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TAR Campania Salerno, Sec. II, 24 September 2024, no. 1706 – the owner of an unauthorised building, following the demolition order issued by the municipality, is obliged to demolish it as the seizure by a credit institution does not constitute force majeure.

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TAR Liguria, Sez. I - 29 August 2024 n. 600 – in the matter of tenders called by a municipality for the award, *pursuant to* Article 45-bis of the Naval Code, of the public service concession regarding the management of equipped public beaches, the award of two lots to two interconnected companies is unlawful.

BANKING AND FINANCIAL LAW

Italian Supreme Court, 23 September 2024, no. 25420 – prescription for interest consideration and bank deposit: in the matter of a bank deposit not settled on a current account, the request for recognition of interest consideration not credited on the bank passbook constitutes an independent claim and, as such, is subject to a five-year prescription.

The Italian Supreme Court, in its judgment No. 25420, published on 23 September 2024, ruled on the issue of the prescription of the action for restitution of interest in the case of a bank account deposit.

The Supreme Court preliminarily observed that «*in bank deposits, the bank's restitutionary obligation arises, except where a contractual deadline is provided for, only upon the customer's request*», therefore, «*the prescription of depositor's right to obtain the restitution of the sums deposited does not begin to run until the customer has requested the sum to be returned, thus giving rise to the bank's corresponding obligation*».

However, according to the Court «*as far as interest is concerned (...) the relative obligation is linked to the principal obligation by an ancillary bond only at the genetic moment, while its events are independent of those of the capital and of the relative interruptive acts, with the consequence that, constituting the object of a performance due on the basis of a continuous "*causa debendi*", such obligation is subject to the five-year prescription established by Article 2948(4) of the Civil Code*».

The Court went on to point out that «*the request for recognition of the interest due, not credited to the*

bank passbook, and therefore not included in the apparent balance resulting therefrom, ***constitutes an autonomous request with respect to that for the restitution of the capital sum entered in the accounts****».*

Infact, continues the Supreme Court, in the case of a «*bank deposit, not regulated in a current account, the interest is annotated by the bank, at the end of the capitalisation period and at the contractually agreed rate or at the legal rate, on an individual deposit account correlated to the individual deposit opened, to then be annotated, at the first opportunity (withdrawal, also extinction, or payment, or ad hoc request) also on the bank passbook*».

On this basis, the Supreme Court concludes, the depositor's «*failure to request the payment of interest*' ***cannot preclude the running of the five-year prescription, in the absence of conduct on the part of the bank incompatible with the intention of availing itself of the limitation period, and therefore capable of being valid as a waiver of the prescription pursuant to Article 2937 of the Civil Code****».*

Italian Supreme Court, 9 September 2024, no. 23693 – liability of the bank for transactions carried out by means of electronic instruments: with regard to computer fraud suffered by the account holder, the bank's liability shall be excluded if there is a situation of gross negligence on the part of the user, which can be assumed in the case of prolonged waiting before communicating the unauthorised use of the payment instrument.

The Supreme Court, in its decision No. 23693, published on 4 September 2024, ruled on the subject of the bank's liability for transactions carried out by means of electronic instruments.

In this regard, the Supreme Court first of all recalled that the bank's liability has a «***contractual nature***», and that the «*the diligence required to the professional, with regard to the services provided to the customer, is of a technical nature and* ***must be assessed by taking into account the typical risks of the professional sphere of reference, taking as a parameter that of the prudent banker****».*

Therefore, continues the Court, «*in order to exonerate the debtor, whose contractual liability is presumed*', the conduct of the account holder «***must be beyond the possibilities of his sphere of control****».*

In this vein, the Court of Cassation stated that the bank's liability «***is to be excluded if there is a situation of gross negligence on the part of the user, configured, for example, in the case of protracted waiting before communicating the unauthorised use of the payment instrument****».*

In any event, observes the Court, the «*distribution of the burden of proof placed on the parties follows the*

regime of contractual liability», therefore, on the one hand «*the customer is only required to prove the source of its right and the expiry date*», on the other hand, «*the debtor, i.e. the bank, must prove the extinction of the other party's claim,* ***so that it cannot omit to verify the adoption of measures to ensure the security of the service****».*

It follows that, according to the Supreme Court, «***since the possibility of the subtraction of the codes from the account holder by means of fraudulent techniques is an eventuality falling within the business risk, the bank, in order to release itself from its liability, must prove the occurrence of events beyond the diligent effort required of the debtor***».

COMPANY LAW

Italian Supreme Court, 3 September 2024, no. 23557 – purchase of own shares in companies that do not make use of risk capital: pursuant to Article 2357 - *ter* of the Italian Civil Code, in companies that do not resort to the venture capital market, treasury shares are included in the calculation for the purposes of both the constitutive *quorum* and the deliberative *quorum*.

The Supreme Court of Cassation, with its ruling no. 23557, published on 3 September 2024, ruled on the issue of the computation of treasury shares for the purposes of the constitutive *quorum* and deliberative *quorum* in companies that do not make use of risk capital.

In fact, the Supreme Court clarified that, pursuant to Article 2357 - *ter*, paragraph 2, of the Italian Civil Code as amended by Legislative Decree no. 224 of 2010, in companies that do not have recourse to risk capital «*treasury shares are counted for the purposes of calculating the majority and quotas required for the constitution and resolutions of the shareholders' meeting, so that they enter into the counting of all the quorums for constitution and resolutions: even those that depend on the capital present at the meeting (as is the case for resolutions of the ordinary shareholders' meeting in second call)*».

This is because the legislative intention is based on the need «*to prevent, in "closed" companies, that the shares alter the respective powers of the shareholders and, more generally, that the so-called organisational function of the share capital», as well as in order to «preserve, within the shareholders' meeting, the balances pre-existing at the time of the company's purchase of treasury shares», with a legislative discretion that «was spent by differentiating "closed" companies from "open" companies and excluding for the latter that treasury shares were included in the deliberative quorum*».

BANKRUPTCY LAW

Italian Supreme Court, 23 September 2024, no. 25407 – "ordinary revocatory" action: in the course of an ordinary revocatory action brought by the bankruptcy curatorship pursuant to art. 66 l.f., it is the curatorship's burden to prove the existence of pre-existing claims with respect to the debtor's dispositive acts and the prejudice resulting from the so-called "*eventus damni*", *i.e.*, the increased danger of insufficiency of debtor's assets for the purpose of satisfying creditors' claims.

The Italian Supreme Court, in its decision no. 25407, issued on 23rd September 2024, ruled on the ordinary revocatory action brought by the bankruptcy curatorship pursuant to art. 66 l.f.

Firstly, the Supreme Court recalled that «***art. 95, paragraph 1, of the Bankruptcy Law,*** *as is well known,* ***allows the curatorship to object to the extinguishing, modifying or impeding facts of the right asserted with the application for admission to the liabilities as well as the ineffectiveness of the title on which the claim asserted, or the preemption invoked is based***».

Therefore, the Court affirmed that «[i]*n virtue of this rule,* ***the curatorship****, in order to prevent the acceptance of all or part of the claim,* ***may,*** *among other things,* ***infer, pursuant to Articles 66 ff. L. Fall., the revocability of the negotiated title on which the creditor has based the application for admission to the liabilities of the claim asserted or****, as in the case at hand,* ***of the mortgage guarantee granted by the debtor company then bankrupt*** *(Cass. no. 4694 of 2021* […])».

Specifically, the Supreme Court analysed the rules set forth in art. 66 l.f., pointing out that «**[l]*art. 66 of the Bankruptcy Law****, in particular, headed "ordinary revocatory action",* ***provides that the curatorship may request or, as mentioned, object, pursuant to Article 95, paragraph 1, of the Bankruptcy Law, the ineffectiveness of "acts performed by the debtor", then declared bankrupt, "to the detriment of creditors" in accordance with the rules of the Civil Code***».

On the basis of the abovementioned analysis, the Supreme Court held that «***the provision, there where it makes a reference to the civil law rules on revocatory actions, attests to the derivative nature of the action (or exception) proposed by the liquidator*** *pursuant to the aforementioned rule,* ***which, despite the peculiarity of its exercise in the context of a bankruptcy proceeding, nevertheless remains governed by the substantive requirements provided for in Article 2901 of the Civil Code****, with the consequence that the exercise of the pauliana action (or, as in the case at hand, the exception) by the bankruptcy curator entails a deviation from the common scheme only in terms of effects, legitimacy and competence, due to the insolvency context from which it originates, but does not change the prerequisites to which the acceptance of the same is related and its nature as a means of preserving the patrimonial guarantee (Cass. no. 36033 of 2021)*».

Accordingly, the Court continued its reasoning by stating that «***according to Article 2901(1) of the Civil Code, the creditor (and, therefore, the curatorship of the bankruptcy) may request that they be declared ineffective (or, in the case of the curatorship, object to the ineffectiveness, even when the relevant action is prescribed: art. 95, paragraph 1, L. Fall.) against him (de)acts of disposition of assets by which the debtor (then bankrupt) has caused****, as a result of the change thus caused to his assets (Cass. No. 1414 of 2020), **an "injury to his reasons" (cd. eventus damni)**: including, since they are also acts dispositive of his assets, the acts by which the debtor has assumed, (where appropriate) as consideration for a service (e.g., a professional), the obligation to pay, towards the other party, a sum of money*».

Indeed, the Supreme Court has explained that «***the "dispositive act" alluded to in Article 2901 of the Civil Code is, in fact, "any act that determines or simply aggravates the danger of its insufficiency", so that they can be "subject to revocation ... not only acts of alienation*** *(which in themselves obviously import a present diminution of the debtor's assets),* ***but also those which may in any way impair its consistency in the future", such as, precisely, "the assumption of debts"*** *(Cass. no. 3462 of 2024)*».

However**,** the Supreme Court clarified that «***the objective prerequisite (which the curatorship has the burden of proving in court) of the action*** *(or, as in the case at hand, the exception)* ***of ordinary revocation, however, is constituted, even in the case of a dispositive act that took the form of the assumption of a debt, by the prejudice that such act caused to the "reasons", that is, to the claims asserted by one or more creditors against the debtor who performed the dispositive act****: **which occurs when, as a result of the performance of the same by the debtor*** *(and except in the case, in the case at hand not even envisaged, of the wilful preordination of the act to damage claims not yet arisen against its author),* ***the latter's assets have, as a result, become, quantitatively and/or qualitatively, of such consistency or composition as to make it impossible or, in any case, more uncertain or difficult to fully satisfy the claims already claimed against its holder*** *(Cass. No. 20232 of 2023),* ***determining or aggravating the danger of its insufficiency*** *(Cass. No. 3462 of 2024), against, evidently, the fact that, prior to the act of disposition performed by the debtor, the satisfaction of the aforementioned claims was, at least in part, concretely possible or, at any rate, less difficult or uncertain*».

On the basis of the above considerations, the Supreme Court of Cassation has ruled the following principle of law: «***the bankruptcy curatorship who intends to promote*** *(or, as in the case at hand, to object to)* ***the ordinary revocation of a dispositive act performed by the debtor then bankrupt, pursuant to Articles 66 L. Fall. and 2901 Civil Code, in order to prove in court the eventus damni, he has, therefore, the burden of proving, on the one hand, the existence of pre-existing creditor reasons with respect to the performance of the detrimental act (which remained, of course, unsatisfied and,***

as such, then admitted to the liabilities of the bankruptcy of the debtor who was its author), and, on the other hand the qualitative and/or quantitative change that the debtor's assets have undergone as a result of that act, provided that the overall and rigorous assessment of these elements should show, in fact, that, as a result of the challenged act, it has become, by reason of the value or nature of the residual assets *(Cass. No. 9565 of 2018)****, objectively more uncertain or difficult the satisfaction of claims prior to its completion and admitted to the liabilities*** *(see Cass. No. 26331 of 2008; Cass. No. 19515 of 2019; Cass. No. 524 of 2023; Cass. No. 7201 of 2024)*».

ADMINISTRATIVE LAW

TAR Campania Salerno, Sec. II, 24 September 2024, no. 1706 – the owner of an unauthorised building, following the demolition order issued by the municipality, is obliged to demolish it as the seizure by a credit institution does not constitute force majeure.

The judgment in comment clarified that «*the failure to comply with the demolition order within the prescribed time limit requires the issuance of the deed of acquisition of the property to the municipal heritage, except in the case in which an application for amnesty has been made or the non-attributability of the non-compliance has been deduced and proven»* as the fact does not constitute force majeure, inferred in the application, whereby «*the applicants, quite correctly, did not comply with the Municipality's order, since they would have deprived the pledging bank of the guarantee of recovery of the credit, but above all they would have incurred a criminal charge»*, given that they could have asked the real estate execution judge to be authorised to demolish the property.

For these reasons, the Regional Administrative Court *of* Salerno concludes that «*the measure by which the Municipality ascertained the non-compliance by the author of a building abuse with the order of demolition of the building sine titulo, issued by the Municipality and, consequently, applied the sanction pursuant to Article 31 paragraph 4 bis of Presidential Decree 380/2001, is legitimate».*

TAR Veneto, Sez. IV, 18 September 2024 no. 2196 – a trade-union ordinance pursuant *to* art. 192, paragraph 3, legislative decree no. 152/2006 relating to the characterisation plan for waste disposal adopted in the absence of the ascertainment, in cross-examination with the addressees of the ordinance, of the actual imputability of the abandonment of waste in terms of intent or negligence is unlawful.

According to the Veneto Regional Administrative Court, «*the unlawfulness of waste disposal orders is* to be affirmed *in the absence of adequate demonstration - on the basis of a complete preliminary investigation and exhaustive motivation, also based on reasonable presumptions or shared maxims of*

experience - of the imputability of the wilful or negligent abandonment of waste also by the partners themselves (T.A.R. Basilicata Potenza Sez. I, 12-03-2016, no. 244) or of the material availability of the assets and of the existence of a legal title allowing (or imposing) the administration of an estate in which the polluted real estate is included (Consiglio di Stato, Adunanza Plenaria, 26 January 2021, no. 3)».

Therefore, the unlawfulness of the union ordinance *pursuant to* Article 192, paragraph 3, of Legislative Decree no. 152/2006 (Environmental Code) was recognised. 152/2006 (Environmental Code) relating to the characterisation plan for the disposal of waste «*for lack of motivation and preliminary investigation in the part in which - without having established a prior cross-examination - it automatically imposes on the shareholders who are not directors or legal representatives of a joint-stock company, persons distinct from the company, the obligations incumbent on the company itself, in the absence of adequate demonstration of the existence of the aforementioned imputation titles for such persons*».

TAR Liguria, Sez. I, 29 August 2024 n. 600 – in the matter of tenders called by a municipality for the award, *pursuant to* Article 45-bis of the Naval Code, of the public service concession regarding the management of equipped public beaches, the award of two lots to two interconnected companies is unlawful.

The Regional Administrative Court of Liguria ruled that «*the institution of the award constraint applies not only in the cases typified by Article 2359 of the Italian Civil Code, but also, more generally, when the economic operators belong to the same corporate group, or are the expression of the same entrepreneurial reality, in order to discourage the hoarding of lots by a 'dominant' team».*

So that, the Liguria Regional Administrative Court concludes, the unlawfulness of the award of two lots to two related companies should be affirmed since «*the imputability of the bids of formally distinct economic operators to a unitary decision-making centre constitutes a cause for exclusion from competition, provided for by Article 95, paragraph 1, letter d) of Legislative Decree no. 36/2023 (and, previously, by Article 80, paragraph 5, letter m of Legislative Decree no. 50/2016), aimed at preventing the distortion of the game of competition».*