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Case-law update

Civil and Administrative Law

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BANKING AND FINANCIAL LAW

Italian Supreme Court, 4 December 2024, no. 31052 – bank account: regarding bank accounts, there is no obligation for banks to monitor account movements. However, based on the principle of objective good faith, the credit institution must take action to avoid causing excessive to the client by flagging transactions that appear abnormal due to their frequency, amount or execution methods.

Italian Supreme Court, 12 December 2024, no. 31844 – bank liability when negotiating non-transferable cheques: the bank is required to observe a high degree of diligence when verifying the authenticity of signatures and the legitimacy of the delegated persons to collect non-transferable cheques, as it is contractually liable for any negligence or omissions in that regard.

COMPANY LAW

Italian Supreme Court, 11 December 2024, no. 32000 – contribution obligation of the member of a contribution or transformation cooperative: in contribution cooperatives, the relationship pertaining to the achievement of the services or goods produced by the company and having as its object services of cooperation or exchange between the member and the company is additional to that relating to participation in the organisation of the company's life and is characterised not by a common purpose, but by the contrast between those services and the remuneration or price.

BANKRUPTCY LAW

Italian Supreme Court, 10 December 2024, no. 31689 – inadmissibility of late contestation of title: a creditor, who has applied for admission to the liabilities without raising the issue of the lack of the original title and trusting that the documents filed in court were suitable to prove his claim, may not belatedly raise this issue in the opposition proceedings pursuant to art. 98 l.f., inadmissibly, requesting a remittance in terms in violation of the preclusions set forth in art. 99 l.f.

INSURANCE LAW

Italian Supreme Court, 15 november 2024, no. 29483 – claims made clause: the claims made clause embodied in the Professional Liability insurance contract is not void pursuant to Article 2965 of the Civil Code. The claim represents a future and unpredictable occurrence on which the operation of the policy depends, and it is consistent with the structure of a non-life insurance contract. The claims made clause aims to delimit the subject matter of the agreement by selecting the insured risks.

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TAR Liguria, Sez. I, 14 December 2024, no. 869 – with regard to State-owned maritime concessions for tourism and seaside resorts, in the wake of the case law of the Court of Justice, of the Plenary Assembly's decision no. 17 of 2021 and of all subsequent consistent case law, all extensions of State-owned maritime concessions for such purposes are unlawful and must be disapplied by the Administrations.

TAR Campania - Napoli, Sez. V, 9 December 2024, no. 6903 – even in the matter of reclamation of polluted sites and waste removal orders, the adoption of a contingent and urgent ordinance may be resorted to in the presence of a situation of real and imminent danger for public hygiene and safety.

Consiglio di Stato, Sez. V, 19 December 2024 n. 10201 – Exclusion from a tender procedure on the ground that an economic operator is, in relation to another participant in the same award procedure, in a situation of control within the meaning of Article 2359 of the Civil Code is lawful.

BANKING AND FINANCIAL LAW

Italian Supreme Court, 4 December 2024, no. 31052 – bank account: regarding bank accounts, there is no obligation for banks to monitor account movements. However, based on the principle of objective good faith, the credit institution must take action to avoid causing excessive to the client by flagging transactions that appear abnormal due to their frequency, amount or execution methods.

The Court, in its decision no. 31052 of 4 December 2024, addressed the issue of a bank’s liability toward the account holder.

The Supreme Court emphasized that «*the banking operator cannot be subjected to an obligation to monitor counterparties for undefined content which would entail a systematic analysis of all transactions over an extended period (such as five years), their concatenation, and verification of the identity of the*

beneficiaries (whether individuals or entities) and their specific relationships with the account holder operating the account on behalf of another party».

However, the Court also highlighted that «*the bank is obligated,* ***under the principle of good faith within the contractual relationship governed by article 1175 civile code and in fulfilling it's duties under article 1375 civil code, to act in order to avoid, without excessive sacrifice to it's own interest, causing undue harm to it's account holder. It must, at minimum, inform the client about transactions that, in the case at hand, appear abnormal due to their frequency, excessive amount, or anomalous execution methods (..) as they deviate from the nature of the client's activities or interest***».

In this regard, the Court recalled it's previous case law, according to which «*in the context of bank account relationship, it cannot be expected that the credit institution, with which a company maintains account relationships, transforms into an external controller of the regularity of transactions carried out by the administrator of said company, fall within the duty executing the contract according to fairness and good faith, incumbent on the agent (and therefore on the bank, to which the company has entrusted its deposits), the refusal of "ictu oculi'' anomalous transactions, when they are such as to clearly compromise the interest of the account holder or, at least, as a duty to protect the other contracting party, the activation of the bank to inform the company, in the person of a director other than the one who intended to carry out the manifestly detrimental transaction Cass., 31/03/2010, n. 7956*».

In particular, the Supreme Court continues, «*these duties of information and protection are particularly stringent in relationships with clients, for the credit institution, as it is required to operate with the diligence demanded by the professional activity outlined in article 1176, paragraph 2, of civil code*».

The Italian Supreme Court finally emphasized that, in the case under examination «***the indicators of anomaly referred to in anti-money laundering regulations also constitute, in general terms, makers of "unusual" operations, and therefore for this reason should have compelled the credit institution to provide the account holder with the appropriate notifications***».

Italian Supreme Court, 12 December 2024, no. 31844 – bank liability when negotiating non-transferable cheques: the bank is required to observe a high degree of diligence when verifying the authenticity of signatures and the legitimacy of the delegated persons to collect non-transferable cheques, as it is contractually liable for any negligence or omissions in that regard.

The Supreme Court, in its judgment no. 31844, published on 12 December 2024, ruled on the subject of the bank's liability when negotiating non-transferable cheques.

In this regard, the Supreme Court first of all recalled the orientation according to which the liability of a debtor pursuant to Article 1218 of the Italian Civil Code «*must be considered contractual not only in the event that the obligation to perform derives properly from a contract, within the meaning given by Article 1321 of the Italian Civil Code, but also in any other hypothesis in which it depends on the inexact performance of an obligation pre-existing the damaging conduct, placed by the law on certain persons*».

This liability, continues the Court, is «*recognisable in the context of the exercise of so-called protected professional activities, i.e. reserved by law to certain persons (...) on the assumption that, when the damage is derived from the violation of one or more precise rules of conduct imposed by law for the specific purpose of protecting third parties potentially exposed to the risks of the activity carried out by the person in question, the legal basis of the latter's liability must be identified in the reference of Article 1173 of the Italian Civil Code to the other acts or facts capable of producing obligations in accordance with the legal system*».

With specific reference to the banking business, the Supreme Court pointed out that «*the banker is in fact a subject endowed with specific professionalism, which necessarily reflects on the entire range of activities carried out by him in the exercise of the banking business and on the relationships that are rooted in those activities, since these are relationships for the proper implementation of which he has instruments and skills that other parties do not normally have*».

In particular, according to the Court, the banker's liability «***must be considered contractual in nature, since it is precisely the special trust that anyone who uses a banking intermediary to make a payment is entitled to place in the adoption, by the intermediary itself, of all the necessary precautions to avoid the risk of mistaken identification of the beneficiary of the payment and the banker being a person who, because of his professionalism, is required to make a greater effort, in terms of fairness, protection and protection of the trust, than that which can be expected of the quisque de populo***».

The Supreme Court went on to observe how, in the case under consideration, «*payment of the pension is assumed to have been made by means of postal cheques from a special current account, pursuant to Article 1, Presidential Decree No. 429/1986, the collection of which, by virtue of a proxy issued to the beneficiary pursuant to Article 17, had been allowed to*» the bank «*and that Article 17, cited above, in the text in force pro tempore, had been made by the bank, in the text in force pro tempore, established in its second paragraph that 'the delegated bank is liable for the authenticity of the delegating party's signature*».

The Italian Supreme Court therefore established «*the liability of the bank for not having verified the daughter's continued legitimacy to collect her mother's pension (**and especially the authenticity of the latter's signatures affixed at the foot of the proxies presented for collection**)*».

COMPANY LAW

Italian Supreme Court, 11 December 2024, no. 32000 – contribution obligation of the member of a contribution or transformation cooperative: in contribution cooperatives, the relationship pertaining to the achievement of the services or goods produced by the company and having as its object services of cooperation or exchange between the member and the company is additional to that relating to participation in the organisation of the company's life and is characterised not by a common purpose, but by the contrast between those services and the remuneration or price.

The Italian Supreme Court, in its decision no. 32000, published on 11 December 2024, ruled on the contribution obligation of the member of a contribution or transformation cooperative.

The Italian Supreme Court first of all reaffirmed the principle according to which «*in cooperative contribution companies* [...] ***the relationship pertaining to the attainment of the services or goods produced by the company and having as its object services of collaboration or exchange between the member and the company is additional to that relating to participation in the organisation of* company's *life and is characterised not by a common purpose, but by the contrast between those services and the remuneration or price***».
Therefore, «**[t]*he shareholder must*** [...] ***receive in consideration the price of the goods transferred to the company and, if the situation permits, also the return commensurate with the mutual exchanges made at the end of the company's financial year***. *The mutualistic service cannot be transformed, as has been expressly stated, into a gratuitous act, nor into a sort of permanent and in any event indefinite contribution*».

The Italian Supreme Court, ruling on the case at hand, thus found that «[i]*n the case of agricultural and zootechicanl cooperatives, what is atechnically defined in the bylaws as the "contribution" of the agricultural product by the member represents, on the contrary, the performance of a contractual performance that is autonomous and different from the corporate relationship, even though it originates within a relationship of an associative nature and on the basis of negotiated agreements whose source is also the corporate contract, bylaws and deed of incorporation*».

On the basis of the principles set forth above, the Italian Supreme Court concluded that: «***in this type of associative relationship two distinct relationships are generated, one mutualistic regulated by the***

associative rules and one of exchange regulated according to the rules of sale and purchase. *Therefore, the reconstructive hypothesis of a conversion of the associative contract into an exchange contract must also be ruled out, since the two relationships are distinct and have different regulations, unless different rules are set forth in the bylaws that may affect the configuration of the exchange relationship in agricultural contribution and transformation cooperatives, making it extremely variable due to specific and particular cases*».

BANKRUPTCY LAW

Italian Supreme Court, 10 December 2024, no. 31689 – inadmissibility of late contestation of title: a creditor, who has applied for admission to the liabilities without raising the issue of the lack of the original title and trusting that the documents filed in court were suitable to prove his claim, may not belatedly raise this issue in the opposition proceedings pursuant to art. 98 l.f., inadmissibly, requesting a remittance in terms in violation of the preclusions set forth in art. 99 l.f.

Preliminarily, the Supreme Court recalled that «*this Court (see Cass. No. 35974/2021) has, on the subject of labor procedure, already enunciated the principle of law - also applicable to the case at hand, since the preclusions of the judgment pursuant to Art. 98 L.F. are assimilable to those of the labor proceedings - according to which the expression 'matter detected ex officio', referred to in Art. 101, paragraph 2, c.p.c., must be understood as referring to issues (...) that involve the enhancement of impeding, modifying or extinguishing facts of the right asserted in court, since the plaintiff, who has erred in the definition of the "thema decidendum" or the "thema probandum" relating to the constitutive fact of the right, cannot rely on his own error to be put back in terms, in order to ask for evidence or integrate defensive arguments*».

In the case at hand, therefore, the Court affirmed that «*since the date certain pertains to the thema decidendum introduced by the plaintiff herself, an element that she believed she had proven by producing in court copies of the pledge contracts, she cannot invoke a remittance in terms to produce in court supplementary evidence of the facts constituting her right, the preclusions provided for in Article 98 L.F. precluding this*».

Moreover, the Supreme Court found irrelevant «*the reference to this Court's Order No. 27441/2019, which, according to the appellant's own reconstruction, had, on the one hand, denied the party the filing of the originals, and, on the other hand, had doubted the apparent content of the photocopies produced by the party 'precisely by virtue of the doubt he has about fidelity with the originals*».

Indeed, according to the Court, ([t)*he case at hand is different from the one examined in this Court's precedent*» since «*the decree challenged here did not merely doubt the content of the photocopies*

apparently bearing the postmark, but precisely ruled out that the lien documents produced in photocopy formed a single body with the one on which such a stamp is impressed».

Finally, the Supreme Court stated that «*the circumstance deduced by the appellant of not having been able to produce the originals, because they were filed in another opposition case pursuant to Article 98 of the Bankruptcy Law, is* not *relevant, given that the same pledges guaranteed multiple loans and there had been two applications for admission to the liabilities and related oppositions*».
In fact, the Court found that the appellant «*did not consider that the bankruptcy law, and, in particular, Article 96 paragraph 2 no. 2 expressly contemplates the hypothesis in which the creditor is unable, due to facts not referable to him, to produce the title (obviously the original of the same). Well, this rule provides, in such an eventuality, that the creditor may request - and obtain - admission to the liabilities subject to production at a later time of the original of the title*».

In conclusion, the Supreme Court of Cassation ruled on the following principle of law: «***the creditor who*** *(...)* ***has applied for admission to the liabilities tout court, without raising the issue of the lack of the original title and trusting that the documents produced in court were in any case suitable to prove his claim, cannot, belatedly, raise this issue in the opposition proceedings pursuant to Article 98 L.F., asking, impermissibly, for a remittance in terms in violation of the preclusions set forth in Article 99 L.F.***».

INSURANCE LAW

Italian Supreme Court, 15 november 2024, no. 29483 – claims made clause: the claims made clause embodied in the Professional Liability insurance contract is not void pursuant to Article 2965 of the Civil Code. The claim represents a future and unpredictable occurrence on which the operation of the policy depends, and it is consistent with the structure of a non-life insurance contract. The claims made clause aims to delimit the subject matter of the agreement by selecting the insured risks.

The Supreme Court, with decision no. 29483, ruled once again on the validity of the claims made clause embodied in non-life insurance contracts against professional liability.

In a case of medical malpractice, the Court of Appeal of Venice declared the invalidity of the claims made clause triggered by a healthcare facility.

The Court of Venice found the claims made clause in violation of Article 2965 of the Civil Code since it provided the operation of policy only in case the claim was made within the duration period of the contract.

According to the Court of Venice, such a provision set a very short period for the insured to seek and obtain the insurance benefit.

Recalling its previous case-law on the matter, the Supreme Court has overturned the Court of Appeal of Venice's judgment stating that «***it shall be ruled out that the limitation of the insurance benefits for claims provided for the first time during the validity of the policy, and for facts committed in the same period of validity (or even before, but in any case not earlier than three years), consist in a limitation agreed upon by the parties of the contract falling unchangingly within the scope of the mentioned Art. 2965***».

According to the Supreme judges, the claims made clauses delimit the object of the insurance contract - and therefore operate on a different level than the one referred to in Article 2965 of the Civil Code. Such clause triggers the right to «***indemnity and, as a result, the obligation to indemnify, combined occurrence of the conduct of the damaging party and the request made by the injured party***».

ADMINISTRATIVE LAW

TAR Liguria, Sez. I, 14 December 2024, no. 869 – with regard to State-owned maritime concessions for tourism and seaside resorts, in the wake of the case law of the Court of Justice, of the Plenary Assembly's decision no. 17 of 2021 and of all subsequent consistent case law, all extensions of State-owned maritime concessions for such purposes are unlawful and must be disapplied by the Administrations.

The Regional Administrative Court of Liguria ruled that «*the stricto sensu normative events invoked by the applicant in support of the appeal and the (further) ones referred to in the memorandum filed on 8 October 2024 represent no more than further extensions of the duration of the maritime State concessions, unlawful in so far as they are in conflict with Article 12 of the Directive, and therefore unenforceable. The Municipality must therefore be considered to have correctly disapplied, by the contested measure, the extension provided for by Law No 118/2022 (in this sense, moreover, the Council of State has already ruled, in the judgments of section VI, 1 March 2023, No 2192 and 28 August 2023, No 7992)*».

The judgment under comment states that «*Nor, on the other hand, is the principle, evoked by the appellant, on the basis of which the direct effects of a directive may be invoked only by private individuals against the State, and not vice versa (so-called inverted vertical effects), an obstacle to disapplication, since: (a) the Directive was implemented by legislative decree no. 59 of 26 March 2010 (in particular, Article 12 of legislative decree no. 59/2010), with the result that, in effect, rather than the Directive not being implemented (which, as stated above, also in terms of the profile of the vertical effects, is not*

implemented by the State), it is not the Directive that is being implemented by the State, but rather the Directive itself. (in particular, Article 12 of the Directive was implemented by Article 16 of Legislative Decree No. 59/2010), with the result that, on closer inspection, rather than a failure to implement the Directive (which, as has been said, also from the point of view of what is relevant here, was implemented by a provision of a general nature, identical to the corresponding provision of the Directive), what is at issue is a subsequent failure on the part of the State to fulfil its obligations under the Directive».

TAR Campania - Napoli, Sez. V, 9 December 2024, no. 6903 – even in the matter of reclamation of polluted sites and waste removal orders, the adoption of a contingent and urgent ordinance may be resorted to in the presence of a situation of real and imminent danger for public hygiene and safety.

The Regional Administrative Court confirmed that «*also in the matter of the order for the removal of waste, the adoption of a contingent and urgent ordinance may well be resorted to in the presence of a situation of real and imminent danger to public hygiene and safety, which cannot be dealt with by means of the ordinary tools provided by the law and, in this case, with the measures provided for by Article 192 of Legislative Decree no. 152/2006, the content of which may also be partially referred to (as regards the restoration obligations imposed) in the presence of a real danger to public health which, in this case, was caused by the danger to public health. 192 of Legislative Decree no. 152/2006, the content of which may also be partially referred to (as regards the restoration obligations imposed), in the presence of a real danger to public health which, in this case, was caused by the unlawful combustion of waste, also containing hazardous substances (such as bituminous sheaths)*».

The Campania judge also specified that «*the emergency safety measures and the relative powers of the Public Administration (including those of the Mayor pursuant to Article 54 of the Consolidated Act no. 267 of 18 August 2000) can be exercised, even regardless of the ascertainment of the responsibility for the pollution, an ascertainment whose timing would in many cases be incompatible with the urgency of guaranteeing the safety of the site (Cons. St. Cons, Sec. II, 30 April 2012, no. 566; Id., Sec. I, 22 December 2011, no. 452; Id., Sec. V, 15 February 2010, no. 820)*».

Consiglio di Stato, Sez. V, 19 December 2024 n. 10201 – exclusion from a tender procedure on the ground that an economic operator is, in relation to another participant in the same award procedure, in a situation of control within the meaning of Article 2359 of the Civil Code is lawful.

According to the Council of State, «*pursuant to Article 80(5) of Legislative Decree No. 50/16 (applicable ratione temporis to the case at hand), an economic operator shall be excluded from the tender procedure if it is, in relation to another participant in the same award procedure: - in a situation of control within the*

meaning of Article 2359 of the Italian Civil Code; - or in a situation of relationship, even de facto, whereby there is a likelihood that two tenders have resulted from a single decision-making centre».

The board of arbitrators also stated that «*Article 2359 of the Italian Civil Code integrates a form of presumption iuris tantum of a connection between participating companies, while the hypothesis of a substantial connection must be inferred from time to time by the presence of multiple, precise and concordant elements, capable of supporting in an inferential manner the factual assessment of the existence of such a connection between companies participating in the tender, distorting the tender rules (Cons. di Stato no. 1091 of 2013); such multiple elements may be constituted not only by personal links between the companies' corporate structures, but also by the preparation of identical envelopes containing bids, documents drawn up in an identical manner, certifications obtained on the same day, sureties issued by the same bank and authenticated with a progressive number by the same notary, as well as shipment by the same courier*" (C.d.S., V, 30.6.2022, no. 5438)*»*.

For these reasons, the appellate court reiterated that «*for the purposes of exclusion from a public tender, what must be proven is only the uniqueness of the decision-making centre, and not also the concrete ability to alter the free play of competition. This is because the fact that two or more bids can be traced back to a single decision-making centre constitutes, ex se, an element capable of violating the general principles on equal terms, secrecy and transparency of the bids (for the classification of the case in question in terms of mere danger, see, ex alia, C.d.S., V, 14.12.2021, no. 8340)*».