s salary, based on the assumption that an arrangement for the provision of workforce exists between the defendants.
22. *Corte di Cassazione, 24 February 2004 No 3622* ..... 463  
 The prohibition on expelling a non-EU citizen who is married to an Italian citizen or is living with Italian relatives within the fourth degree of kinship, which is laid down by Article 19, second paragraph, *litt. (c)* of the Legislative Decree of 25 July 1998 No 286, reflects the need to protect, on the one hand, the unity of the family and, on the other hand, kin relationships. This need concerns only persons who are tied by definite legal relationships. Therefore, it does not exist in a case of cohabitation, since the equalization of legitimate families and de facto families cannot be applied in the field of illegal immigration. In fact, this field is regulated by mandatory provisions of law, and expulsion can be avoided only in cases strictly provided for by the law, so as to prevent the easy circumvention of the regulations for the control of the immigration flow.
23. *Corte di Cassazione, 25 February 2004 No 3732* ..... 741  
 The provision laid down by Article 19, first paragraph of the Legislative Decree of 25 July 1998 No 286, which prohibits the expulsion of a foreigner to a State where he may be subject to persecution for, among other things, reasons of religion, regardless of whether an application for asylum has been filed, must be read together with Article 20. According to said Article 20, the actual adoption of temporary measures for significant humanitarian needs by decree of the President of the Council of Ministers, upon agreement with all interested Ministers, represents a limit to the discretion of the competent court in

determining whether a non-EU citizen being expelled may be subject to persecution.

The court before which an expulsion order is appealed cannot verify whether the requirements for the application of the prohibition of expulsion are met, except in the event that a decree adopting temporary protection measures has been issued by the Government. After the cessation of the aforesaid measures, the prohibition on expulsion laid down by the aforesaid Article 19, first paragraph does not apply, and mere statements made by the appellant are irrelevant.

24. *Corte di Cassazione (plenary session), 11 March 2004 No 5044* ..... 407

The Brussels Convention of 27 September 1968 does not apply to an action for damages caused to a person by a Contracting State in the performance of its sovereign activities.

A foreign State that has committed international crimes, such as deportation and subjection to forced labour, cannot invoke its immunity from jurisdiction in an action for damages arising from said crimes, since the recognition of the immunity would thwart the protection of values that are considered fundamental by the whole international community. This inconsistency shall be overcome by giving priority to the higher-ranking rules. Even if the possibility of derogating from the immunity principle is not expressly laid down by any rule of law, the emerging fundamental principle that the inviolable rights of all human beings must be respected affects the scope of application of the other principles that traditionally inspire the international legal system, including the principle of the sovereign equality of all States.

Jurisdiction over an action for damages arising from international crimes shall be determined based on the principles of universal jurisdiction.

25. *Corte di Cassazione (plenary session), 17 March 2004 No 5396* ..... 176

In a case where an expulsion order has been issued against a non-EU citizen, the fact that the closest diplomatic or consular representation of the State to which said non-EU citizen belongs has not been informed of the issue of said order pursuant to Article 2, seventh paragraph of the Legislative Decree of 25 July 1998 No 286 does not constitute a violation of said provision, and therefore is not sufficient to make said expulsion order voidable or illegitimate. In fact, an action of a government authority preventing said non-EU citizen from exercising her right to diplomatic protection, in respect of which a complaint should have been filed with the competent authorities, is required in order to produce that result.

26. *Corte di Cassazione, 18 March 2004 No 5465* ..... 812

In proceedings relating to the return of a child wrongfully retained – with respect to which it is sufficient that the parties are put in the position to participate, said proceedings being non-contentious (*procedimento di volontaria giurisdizione*) – Italian courts may refuse to order the return of said child if it implies a grave risk of psychological harm to the child within the meaning of Article 13, *lit.* (b) of the Hague Convention of 25 October 1980.

27. *Council of State, fourth division, 23 March 2004 No 1469* ..... 814

Even though, in general, asylum in Italy cannot be granted to a person coming from, or having travelled through, a Contracting State of the Geneva Convention of 28 July 1951 relating to the Status of Refugees for a period of time reasonably sufficient to file the relevant application in said State, the administrative authority must also consider whether the political situation of



said State at that time (i.e. in the present case, the political situation of Yugoslavia at the time of the well-known conflict) has thwarted the exercise of the right of asylum.

28. *Corte di Cassazione, 27 March 2004 No 6173* ..... 418
- Even though the judgments of the European Court of Human Rights have the force of precedents, said judgments – contrary to the judgments of the European Court of Justice – are not directly binding on Italian courts.
- There are certain limitations on the power and duty of Italian courts to broadly interpret domestic law so as to render enforceable those rights protected under the European Convention of Human Rights and the First Additional Protocol thereto. In particular, it does not allow the non-application of said domestic provisions.
- In light of, *inter alia*, the case law of the European Court of Human Rights, the special provisions concerning the termination of certain legal proceedings and the offsetting of relevant legal costs laid down by Law No 662 of 1996 and the Law No 448 of 1998 do not violate the aforesaid conventional provisions on human rights.
29. *Corte di Cassazione, 6 April 2004 No 6729* ..... 815
- The provision laid down by Article 8 of the Law of 31 May 1995 No 218 – pursuant to which the lack of jurisdiction may be cured by new provisions of law which entered into force during appellate proceedings – does not raise doubts of constitutionality with reference to Article 25 of the Constitution. In fact, the principle of pre-determination of the natural judge does not imply that the jurisdictional criteria cannot be modified, but only requires that any possible modification is not left to the discretion of the court.
30. *Brescia Tribunal, 6 April 2004* ..... 464
- For the purposes of international arbitration, Article 833 of the Code of Civil Procedure, providing for an exception to Articles 1341 and 1342 of the Civil Code, does not require express written consent in the arbitration clause, if the general terms and conditions of the contract, in which said clause is contained, are known by the parties, or should have been known by them in the exercise of the ordinary diligence.
31. *Corte di Cassazione, 8 April 2004 No 6947* ..... 107
- For the purpose of interpreting an arbitration clause, the possibility for the interested party to bring an action, even if before an arbitrator, necessarily implies that said party has the right, but not the obligation, to bring said action.
- The circumstances specified in Article 840, third paragraph, No 4 of the Code of Civil Procedure, whose occurrence implies the rejection of the application for the recognition and enforcement of a foreign arbitral award, do not include errors of judgment made by the arbitrators in applying or non-applying substantive law provisions, or in identifying the criterion for judgment in an international convention or in a substantive law.
32. *Corte di Cassazione (plenary session), 20 April 2004 No 7503* ..... 111
- Pursuant to Article 17 of the Brussels Convention of 27 September 1968, an agreement conferring jurisdiction contemplated by an exclusive distribution agreement entered into orally between an Italian company and a French company is not valid.
- Pursuant to Article 5 No 1 of the Brussels Convention of 27 September 1968, Italian courts have jurisdiction over a dispute brought by an Italian

company against a French company for the payment of the purchase price of certain goods, since the obligation in question must be performed at the place of business of the seller pursuant to Article 57, first paragraph, *litt. (a)* of the Vienna Convention of 11 April 1980.

33. *Genoa Tribunal, order 24 April 2004* ..... 744
- The application of Article 10 of the Law of 31 May 1995 No 218 is not incompatible with Articles 2 et seq. of the Brussels Convention of 10 May 1952 for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships. Pursuant to the aforesaid Article 10, Italian courts do not have jurisdiction over an application for the arrest of a motorboat flying the Italian flag if they do not have jurisdiction over the merits of the case and the arrest cannot be enforced in Italy, as said motorboat is not in Italian territorial waters. In fact, the publication of the decision providing for the arrest in accordance with the formalities laid down by Article 684 of the Navigation Code is not sufficient to carry out the enforcement of said decision.
34. *Corte di Cassazione, 27 April 2004 No 8000* ..... 115
- Pursuant to Article 13, second paragraph of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the judicial or administrative authority may refuse to order the return of a child if said child has attained the necessary age and degree of maturity and objects to being returned. For this purpose, it is necessary to distinguish between a clear refusal to being returned and an opinion favourable to remain in the new State.
- Pursuant to Article 13, first paragraph, *litt. (a)* of the 1980 Hague Convention, the competent authority is not bound to order the return of a child if the person, institution or other body having the care of the person of the child was not actually exercising the custody rights, or had consented to the removal of the child.
- Article 13, first paragraph, *litt. (a)* of the 1980 Hague Convention does not apply if the parents have reached an agreement whereby each parent may live with the child for a quantitatively different period of time and the child may expatriate with one parent for a limited period of time.
35. *Corte di Cassazione, 27 April 2004 No 8010* ..... 465
- The revocation by one of the spouses of her/his consent to a joint petition for the dissolution of marriage relates to the procedural requirements (*presupposti processuali*) for such petition, i.e. to the governing law of the proceedings, pursuant to both Article 27 of the Preliminary Provisions to the Civil Code and Article 12 of the Law of 31 May 1995 No 218. Without prejudice to the above, Article 17 of the Preliminary Provisions to the Civil Code, which was in force at the time a divorce petition was lodged by two Swiss spouses, one of whom was also an Italian citizen, shall apply to said petition.
36. *Corte di Cassazione, 3 May 2004 No 8321* ..... 745
- Pursuant to the provisions of the Vienna Convention of 18 April 1961 on Diplomatic Relations, which has been implemented by the Law of 9 August 1967 No 804, the status of diplomatic agent, member of a mission, originates, exists and terminates based on a discretionary agreement between the sending State and the receiving State. Accordingly, if Italy, as the receiving State, refuses in its unquestionable discretion to recognise the status of diplomatic agent to a non-EU citizen, the alleged existence of the State which said citizen claims to represent or the recognition of said State by other States is irrelevant. As a consequence, said non-EU citizen needs, in order to remain in Italian

territory, a residence title pursuant to the Legislative Decree of 25 July 1998 No 286, as amended by the Law of 30 July 2002 No 189.

37. *Corte di Cassazione, 4 May 2004 No 8423* ..... 748

An application for asylum is subject to the same formalities provided for an application for the recognition of refugee status, even though said applications are subject to different substantive requirements. In particular, pursuant to Article 1, fifth paragraph of the Law Decree of 30 December 1989 No 416, which has been converted into law with amendments by the Law of 28 February 1990 No 39, the person seeking asylum must file with the competent police office a reasoned request, based on which the local head of police administration (*questore*) may issue a temporary residence permit that is valid until the procedure for the recognition of asylee status is completed.

In the absence of any evidence or allegation that a request for the issue of the aforesaid residence permit has been filed, the mere fact that an application for asylum has been filed with the competent authorities does not prevent expulsion. Furthermore, the fact that said application has been filed does not represent in any way an objection to the finding of the lower court, according to which no situation of persecution exists that would prevent the expulsion pursuant to Article 19, first paragraph of the Legislative Decree of 25 July 1998 No 286.

38. *Corte di Cassazione, order 7 May 2004 No 8748* ..... 424

Pursuant to Article 11, second paragraph of EC Regulation No 1347/2000 of 29 May 2000 concerning disputes in matrimonial matters and in matters of parental responsibility for children of both spouses, where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Special proceedings for a preliminary ruling on jurisdiction (*regolamento di giurisdizione*) cannot be brought against an order of an Italian court staying its proceedings pursuant to Article 11, second paragraph of Regulation No 1347. However, special proceedings for a ruling on venue (*regolamento di competenza*) pursuant to Article 42 of the Code of Civil Procedure can be brought against said order.

39. *Piemonte Regional Administrative Tribunal (I Session), 11 May 2004* ..... 467

The acquisition of Italian citizenship pursuant to Article 9 of the Law of 5 February 1992 No 91 depends upon the issue of a decree which is broadly discretionary. For the issue of said decree, financial considerations, other considerations resulting from an evaluation of the applicant and the existence of previous convictions may be taken into account.

40. *Corte di Cassazione, 12 May 2004 No 8961* ..... 123

An appeal before the *Corte di Cassazione* pursuant to Article 111 of the Constitution against a decision of a Court of Appeal, which has been issued on appeal pursuant to Article 739 of the Code of Civil Procedure in the proceedings concerning the admissibility of an action for judicial declaration of paternity of foreign children pursuant to Article 274 of the Civil Code, is inadmissible.

41. *Corte di Cassazione (plenary session), order 21 May 2004 No 9802* ..... 126

The special proceedings for a preliminary ruling on jurisdiction on the

- question of whether Italian courts have jurisdiction over a foreigner is generally admissible even after Article 73 of the Law of 31 May 2005 No 218 has repealed Article 37 of the Code of Civil Procedure, since Article 41 of the Code of Civil Procedure incorporates by reference the (repealed) provision laid down by said Article 37. However, the aforesaid special proceedings cannot be brought in case of a dispute between Italian citizens who are resident and domiciled in Italy.
42. *Genoa Tribunal, order 21 May 2004* ..... 756
- Article 10 of the Law of 31 May 1995 No 218 does not apply to an application for the arrest of a ship flying the Italian flag and anchored in a port of another contracting State of the Brussels Convention of 10 May 1952 for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships.
- Pursuant to Article 4 of the Brussels Convention of 10 May 1952, Italian courts do not have jurisdiction over an application for the arrest of a ship flying the Italian flag and anchored in a port of another Contracting State.
43. *Corte di Cassazione, 28 May 2004 No 10378* ..... 129
- For the purposes of the recognition of foreign judgments concerning family relationships, Article 64 of the Law of 31 May 2005 No 218 sets forth a general procedure with respect to the simplified and facilitated procedure set forth by Article 65 of said Law. The general procedure, as such, applies if the requirements for the application of the latter procedure are not met.
- Pursuant to Article 64, *litt.* (a) of the Law No 218 of 1995, a divorce decree between a US/Italian citizen and an Italian citizen, which has been issued in the State where the marriage has been celebrated, can be recognised in Italy.
- The provisions of a foreign divorce decree concerning a prenuptial agreement are not contrary to public policy within the meaning of Article 64, *litt.* (g) of the Law No 218 of 1995, since, based on Article 30 of said Law, even two Italian spouses who are resident abroad may choose a foreign law as the governing law of the economic aspects of their relationship.
- A foreign judgment declaring the dissolution of a marriage with procedures and for reasons which are not identical to those contemplated by Italian law is not contrary to public policy within the meaning of Article 64, *litt.* (g) of the Law No 218 of 1995.
- The question of constitutional legitimacy of the favourable regime that Article 64 of the Law No 218 of 1995 has allegedly introduced for Italian citizens who have obtained a divorce abroad, raised with reference to Articles 3, 24 and 29 of the Constitution, is unfounded.
44. *Council of State, fourth division, 7 June 2004 No 3571* ..... 815
- A residence permit for study, access to work, employment or self-employment or reasons of health or medical treatment can be granted to a foreign citizen who has come of age only if she/he was a minor in foster care pursuant to Article 2 of the Law of 4 May 1983 No 184, a minor living in Italy with her/his family, or the beneficiary of a foster care order, at least on a temporary basis.
45. *Milan Tribunal, order 8 June 2004* ..... 141
- The lodging of the document instituting the proceedings, followed by the irregular service of said document due to the lack of the translation required by Article 4, third paragraph of the EC Regulation No 1348/2000, is sufficient in order to deem the relevant court seised pursuant to Article 30 of the EC Regulation No 44/2001.
- Article 27 of the EC Regulation No 44/2001 must be interpreted so that the

court subsequently seised, whose jurisdiction is allegedly based on an agreement conferring jurisdiction, shall nevertheless stay its proceedings until such time as the court first seised declines jurisdiction.

46. *Bologna Tribunal, decree 9 June 2004* ..... 759
- From the interpretation of Articles 12 and 17 of the EC Treaty, as laid down by the EC Court of Justice in its decision dated 2 October 2003, case C-148/02 (*Garcia Avello*), a principle may be inferred whereby, in the case of a person holding the citizenship of two different Member States, the administrative authorities of one of said Member States are not allowed, where the attribution of surnames is concerned, to impose its domestic regulations against the will of the interested person in order to correct the legal effects arising from the application of the regulations of the other Member State.
47. *Genoa Criminal Tribunal, order 10 June 2004* ..... 468
- A ship owner, whose ship is under provisional arrest due to the fact that it has been used to transport clandestine passengers in Italian territory in violation of Article 12 of the Legislative Decree No 286 of 1998, may obtain the restitution of his ship by proving that he is unrelated to the crime committed by the ship's crew, provided that the proof of his good faith demonstrates that there was no lack of vigilance on his part or that the illegal use of the ship was not foreseeable.
48. *Corte di Cassazione, 7 July 2004 No 12509* ..... 1110
- The prohibition on acting as an intermediary in employment relationships, which is laid down by Article 1 of the Law of 23 October 1960 No 1369, does not conflict with Community law, as interpreted by the EC Court of Justice in its decision dated 11 December 1997, case C-55/96 (*Job Centre*). In fact, in said decision the Court ruled on the public monopoly on the placement of employees (i.e. the intermediation between demand for and supply of employment) – considering said monopoly incompatible with Community law – but not on the provision by a contractor or other intermediary of mere workforce, which implies an intermediation replacing the conclusion of a direct contract between the employee and the person who actually makes use of said workforce.
49. *Corte di Cassazione, 12 July 2004 No 12821* ..... 145
- Pursuant to Article 12 of the Law of 31 May 2005 No 218, a power of attorney for legal proceedings used for the purposes of proceedings being held in Italy, even if granted abroad, is governed by Italian procedural law.
- Italian procedural law, insofar as it allows said power of attorney to be granted by notarial deed (*atto pubblico*) or by a document with authenticated signature (*scrittura privata autenticata*), refers to the substantive law. Accordingly, in this case the validity of the power of attorney must be ascertained based on the law of the State in which it has been granted. However, the foreign law shall at least contemplate the possibility to make notarial deeds and documents with authenticated signature, and regulate them in a manner not conflicting with the fundamental requirements applicable to them under the Italian legal system, which, as far as documents with authenticated signature are concerned, consist in a declaration of a public official that the document has been executed in her/his presence.
50. *Corte di Cassazione, 16 July 2004 No 13167* ..... 147
- Based on the prevailing international case law concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child

Abduction, the habitual residence of a child immediately before her/his wrongful removal must be identified with the place that said child – based on her/his permanent stay at said place, even if only *de facto* – recognises as the centre of her/his affective relationships, as they arise from her/his everyday life. The aforesaid concept of habitual residence is unrelated to the concept of prevailing localisation of the matrimonial life within the meaning of Article 31 of the Law of 31 May 1995 No 218.

The rights of custody referred to in Article 3 of the 1980 Hague Convention are those granted under the domestic law of the State in which the child was habitually resident, provided that said rights were actually exercised, it being irrelevant that the court of another State had granted the custody of the child to the other parent.

51. *Lazio Regional Administrative Tribunal (Session III-ter), 16 July 2004 No 6998* 428

The provisional liquidator of an insolvent company appointed by a court of another Member State has standing (*legittimazione*) and interest (*interesse*) to appeal to the Administrative Tribunal against an Italian administrative order that opens the special administration procedure (*procedura di amministrazione straordinaria*) against said company pursuant to the Law Decree of 23 December 2003 No 347.

Pursuant to Article 2, *lits.* (e) and (f) of the EC Regulation No 1346/2000, the order appointing the provisional liquidator, which has been issued on a merely provisional basis, does not constitute a decision to open insolvency proceedings.

Notwithstanding the fact that an Irish decision concerning the winding-up of a company may have retroactive effects, said decision cannot affect the main insolvency proceedings previously opened in Italy against the same company, which proceedings are effective *erga omnes* for the purposes of Article 16, first paragraph of the EC Regulation No 1346/2000.

52. *Constitutional Court, 21 July 2004 No 253* ..... 1111

Article 722 of the Code of Criminal Procedure is constitutionally illegitimate, since it conflicts with Article 3 of the Constitution, insofar as it does not provide that preventive detention abroad as a consequence of a request for extradition made by Italy must taken into account, *inter alia*, for the purposes of calculating the terms contemplated by the Code for the various phases of the proceedings.

53. *Corte di Cassazione, 22 July 2004 No 13662* ..... 152

Pursuant to Article 64, *litt.* (b) of the Law of 31 May 1995 No 218, the court before which the recognition of a foreign judgment is sought must verify both that the document which instituted the proceedings has been served in accordance with the law of the place in which the proceedings has been held, and that the service of said document, even if it complies with said law, is not contrary to the procedural public policy of the Italian legal system. The aforesaid verification is lacking if the court, on the one hand, merely states that, based on what “seemingly” required under the relevant foreign law, the *audi alteram partem* requirement has been complied with and, on the other hand, has considered decisive the circumstance that, in any case, no violation of the principles of Italian public policy relating to the rights of defence has occurred.

A judgment of a foreign court which, ruling on both claims based on torts and claims based on breach of contractual obligations, has affirmed jurisdiction over the second type of claims based on the fact that it had jurisdiction on the first type of claims, violates Article 64, *litt.* (a) of the Law of 31 May 1995 No

218, whereby the foreign court shall have jurisdiction based on the jurisdictional criteria set forth by the Italian legal system.

54. *Corte di Cassazione, 23 July 2004 No 13905* ..... 435

The obligation that a guarantor – which has paid customs duties pursuant to a guarantee agreement entered into with the forwarding agent – is seeking to enforce against the owner of imported goods in an action of recourse, by way of subrogation into the rights of the customs authorities, does not constitute a contractual obligation within the meaning of Article 5 No 1 of the Brussels Convention of 27 September 1968, if the owner is not a party to the guarantee agreement and has not authorised the execution of said agreement. The aforesaid obligation does not also fall within the notion of a delict or *quasi-delict* referred to in No 3 of said Article 5, since the failure by the forwarding agent to pay the customs authorities with the funds provided to it by the owner of the imported goods constitutes the mere fact that has caused the payment by the guarantor and the related subrogation and recourse against the owner. Finally, Article 11 of the aforesaid Convention does not apply, since the guarantee in question was undertaken pursuant to an agreement of a type not specifically regulated by law (*contratto innominato*), which does not constitute an insurance contract. In fact, said guarantee is substantially similar to a fidejussion, and is therefore subject to the provisions applicable to fidejussions.

Italian courts do not have jurisdiction over an action of recourse in which the guarantor, by way of subrogation into the rights of the customs authorities, requests that the owner of the imported goods pay an amount corresponding to the customs duties that it has paid to said customs authorities pursuant to a guarantor agreement entered into with the forwarding agent, if the defendant is not domiciled in Italy and, considering the circumstances of the case, Article 5, Nos. 1 and 3, and Article 11 of the Brussels Convention of 27 September 1968 are not applicable.

55. *Corte di Cassazione (plenary session), 26 July 2004 No 13968* ..... 1112

The Brussels Convention of 27 September 1968 does not apply to an action brought by a Danish company against persons domiciled or having their seat in Italy, since both the defendant and the third party defendant in said action have not been sued before the courts of a State different from their own.

56. *Corte di Cassazione (plenary session), order 28 July 2004 No 14348* ..... 441

Pursuant to Article 1, second paragraph of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, said Regulation does not apply to credit institutions.

Article 25, third paragraph of the Law of 31 May 1995 No 218 does not apply to the transfer abroad of the registered office of a company, if after said transfer said company ceases to exist under Italian law.

Pursuant to Article 25, first paragraph of the Law No 218 of 1995, Italian courts have jurisdiction over a bankruptcy petition lodged against an Italian company incorporated and doing business in Italy.

57. *Rovereto Tribunal, 2 September 2004* ..... 162

For the purposes of Article 5, No 1, *litt.* (b) of the EC Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the place of delivery of the goods under a sale and purchase agreement is an independent concept that shall be interpreted according to its literal meaning, in the sense that said place is the place where the goods are actually made available to the consignee.

58. *Corte di Cassazione (plenary session), order 20 September 2004 No 18902* ..... 443
- A distribution agreement containing an exclusivity clause constitutes a framework agreement, which may be implemented through different contractual relationships. Reference shall be made to the regulation of the relevant contractual relationship in determining jurisdiction and venue as well as the substantive provisions of law governing said distribution agreement.
- Pursuant to Article 5 No 1 of the Brussels Convention of 27 September 1968 and Article 31 of the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, Italian courts do not have jurisdiction over a dispute concerning a distribution agreement entered into between a German company and an Italian company – which agreement contains an exclusivity clause that has a merely ancillary function and is not relevant for the purposes of the proceedings in question – if the place of performance of the obligation to deliver the goods constituting the object of the various sales under said distribution agreement is located in Germany.
59. *Constitutional Court, order 29 September 2004 No 302* ..... 470
- Article 14, paragraph 5-ter of the Legislative Decree of 25 July 1998 No 286 (which has been added by Article 13, first paragraph of the Law of 30 July 2002 No 189) provides that any non-EU citizen remaining in Italian territory without justified reason in violation of the removal order issued by the local head of police administration (*questore*) shall be punished by imprisonment (*arresto*) from six months up to one year. The question of the constitutional legitimacy of the above-mentioned provision, raised with reference to Article 25 of the Constitution, is manifestly inadmissible. The question of the constitutional legitimacy of the same provision, raised with reference to Articles 3, 24, 25 and 27 of the Constitution, is manifestly unfounded.
60. *Corte di Cassazione, 14 October 2004 No 20275* ..... 1113
- The non-applicability of the Italian provisions that require commercial agents to be registered in the registry of commercial agents under penalty of nullity of the relevant agency agreements – which is due to the fact that said provisions conflict with the EC Directive 86/653/EEC – shall also be extended to insurance agents and brokers.
61. *Rome Tribunal, decree 15 October 2004* ..... 760
- In light of the interpretative principles laid down by the case law of the EC Court of Justice and of the Constitutional Court, all persons having the authority to enforce the law, whether judicial or administrative authorities, are required not to apply any domestic provisions of law that are incompatible with the principles of the EC Treaty.
- Following the issue of the decision of the EC Court of Justice dated 2 October 2003, case C-148/02 (*Garcia Avello*), it is necessary to order the deletion, from the birth certificate of a child holding both Italian and Spanish citizenships, of a correction made by the Italian registrar general of births, deaths and marriages aimed at attributing to said child the entire surname of her father and deleting that of her mother.
62. *Milan Court of Appeal, 19 October 2004* ..... 765
- Contrary to EC Regulations, which have general application and, as such, are directly applicable, the binding effect of an EC Decision cannot be considered by a court on its own motion, but must be pled by the interested party in accordance with the domestic rules of procedure.
- The regulation of the special administrative procedure (*amministrazione*



*straordinaria*) laid down by the Law of 3 April 1979 No 95 does not conflict with Articles 87 and 88 of the EC Treaty on aids granted by States as a whole, but only with respect to those aspects that derogate from the ordinary bankruptcy procedure and imply benefits for the insolvent undertaking the costs of which are actually borne by public authorities. Furthermore, following the Law of 12 December 2002 No 273, which has modified the structure of special administrative procedures, any conflict between said procedures and the Community regulation of the aids granted by States has been eliminated.

63. *Rome Tribunal, order 19 October 2004* ..... 1059

Italian courts do not have jurisdiction over a petition for interim relief aimed at guaranteeing the payment of bonds issued by the State of Argentina. In fact, due to their nature and purposes, the laws through which the State of Argentina has implemented the moratorium on the national debt constitute non-commercial State activities. Therefore said laws cannot be subject to the jurisdiction of the courts of other States pursuant to a principle of general international law that is enforceable in the Italian legal system by virtue Article 10 of the Constitution.

The principle of the immunity of foreign States from Italian jurisdiction for their non-commercial activities, which is referred to by Article 10 of the Constitution, is not in conflict with the right to the judicial protection of contractual rights against the State of Argentina, which is laid down by Article 24 of the Constitution, for the following reasons: both the aforesaid constitutional provisions have equal ranking; other forms of protection of said rights are not excluded; and, finally, in a comparative assessment of the values underlying said constitutional provisions, the value of non-interference in the sovereignty of foreign States should be considered prevailing.

Even if an implied, advance waiver by the State of Argentina of its immunity from civil jurisdiction in favour of the selected forum could be inferred from the forum selection clauses contained in the general terms and conditions of the bonds issued by said State, said waiver would not have any value against the subsequent non-commercial activity of said State concerning the consolidation of the national debt.

64. *Corte di Cassazione, 3 November 2004 No 21088* ..... 1114

In light of, *inter alia*, Articles 3 and 7 of the New York Convention of 20 November 1989 on the Rights of the Child, the fact that an actual and concrete interest of the child to be recognised by one of her/his parents cannot be found does not thwart the exercise by said parent of her/his right to recognise the child pursuant to Article 250 of the Civil Code, notwithstanding the opposition of the parent who first recognised her/him.

65. *Rome Tribunal, order 8 November 2004* ..... 1102

Based on a principle of general international law on the immunity of foreign States from jurisdiction, which is enforceable in the Italian legal system by virtue of Article 10 of the Constitution, a petition for interim relief aimed at guaranteeing the payment of bonds issued by the State of Argentina is barred. In fact, while the issue of said bonds and their placement on the international markets constitute commercial activities, the subsequent suspension of the related payments was implemented through acts adopted by the State of Argentina in the exercise of its sovereign powers and, as such, cannot be challenged before Italian courts.

The State of Argentina did not waive its immunity in advance, not only because the trust deed or fiscal agency agreement related to said bonds contains

a provision conferring jurisdiction on foreign courts, but also because said waiver would not have any value with respect to wholly exceptional defaults, which are due to sovereign acts subsequently issued in a situation of national emergency.

66. *Corte di Cassazione, 12 November 2004 No 21525* ..... 1115  
 Pursuant to Article 18, third paragraph of the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules Relating to International Carriage by Air, said Convention applies to a carriage of goods by land performed for the sole purpose of delivering goods that are the object of a contract of carriage by air. Pursuant to Article 24 of said Convention, this implies that the liability regime, including any relevant statute of limitation, is subject to the conditions and limits set out in said Convention.
67. *Corte di Cassazione, 26 November 2004 No 22332* ..... 771  
 Pursuant to the provision on international public policy laid down by Article 31 of the Preliminary Provisions to the Civil Code, and nowadays by Article 16 of the Law of 31 May 1995 No 218, a court shall refuse to apply only those provisions of foreign law that are in conflict with the principles that the Italian legal system shares with the majority of the other States.  
 Provisions of Canadian law, which has been chosen by the parties to govern an employment relationship pursuant to Article 25, first paragraph of the Preliminary Provisions to the Civil Code, do not conflict with international public policy within the meaning of Article 31 of the Preliminary Provisions to the Civil Code even if they do not grant to the employee any bonus payment (*mensilità aggiuntive*), provided that the overall remuneration of said employee is greater than that provided for by Italian law.
68. *Corte di Cassazione, order 26 November 2004 No 22335* ..... 448  
 Pursuant to Article 22 of the Lugano Convention of 16 September 1988, a divorce action pending in Switzerland and an action for judicial separation pending in Italy are related actions, as far as urgent measures concerning maintenance issued in both proceedings are concerned. However, the relationship between these two actions is not such that one action is preliminary to the other.  
 The determination that two actions are related may give rise to an order of the court second seised (in the instant case, the Italian court) to stay its proceedings, although the issue of said order is not mandatory. In this case, the order to stay the proceedings is not regulated by Article 295 of the Code of Civil Procedure, and therefore special proceedings for a ruling on venue (*regolamento di competenza*) pursuant to Article 42 of the Code of Civil Procedure cannot be brought against said order.
69. *Turin Court of Appeal, 10 December 2004* ..... 777  
 The satisfaction of the condition of reciprocity laid down by Article 16 of the Preliminary Provisions to the Civil Code, which has not been repealed by the Law reforming the Italian private international law, shall, if challenged, be proved by the plaintiff, since it is a factual requirement for the existence of the right of the foreigner in question.  
 Pursuant to Article 1, first section, first, second and fourth paragraphs of the Convention between Italy and Yugoslavia of 3 December 1960 on mutual judicial assistance in administrative matters, the citizens of each contracting State enjoy, on the territory of the other, legal protection of their own person and property on conditions no less favourable than those provided for by their national law. They also have free access to judicial and administrative

authorities, in accordance with the laws of the State in which protection is sought, and subject to the international public policy of said State.

Due to the embargo approved by the Security Council of the United Nations with Resolution No 757/1992 and to the Decision No 92/285 of the Governments of the Member States of the ECSC, a claim for damages arising from a contract brought by a Serbian company against an Italian company cannot be allowed, since this would benefit the State against which the embargo was adopted, thereby violating international public policy.

70. *Corte di Cassazione (criminal), 28 December 2004 No 49666* ..... 783

The provision of international law granting immunity from criminal jurisdiction to the head of State and the Minister of Foreign Affairs of a sovereign State with respect to all activities carried out by them, whether or not in the exercise of their functions, is of customary nature. Therefore, being a provision of general international law, it is automatically part of the Italian legal system and is immediately enforceable therein, pursuant to the reference contained in Article 10, first paragraph of the Constitution.

In order for an entity of international law to be considered a sovereign entity, it must have the characteristics of a government organisation that actually and independently exercises its power over a certain territorial community. In contrast, recognition by other States is an act that does not have legal consequences and is therefore irrelevant for this purpose.

Currently, the State of Montenegro does not qualify as a sovereign State and as an autonomous and independent subject of international law within the international community. Therefore, the conditions for granting immunity from criminal jurisdiction to its head of government are not met.

71. *Padua Tribunal, division of Este, 11 January 2005* ..... 791

Pursuant to the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, a contract for the sale of goods must be defined in an independent way, as a contract whereby one party is obliged to deliver the goods, transfer the property in said goods and, possibly, hand over all documents relating to them; whereas the other party is obliged to pay the price for the goods and take delivery of them. Consequently, a supply contract (*contratto di somministrazione*) falls within the sphere of application of the Convention, regardless of the legal characterisation of said contract in the domestic legal system.

If the performance of an obligation under a contract (i.e. in the present case, the periodic delivery of goods) is interrupted and it does not appear reasonably possible that said performance may be resumed, a “fundamental” breach within the meaning of Article 25 of the 1980 Vienna Convention – corresponding to a breach “not of minor importance” within the meaning of Article 1455 of the Civil Code – has occurred, allowing the termination of the contract.

72. *Corte di Cassazione (plenary session), order 12 January 2005 No 385* ..... 801

Pursuant to Article 16 No 2 of the Brussels Convention of 27 September 1968, proceedings relating to a dispute among members of a company do not fall within the exclusive jurisdiction of the courts of the Contracting State where the company has its seat, even if said dispute concerns alleged abuses of the position of member or director.

Pursuant to Article 18 of the 1968 Brussels Convention, Italian courts have jurisdiction if the defendant has entered an appearance without contesting jurisdiction, unless the courts of another Contracting State have exclusive

jurisdiction (which circumstance may also be declared by the court seized of its own motion pursuant to Article 19 of said Convention).

73. *Corte di Cassazione (plenary session), 17 January 2005 No 731* ..... 804

For the purposes of determining whether written evidence of an agreement to derogate from Italian jurisdiction within the meaning of Article 4, second paragraph of the Law of 31 May 1995 No 218 exists, the so-called judicial formation of consent, i.e. the production in the proceedings of a document by the party who has not signed it but intends to rely on its effects, must be considered equivalent to the existence of a written instrument signed by both parties.

Taking into account that Law No 218 of 1995 is inspired by the procedural principles laid down by the Brussels Convention of 27 September 1968, Article 4, second paragraph of said Law shall be interpreted consistently with Article 17 of said Convention. Accordingly, relevance shall be given to the conclusive behaviour of the parties if, in the particular sector of international trade or commerce in which they operate, a usage exists whereby said behaviour is suitable to reveal the will of the parties.

In case of an agreement to derogate from the Italian jurisdiction contained in a bill of lading signed only by the carrier, and not by the shipper, the requirement of written evidence laid down by Article 4, second paragraph of the Law No 218 of 1995 must be considered met pursuant to international usage in the field of international carriage by sea if the shipper, intentionally observing usage of which it is or ought to have been aware, has received the bill of lading without objections and has negotiated it to the benefit of a third party consignee/holder of the bill of lading. Therefore, said agreement is enforceable against the latter.

74. *Corte di Cassazione (plenary session), order 28 January 2005 No 1734* ..... 450

The fact that a company having its registered office in another Member State owns real estate in Italy – said real estate being the sole asset on which the company's creditors may actually satisfy their claims – does not confer jurisdiction on Italian courts to open the main insolvency proceedings against said company pursuant to Article 3, first paragraph of the EC Regulation No 1346/2000.

Pursuant to Article 147 of the Bankruptcy Law, Italian courts do not have jurisdiction to declare bankrupt a company having its registered office abroad, and which is the sole shareholder with unlimited liability of another company which, having transferred its registered office abroad, no longer exists as an Italian company.

75. *Corte di Cassazione (plenary session), order 15 February 2005 No 2983* ..... 1077

The party invoking an agreement conferring jurisdiction has the burden of proving the existence of an international usage within the meaning of Article 17 of the Brussels Convention of 27 September 1968. In particular, the party must show that, in the sector of international trade or commerce in which the parties operate, a usage exists which corresponds to a course of conduct generally and regularly observed by the operators of said sector when entering into any contract of the type involved.

Pursuant to Article 5 No 1 of the Brussels Convention of 27 September 1968, the place of performance of the obligation to deliver in a sales contract must be determined directly by the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, and particularly by Article 31 of said Convention.

76. *Rome Tribunal, order 3 March 2005* ..... 1059

Italian courts do not have jurisdiction over a petition for interim relief aimed at guaranteeing the payment of bonds issued by the State of Argentina. In fact, due to their nature and purposes, the laws through which the State of Argentina has implemented the moratorium on the national debt constitute non-commercial State activities. Therefore said laws cannot be subject to the jurisdiction of the courts of other States pursuant to a principle of general international law that is enforceable in the Italian legal system by virtue of Article 10 of the Constitution.

The clauses concerning the advance waiver by the State of Argentina of its immunity from jurisdiction – which are contained in certain trust deeds or fiscal agency agreements referred to by said bonds – cannot have any force against the subsequent non-commercial activities of said State concerning the consolidation of the national debt.

77. *Corte di Cassazione, 18 March 2005 No 6014* ..... 1082

Article 5 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction distinguishes between rights of custody – which include the right to determine the place of residence of the child – and rights of access, and provides for different protection for these two types of rights.

In interpreting the provisions of the 1980 Hague Convention, and particularly those concerning custody and rights of access, an international perspective must be taken into consideration and, accordingly, any contamination with concepts belonging to the domestic laws of the States should be avoided.

The measure of the prompt return of the child in the State of her/his habitual residence cannot be applied where there has been a breach of the rights of access arising from the removal abroad of said child, following a legitimate decision of the parent having the care of the child.

78. *Corte di Cassazione, 21 April 2005 No 8296* ..... 1088

In an employment contract, the limit of public policy to the application of the foreign law chosen by the parties pursuant to Article 25, first paragraph of the Preliminary Provisions to the Civil Code – which limit is laid down by Article 31 of the Preliminary Provisions to the Civil Code – is relevant only if a violation of specific rights granted by provisions of Italian law, which arises as a result of the application of said foreign law, has been alleged.

79. *Corte di Cassazione (plenary session), order 27 May 2005 No 11225* ..... 1091

Based on a customary principle of international law, which is enforceable in the Italian legal system by virtue of Article 10 of the Constitution, the exemption of foreign States from jurisdiction is limited to their commercial activities, and does not apply with respect to their non-commercial activities.

The immunity of foreign States from jurisdiction may exceptionally be derogated from in cases of sovereign activities that violate universal values of human dignity.

While the issue of bonds and their placement on the international markets by a foreign Government can be considered commercial activities, the subsequent measures of moratorium on debt adopted by said Government in the context of a serious national emergency do not have the same nature.

Italian courts do not have jurisdiction over the activities carried out by the

State of Argentina in relation to the moratorium on foreign debt arising from the issue of bonds and their placement on the international markets.

80. *Latina Tribunal, decree 10 June 2005* ..... 1095

A marriage celebrated in the Netherlands between persons of the same sex cannot be recognised or registered in Italy since, at the present stage of evolution of Italian society, said practice conflicts with Italian international public policy within the meaning of Articles 64 and 65 of the Law of 31 May 1995 No 218. Furthermore, it cannot be maintained that the provisions of another EC Member State may not be in conflict with the international public policy of the requested State, nor that an international principle exists which requires the automatic recognition of foreign acts.

### EUROPEAN COMMUNITIES CASES

*Acts of institutions:* 18, 20.

*Brussels Convention of 1968:* 3, 6, 7, 8, 10, 14, 15, 16.

*Community proceedings:* 13.

*Companies:* 13.

*Co-operation in criminal matters:* 18.

*EC Regulation No 1346/2000:* 13.

*EU Citizenship:* 5.

*Freedom of movement of capitals:* 19.

*Freedom of movement of persons:* 1, 5.

*Freedom to provide services:* 2.

*Legal capacity:* 13.

*Preliminary ruling on interpretation:* 9, 17, 18.

*Prohibition of discrimination:* 19.

*Right of residence and establishment:* 4.

*Treaties and general international rules:* 11, 12, 19.

1. *Court of Justice, 16 September 2004, case C-386/02* ..... 206

Article 39(2) EC, Article 4(4) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, and Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, must be interpreted as not precluding national legislation which, in circumstances such as those in the main proceedings, refuses to grant an allowance in favour of former prisoners of war on the ground that the applicant did not hold the nationality of the

Member State involved when the application was made, but that of another Member State.

2. *Court of Justice, 12 October 2004, case C-60/03* ..... 1117

Article 5 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, interpreted in the light of Article 49 EC, does not preclude a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived benefit of execution, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective.

3. *Court of Justice, 14 October 2004, case C-39/02* ..... 178

An application to a court of a Contracting State by a shipowner for the establishment of a liability limitation fund, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner do not create a situation of *lis pendens* within the terms of Article 21 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978 Accession Convention.

A decision ordering the establishment of a liability limitation fund, such as that in the main proceedings in the present case, is a judgment within the terms of Article 25 of that Convention.

A decision to establish a liability limitation fund, in the absence of prior service on the claimant concerned, and even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it, cannot be refused recognition in another Contracting State pursuant to Article 27(2) of that Convention, on condition that it was duly served on or notified to the defendant in good time.

4. *Court of Justice, 14 October 2004, case C-299/02*... 188

The law of a Member State on the registration of a ship and on the carrying out of the shipping business is contrary to Articles 43 and 48 EC when requiring certain conditions to confer the nationality of such Member State as those concerning: the nationality of the shareholders of companies owning seagoing ships; the nationality of the directors of companies owning seagoing ships; the nationality of the natural persons responsible for the day-to-day management of the place of business from which the shipping business, which is necessary for registration of said ship in the national registers, is carried out in that State; the nationality of the directors of shipping companies owning seagoing ships and the residence of the directors of shipping companies owning seagoing ships.

5. *Court of Justice, 19 October 2004, case C-200/02* ..... 194

The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally.

Purely as a national of a Member State, and therefore as a citizen of the Union, a person is entitled to rely on Article 18(1) EC. The right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect.

Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.

Article 18 EC and Council Directive 90/364/EEC of 28 June 1990 on the right of residence confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent, who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

6. *Court of Justice, 28 October 2004, case C-148/03* ..... 202

Article 57(2) *lit. a* of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting State is sued may derive its jurisdiction from a specialised convention to which the first State is a party as well and which contains specific rules on jurisdiction, even where the defendant, in the course of the proceedings in question, submits no pleas on the merits.

7. *Court of Justice, 20 January 2005, case C-464/01* ..... 474

The rules of jurisdiction laid down by the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions must be interpreted as follows:

– a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;

– it is for the court seised to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;

– to that end, that court must take into account all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.



8. *Court of Justice, 20 January 2005, case C-27/02* ..... 484

The rules of jurisdiction of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions must be interpreted in the following way:

– legal proceedings by which a consumer seeks an order, under the law of the Contracting State in which he is domiciled, that a mail order company established in another Contracting State award a prize ostensibly won by him is contractual in nature for the purpose of Article 5(1) of that Convention, provided that: first, that company, with the intention of inducing the consumer to enter a contract, addresses to him in person a letter of such a kind as to give the impression that a prize will be awarded to him if he returns the “payment notice” attached to the letter and, second, he accepts the conditions laid down by the vendor and does in fact claim payment of the prize announced;

– on the other hand, even though the letter also contains a catalogue advertising goods for that company and a request for a “trial without obligation”, the fact that the award of the prize does not depend on an order for goods and that the consumer has not, in fact, placed such an order has no bearing on that interpretation.

9. *Court of Justice, 27 January 2005, case C-125/04* ..... 495

The Collège d'arbitrage de la Commission de Litiges Voyages (a non-profit association under Belgian law) is not a “court or tribunal of a Member State” within the meaning and for the purposes of Article 234 EC since the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration.

10. *Court of Justice, 1 March 2005, case C-281/02* ..... 498

Nothing in the wording of Article 2 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, the 1982 and the 1989 Accession Conventions, suggests that the application of the general rule of jurisdiction laid down by that article solely on the basis of the defendant's domicile in a Contracting State is subject to the condition that there should be a legal relationship involving a number of Contracting States. It follows that Article 2 of the Brussels Convention applies to circumstances involving relationships between the courts of a single Contracting State and those of a non-Contracting State rather than relationships between the courts of a number of Contracting States.

The Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.

11. *Court of Justice, 1 March 2005, case C-377/02* ..... 508

The World Trade Organisation agreements are in principle not among the rules in the light of which the EC Court of Justice is to review the legality of measures adopted by the Community institutions. It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the

precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.

An operator cannot plead before a national court that Community legislation is incompatible with certain rules of the WTO even where such incompatibility has been declared by the Dispute Settlement Body referred to in Article 2(1) of the Understanding on rules and procedures governing the settlement of disputes, which forms Annex 2 to the Agreement establishing the WTO.

12. *Court of Justice, 10 March 2005, case C-469/03* ..... 818

The principle *ne bis in idem*, enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen, is not applicable to a decision of the judicial authorities of one Member State declaring a case to be closed, after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

13. *Court of Justice, 17 March 2005, case C-294/02* ..... 823

The designation of the EC Court of First Instance in an arbitration clause contained in a contract, governed by private law, concluded by the Commission and some companies may entail the result that the EC Court of Justice has jurisdiction under Article 238 EC which grants jurisdiction specifically to the "Court of Justice".

The law applicable to the legal capacity of a company and to its capacity to be a party to legal proceedings is the law governing its incorporation.

The Court of Justice jurisdiction exercised *vis-à-vis* a party against which insolvency proceedings have been instituted must be examined in the light of the procedural law applicable in the Court of Justice. Given that neither the Statute of the Court of Justice nor its Rules of Procedure contain any specific provisions concerning applications brought against parties subject to insolvency proceedings, the applicable rules must be deduced from the principles common to the procedural laws of the Member States in this area.

According to Article 4(2)(f) of Regulation No 1346/2000 on insolvency proceedings the law governing the effects of insolvency proceedings brought by individual creditors is that of the State in which they were opened.

Pursuant to Article 17(1) of Regulation No 1346/2000, the opening of insolvency proceedings takes effect in the other Member States without the need for any notice to be given under Article 40 of that Regulation.

The Commission can pursue its credit against the insolvent undertaking only in the insolvency proceedings brought before the national courts.

The Court of Justice has no jurisdiction on an application brought by the Commission seeking a finding of its credits against a debtor subject to insolvency proceedings before the court of a Member State, when the Court is designated in the arbitration clause enshrined in the contract from which the credit arises, in the case the Commission has not taken any steps to involve other parties, namely the other creditors of the insolvent undertaking, in the proceedings before the Court.

14. *Court of Justice, 28 April 2005, case C-104/03* ..... 833

Article 24 of the 1968 Brussels Convention on Jurisdiction and the

Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions, must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of provisional, including protective, measures.

15. *Court of Justice, 12 May 2005, case C-112/03* ..... 837

A jurisdiction clause conforming with Article 12(3) of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, the 1982, the 1989 and the 1996 Accession Conventions cannot be relied on against a beneficiary under that contract who has not expressly subscribed to that clause and is domiciled in a Contracting State other than that of the policy-holder and the insurer.

16. *Court of Justice, 26 May 2005, case C-77/04* ..... 1124

Third-party proceedings between insurers based on multiple insurance are not subject to the provisions of Section 3 of Title II of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, the 1982, the 1989, the 1996 Accession Conventions.

Article 6(2) of the Brussels Convention is applicable to third-party proceedings between insurers based on multiple insurance, in so far as there is a sufficient connection between the original proceedings and the third-party proceedings to support the conclusion that the choice of forum does not amount to an abuse.

17. *Court of Justice, 31 May 2005, case C-53/03* ..... 1153

*Epitropi Antagonismou* (the Greek Competition Commission) is not a “court or tribunal” within the meaning of Article 234 EC and accordingly the Court has no jurisdiction to answer a preliminary ruling referred by it.

18. *Court of Justice, 16 June 2005, case C-105/03* ..... 1130

The EC Court of Justice has jurisdiction to give preliminary rulings on the interpretation question of Articles 2, 3 and 8 of Council Framework Decision 2001/220/JHA of 15 March 2001, on the standing of victims in criminal proceedings, raised by the Italian judge in charge of preliminary enquiries in criminal proceedings (“*giudice per le indagini preliminari*”), since the Italian Republic indicated by a declaration pursuant to Article 35(2) EU that it accepted the jurisdiction of the Court of Justice, the judge in charge of preliminary enquiries in criminal proceedings acts in a judicial capacity so that he must be regarded as a “court or tribunal of a Member State” within the meaning of Article 35 EU, and the Framework Decision, based on Articles 31 and 34 EU, is one of the acts referred to in Article 35(1) EU in respect of which the Court may give a preliminary ruling.

The system of Article 234 EC is in principle applicable to the preliminary rulings requested under Article 35 EU, subject to the conditions laid down by that provision. Namely the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

The binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national

law in conformity with Community law. The principle of interpretation in conformity with Community law is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.

The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity.

The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of interpretation in conformity with Community law cannot serve as the basis for an interpretation of national law *contra legem*.

Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.

19. *Court of Justice, 5 July 2005, case C-376/03* ..... 1141

When concluding bilateral conventions for the avoidance of double taxation, the Member States are at liberty to determine the connecting factors for the purposes of allocating powers of taxation. A difference in treatment between nationals of the two Contracting States that results from that allocation cannot constitute discrimination contrary to Article 39 EC.

Articles 56 and 58 EC do not preclude a rule laid down by a bilateral convention for the avoidance of double taxation from not being extended, in a situation and in circumstances such as those in the main proceedings, to residents of a Member State which is not party to that convention.

20. *Court of Justice, 13 September 2005, case C-176/03* ..... 1147

Legislation in criminal matters as well as criminal procedure provisions fall in principle outside EC's general competence.

Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law must be annulled as it encroaches on the powers which Article 175 EC confers on the Community.

#### CASES IN FOREIGN COURTS

- Irish Supreme Court, 27 July 2004* ..... 209

Within the meaning of Article 3 and Recital 13 of EC Regulation No 1346/2000 on insolvency proceedings, the centre of main interests of a company having its registered office in Ireland is in the place where it conducts the

administration of his interests on a regular basis ascertainable by third parties, without any consideration of the financial control by a parent company having the registered office in another Member State.

Questions must be referred for preliminary ruling to the EC Court of Justice on the notion of “judgment opening insolvency proceedings” under Article 16 of EC Regulation No 1346/2000, on the issue whether, under Articles 3 and 16, a judgment opening main insolvency proceedings delivered by a court of a Member State prevent courts of other Member States from having jurisdiction to open main insolvency proceedings, and on the notion of “centre of debtor’s main interests”.

While it is for the EC Court of Justice to determine the extent of public policy within which Article 17 allows a Member State not to give recognition to decisions of the courts of another Member State opening insolvency proceedings, it is for the national court to decide the issue of its national public policy.

It is manifestly contrary to Irish public policy to give recognition to a decision of a court of another Member State opening insolvency proceedings when the right to a fair hearing of the provisional liquidator, duly appointed in accordance with Irish law, has not been respected in reaching such a decision.

#### DOCUMENTS

The new Belgian private international law code (Law 16 July 2004) .....	231
Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions .....	263
Implementation of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (Legislative Decree 9 July 2004 No 197) .....	276
Council Regulation (EC) No 2116/2004 of 2 December 2004 amending 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, as regards treaties with the Holy See .....	516
Information relating to courts and redress procedures pursuant to Article 68 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 .....	517
Commission Regulation (EC) No 2245/2004 of 27 December 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters .....	520
General Rules on the participation of Italy to the legislative process of the European Union and on the procedures to comply with Community obligations (Law 4 February 2005 No 11) .....	521
Amendments to Article 2412 of the Italian Civil Code (Legislative Decree 28 December 2004 No 310) .....	532

Regulation on the procedures for the recognition of the refugee <i>status</i> (Presidential Decree 16 October 2004 No 303) .....	533
Agreement between Italy and Kuwait on Judicial Co-operation, Recognition and Enforcement of Judgments in Civil Matters (Kuwait, 11 December 2002) .....	846
Italian provisions implementing Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (Law 22 April 2005 No 69) .....	851
Council Decision 2005/150/EC, Euratom of 18 January 2005 Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal .....	868
Regulation implementing the consolidated act on immigration law and on non-EC nationals <i>status</i> (Presidential Decree 18 October 2004 No 334) .....	1158
Convention for the Unification of Certain Rules Relating to International Carriage by Air (Montreal, 28 May 1999) .....	1208
Resolutions of the Institute of International Law at the Cracovia Session (20-28 August 2005) .....	1224

#### CURRENT EVENTS AND RECENT DEVELOPMENTS

The Enlargement of the European Union, Free Movement of Persons and the Co-operation in the Field of Justice and Home Affairs (C. SANNA) .....	282
<i>Legislative, judicial and international practice.</i> International treaties coming into force in Italy (according to the Official Journal from January to February 2005) – Member States of the Hague Conventions in force – The European Council and the area of freedom, security and justice: the Hague Programme – Opinion of the European Economic and Social Committee on the Green Paper on “Rome I” – Opinion of the European Economic and Social Committee on the Proposal for a EC Regulation on “Rome II” – Opinion of the European Economic and Social Committee on the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation – Results of the experimental phase of the European extrajudicial network – European Parliament resolution on the EC Commission’s Green Paper on alternative dispute resolution and a proposed directive on mediation in civil and commercial matters – New EC Commission communications concerning the entities qualified to bring actions for an injunctions for the protection of consumers’ interest – German and French provisions on foreign companies – More on the recognition of German notarial documents in Spain – Communication of the European Commission on “transfer prices” and the convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises – Report from the Commission on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime – On visa concerning tourist groups from the People’s Republic of China – The EC Council approval decision on the conclusion of bilateral agreements between the European Community and the new Member States laying down a procedure for the provision of information in the field of technical regulations – The conclusion of the Protocol to the 1979 Århus Convention on Long Range Transboundary Air Pollution – The conclusion of the Protocol to the Barcelona Convention for the Protection of the Mediterranean Sea. ....	288

*Legislative, judicial and international practice.* International treaties coming into force in Italy (according to the Official Journal from March to April 2005) – The Italian ratification to the Treaty adopting a Constitution for Europe – Entry into force of the Industrial Property Code – Determination of programmed entries of non-EC nationals in Italy for 2005 – Determination of entries of new EC Member States nationals in Italy for 2005 – The EC Commission's Green Paper on succession and wills – The EC Commission's Green Paper on "Rome III" – Report from the Commission on the application of the EC Regulation on the service of judicial and extrajudicial documents – On the co-operation with the International Criminal Tribunal for the Former Yugoslavia – EC provisions on refugees and on persons who otherwise need international protection – On the free movement of third countries nationals in the EU – A new EC Regulation on co-operation for consumer protection – *Corrigendum* to the Commission Decision on transfer of personal data to third countries – New practice directions relating to direct actions and appeals adopted by the EC Court of Justice – A form for legal aid applications in cross-border disputes – New provisions concerning restrictive measures in respect of Libia, Liberia, Birmania-Myanmar, Zimbabwe and Côte d'Ivoire – Two new EC Commission's proposals for future Community acts in the field of civil procedure – French draft law for the introduction of trust in France .....

542

*Legislative, judicial and international practice.* International treaties coming into force in Italy (according to the Official Journal from May to June 2005) – The law implementing EC rules in Italy for 2004 – New guidelines for international adoptions – Towards the conclusion of the agreement extending to Denmark the provisions of the "Bruxelles I" Regulation – Towards the conclusion of the agreement extending to Denmark the provisions of EC Regulation on the service of documents – *Corrigendum* to different language versions of the EC Regulation creating a European enforcement order – New EC Regulation on the co-ordination of social security systems – Amendments to the common system of taxation applicable to companies of different Member States – EC harmonisation of requirements in relation to information about issuers whose securities are admitted to trading on a regulated market – Council Framework Decision on the principle of mutual recognition of financial penalties – Council Framework Decision on confiscation of crime-related proceeds, instrumentalities and property – General programme on fundamental rights and justice – Council Framework Decision on attacks against information systems .....

885

*Legislative, judicial and international practice.* International treaties coming into force in Italy (according to the Official Journal from July to October 2005) – Action Plan on the implementation of the Hague Programme – Signature of the Accession Treaty to the European Union by the Republic of Bulgaria and Romania – EC Commission Statement concerning the EC Directive on the enforcement of intellectual property rights – The EC Commission's Green paper on mortgage credit – On the mutual recognition of decisions on the expulsion of third country nationals – On the European arrest warrant – The EC Council Regulation concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment – Towards a Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the European Union – New provisions concerning restrictive measures in respect of Zimbabwe, Sudan and Liberia .....

1229

<i>Notices</i> . Fourteenth meeting of the European Group for Private International Law (Tenerife, 17-19 September 2004) – Sixth workshop of the Gaetano Morelli Foundation .....	555
<i>Notices</i> . The 2006 courses of the Hague Academy of International Law .....	1238

*BOOK REVIEWS*

(See Italian Index)

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Grafiche Fiorini - 37131 Verona, Via Altichiero, 11

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