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OF THE RAVENNA SUMMER SCHOOL
ON CROSS-BORDER LITIGATION
AND INTERNATIONAL ARBITRATION
2024 EDITION**

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JURISDICTION IN TRUST DISPUTES:
EMERGING TRENDS IN THE ITALIAN CASE LAW

*Michele Angelo Lupoi**

1. *Jurisdiction Over Trusts: Recurring Issues*

The Italian case law, in the past quarter century, has often tackled the issue of cross-border jurisdiction in trust disputes.

As a matter of fact, in the Italian perspective, trust litigation, even in relation to domestic trusts, has inherent *cross-border* connotations (although a choice-of-foreign law to govern the trust does not in itself imply that the related dispute raises issues of international jurisdiction).

As is well known, in this area, European regulatory sources (in particular, EU Regulation No. 1215 of 2012 on civil and commercial matters) overlap with domestic ones (first and foremost, Law No. 218 of 1995 on the reform of international private and procedural law), thus requiring the interpreter to perform a delicate task of qualifying the disputed relationship and identifying the connecting factor applicable to the case.

From this point of view, Italian jurisprudence, in its interpretation of European rules on jurisdiction in the area of trusts, is generally consistent with the case law of the European Court of justice (in

* This paper is the adapted translation of a paper published in Italian in the book *Il trust in Italia. Tra passato, presente e futuro. Congresso del venticinquesimo*, ed. by M. LUPOI, published by Wolters Kluwer, 2025, on the occasion of the 25th “birthday” of the association “Il trust in Italia”.

particular, with respect to the qualification of a dispute as relating to rights in rem). Limited, by contrast, are the references to foreign case law¹.

The decisions I have collected and examined in the preparation of this short report highlight some common elements.

A) First, under the application of the uniform European regulations, choice-of-forum clauses take primary importance in determining the competent court, with a very broad notion of “will of the party”. Indeed, under Article 25 of EU Regulation 1215, a choice-of-court clause, unilaterally inserted in the trust instrument by the settlor, is valid against (and binds) even parties who, formally, never approved it.

As our Supreme Court has noted², in fact, a choice-of-forum clause is operative even with respect to individuals who have not personally signed it. Indeed, as will be better seen *infra*, Italian case law seeks ways to “compensate” for this deficit of individual consent (in particular, as concerns beneficiaries).

B) Secondly, in the majority of cases, we are faced with multi-party disputes, often governed by Article 102 of the Italian c. p. c. (with regard to the “internal” regulation of the procedural relationship) and Article 8(1) of EU Regulation No. 1215 of 2012, with regard to the determination of jurisdiction. According to this rule, in particular, if the dispute concerns a plurality of defendants domiciled in different states of the European Union, jurisdiction can be

¹ For a rare example, see *Cass., sez. un.* (full chambers), March 18, 2019, No. 7621, which cites, with respect to the interpretation of a choice-of-forum clause, the *Privy Council*'s decision of November 26, 2014, in *Crociani v. Crociani*. With respect to that decision, however, the Italian Court is at pains to clarify that it is not bound by it, since a foreign decision may constitute, at most, “a guiding point of reference”.

² See, e.g., *Cass., sez. un.*, June 20, 2014, No. 14041, where the Court states: “it can certainly be admitted that a choice-of-forum clause inserted in the trust instrument, which is certainly allowed, also in light of what is provided by the fifth paragraph of Article 23 of the European Regulation No. 44 of 2001 (and the corresponding provision of the Lugano Convention of October 30, 2007, in force between the European Union and the Helvetic Confederation), binds, in addition to the settlor, also the managers and beneficiaries of the trust, although not personally signatories of the clause, whenever rights and obligations inherent in the trust and its operation are in question”.

found (at the plaintiff's choice) in the forum of the domicile of one of them, who acts as a so-called "anchor defendant". In this regard, it is relevant to recall that Article 8(1) of Regulation No. 1215 is one of the rules referred to in Article 3, l. 218 of 1995 and which, therefore, may be invoked, in Italy, also against defendants domiciled in a third State.

A prerequisite for the applicability of the multi-party forum in Article 8(1) is that the various claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings³.

Undoubtedly, situations which, under Italian law, fall within the boundaries of *litisconsorzio necessario* (necessary joinder of parties) are included in this definition. This confirms the relevance of Article 8(1) in litigation related to the validity of the trust deed or of the deed of transfer of property into a trust. Indeed, an *actio pauliana*, actions to declare a trust null and void⁴ and actions against an allegedly sham trust⁵ typically imply a necessary joinder of parties.

These actions, moreover, as is well known, in Italian case law, have raised the problem of establishing which, among the parties to the relationship, are to be qualified as necessary and proper parties (in particular, with regard to the role of the beneficiaries)⁶. As far as we are concerned here, the application of the connecting factor in Article 8(1) does not, as a rule, pose interpretative problems in this context, since, in relation to a trust, the individual subjective positions of the prospective defendants are, by definition, so closely connected as to require a unitary decision. Indeed, the Supreme Court has also expressed this view⁷. Notably,

³ Most recently, *Cass., sez. un.*, September 17, 2021, No. 25163.

⁴ For a case in point, *Cass., sez. un.*, March 18, 2019, No. 7621, cited above.

⁵ *Cass., sez. un.*, September 17, 2021, No. 25163, which states, "there is no doubt that in the case of necessary joinder of parties there exists that 'connection so close as to make a single hearing and a single decision convenient' to which Article 8 of Regulation" No. 1215 refers to".

⁶ Significantly, *Cass., sez. un.*, March 18, 2019, No. 7621, cited above, at para. 30, states: "it does not appear to have examined, at least *ex professo* or with particular insight, the question of the standing, moreover whether necessary or not, of the beneficiary in cases of an action for invalidity of the trust".

⁷ For a careful examination, with reference to the position of the beneficiaries, in an action for invalidity of a trust, *Cass., sez. un.*, March 18, 2019, no. 7621,

in 2012, the *Cassazione*⁸, with reference to a dispute over the validity of a trust brought against all the parties of the relationship, went so far as to state that, regardless of whether such an action is classified as a necessary joinder of parties, it is nonetheless inherently unitary with regard to the application of Article 8(1) of Regulation 1215.

C) Problems of qualification of the claim are also recurrent in practice. Indeed, as will be seen, for example, if a claim is qualified as a “consumer” claim or as a claim concerning “rights in rem in immovable property”, then the plaintiff may sue in a different forum than the one unilaterally chosen by the settlor in the trust deed. In this regard, however, it is consistently ruled that the mere wording of the claim is not determinative. As a matter of fact, the court has to adopt an objective point of view and consider the true nature of the dispute.

2. *Attempts to Escape the Application of a Choice of Forum Agreement: The Forum for the Administration of the Trust*

An analysis of Italian cross-border jurisdiction case law over the past 25 years brings out some recurring (and interrelated) themes. Many of them, in particular, concern the attempt by the claimants to “escape” an unwelcome or, indeed, never intended choice-of-court clause (see paragraph 1).

Indeed, on closer inspection, however well worded, no choice-of-forum clause can guarantee that, when a dispute arises, the case will not be brought before (and decided by) a court other than the one chosen in the clause itself.

cit. In that decision, the Court, without expressly qualifying the action as a mandatory joinder of parties, excludes that it can be defined as “artificial” the establishment of a unitary judgment to enforce the invalidity of the constitution of the relationship between the parties to the trust, “this integrating a unitary title and there being an obvious interdependence link between the declarations of nullity and the demand for the restitution of the assets to which the beneficiary could have a legally protectable expectation”.

⁸ *Cass., sez. un.*, September 17, 2021, no. 25163.

By reading the cases, it is possible to identify some frequently used arguments for seeking to (and sometimes succeeding in) circumventing the provisions of a choice-of-forum clause.

The literal wording of the clause comes to the fore in the first place. Depending on how a choice of jurisdiction is worded, it may include a broader or narrower range of disputes. The plaintiff, therefore, may seek to argue that the specific dispute is not “covered” by the clause contained in the trust deed. With this in mind, the plaintiff’s astute pleading of the claim may be crucial.

The Italian Supreme Court, in recent years, in particular, has ruled on the scope of the expression “forum for the administration of the trust” included in a clause regarding dispute resolution in a trust deed. Such an expression is often used in practice, but it may raise significant interpretive doubts. In particular, even where a clause on “forum for the administration of the trust” is characterized as conferring jurisdiction, there is no uniformity of opinion with respect to its objective scope.

This is not the place to go into the details of an issue that I have dealt with in another paper⁹. It is sufficient for me to point out that the Italian Supreme Court has entered into that debate, recalling the Privy Council’s decision in *Crociani v. Crociani*¹⁰ and adhering to the theory that such a clause does not include every dispute concerning the relationships and rights arising from the trust¹¹. Rather, for the *Cassazione*, it pertains to “a range of activities that can be ascribed to the concept of the conclusion (or stipulation), ordinary administration or execution of the contract”, without extending to the validity of the trust. And since, in the case at hand, it was precisely the invalidity of the trust that was the subject of the claim, the Court concluded that the choice-of-court clause “for the administration of the trust” could not determine jurisdiction over that different issue as well¹².

⁹ *La giurisdizione in materia di breach of trust, tra forum for the administration e discrezione del giudice*, in *Trusts e attività fiduciarie*, 2021, p. 796.

¹⁰ *Privy Council, c. Crociani v. Crociani*, cit.

¹¹ See A.S. HOFRI-WINOGRAĐOW, *Trust jurisdiction clauses: their proper ambit*, in *Jour. priv. int. law*, 2017, p. 520.

¹² On the other hand, no such problems were posed by the choice-of-forum clause in the trust instrument, on which *Cass.*, February 8, 2024, No. 3566, ruled. In that case, it was noted that the clause was not limited to disputes concerning the

3. (Continued): Consumer Contracts

An escape route from an “unwelcome” choice-of-court clause is also provided by the European uniform rules on jurisdiction in consumer contracts.

Indeed, practice shows that it is not always easy to determine whether a party can be defined as a consumer with respect to the application of the European common rules on jurisdiction¹³.

If, however, the plaintiff succeeds in qualifying as such, he will be able to take advantage of the limits on the validity of a choice-of-court clause provided by the combined provisions of Arts. 25, para. 4 and 19 of Regulation 1215.

Paragraph 4 of Article 25, as concerns choice-of-forum clauses contained in a trust instrument, in fact, expressly provides that such clauses are invalid if they are contrary, as far as we are concerned here, with the provisions of Article 19. This provision, which is included among the rules on jurisdiction in matters of contracts concluded by the consumers, in turn, provides that the connecting factors provided for the protection of the consumer, may be departed from only by an agreement: (1) which is entered into after the dispute has arisen; (2) which allows the consumer to bring proceedings in courts other than those indicated in the section dedicated to consumer contracts; or (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State (so-called relative non-derogation).

In other words, in this context, a choice-of-court clause is normally valid if it grants jurisdiction to the forum of the consumer’s domicile.

Recently, the Italian Supreme Court ruled on a case that is em-

administration of the trust but also expressly extended to disputes concerning the “establishment” of the trust.

¹³ On this matter I refer to my chapter on Regulation 1215 in *European Rules and Civil Justice*, 4 ed., eds. by P. BIAVATI, M.A. LUPOI, Bologna, 2022, p. 56 ff.

blematic of the courts' difficulties in applying the European uniform consumer protection rules¹⁴.

In that case, the plaintiffs (son and mother) had chosen to establish a trust, in which to place sums deposited in a Swiss account, belonging also to the son, with the mother as the settlor. For this purpose, mother and son needed to open two accounts in a Swiss bank. Specifically, according to the plaintiffs' claim, the contracts in question were signed by the mother, in Florence, at her home, in the presence of two officials of the Swiss bank and of the legal representative of the company responsible for managing the trust.

Problems had then arisen regarding the management of the trust, and the two plaintiffs had brought civil proceedings in Italy, arguing that the contracts stipulated with the bank should be considered invalid as a "consequence of the activity" of the two Swiss bank officials performed in violation of the national rules governing, in Italy, banking activities.

The defendant bank had challenged the jurisdiction of the Italian court on the basis of a choice-of-forum clause in favor of the Swiss courts, essentially denying that it had sent its officials to Italy to enter into contracts with the plaintiff mother.

It was common ground that, with respect to one of the two bank account contracts, the contracting mother was to be considered a "consumer", since such contract was not related to her professional activity.

At this point, the validity of the choice-of-forum clause contained in the bank contract should have been subjected to the test of resistance of Article 19 of Regulation No. 1215 (or, rather, the equivalent rule contained in the Lugano Convention applied in relations between Italy and Switzerland).

The relevant clause, as a matter of fact, did not meet any of the three requirements set forth in Article 19 (see *above*), with the result that the clause itself should have been considered invalid.

The matter, however, was not yet fixed. Indeed, it is not enough for a dispute to be brought by a consumer in order to arrive *ex se* at the application of the uniform rules on consumer contracts juris-

¹⁴ *Cass., sez. un.*, April 12, 2023, No. 9782.

diction. In particular, the provisions of Article 15 of Regulation No. 1215 (*rectius*, of the corresponding rule of the Lugano Convention) were coming into play in the case at hand. Such provisions, for the purpose of the application of the rules on consumer contracts, as far as we are concerned here, require that the professional domiciled abroad has carried out his activities in the defendant's State of domicile or has directed his activities to that State or to a plurality of states comprising that State. In other words, the European uniform rules on consumer contracts does not apply if the consumer domiciled in a member State contacts, on his own initiative, a professional from a different member State, who does not direct his activities to the home State of the other party. Basically, in such situations, the consumer accepts the risk of having to sue and be sued in a State other than that of his domicile.

In the present case, the defendant Swiss bank claimed precisely that it had never carried out professional activities in Italy, nor had it sought to attract Italian clients by directing its activities to Italy. In essence, in the defendant bank's argument, the plaintiff mother had allegedly been induced to sign the disputed bank account contract by the company responsible for managing the trust, which had then forwarded that contract to the Swiss bank. While it was undisputed that the contract had been signed by the mother in Italy, it had, on the other hand, remained unproven that two officials of the defendant bank had gone to Florence to collect the plaintiff's signature. It had, rather, been established the role of the company responsible for managing the trust in collecting, in Florence, the signature in question.

The Supreme Court, in its analysis, notes that the objective requirements of Article 15 disregard the location of the consumer's activity and the place where the contract is concluded. Rather, the rule under consideration gives relevance only to the activity of the contracting party carried out in the State of the consumer's domicile or directed, including by electronic means, to that State. Therefore, in order to establish jurisdiction before the Italian court, i.e. the place of domicile of the contracting party, the plaintiff in the suit, despite the conventional extension of jurisdiction dictated by the general terms and conditions of the contract she entered into, it

had to be determined whether the defendant Swiss bank carried out or had carried out its activity in Italy or whether its activity was offered to Italian customers.

The analysis of the Court of last instance turns, at this point, to the role played by the person who had materially induced the plaintiff to approach the Swiss bank, namely the company responsible for managing the trust. This was a person whom the bank itself described as “well known” and in any case connected to the bank by a long-standing relationship and previous professional collaboration, albeit as an “external asset manager”. In this role, the company provided for the introduction of its client to the bank, “suggesting” that it “support the asset management” entrusted to it at the same bank, facilitating the conclusion of current account contracts, so much so that it was entrusted with the relevant standard forms of the Swiss bank.

After reviewing the case law of the European Court of justice regarding the connecting factors for consumer contracts, the *Cassazione* comes to the conclusion that the Swiss bank had in fact carried out direct business in Italy, albeit not directly but through the operation of an external asset manager who had acted as an intermediary.

Based on this conclusion, the Court established the Italian jurisdiction as the place of the consumer plaintiff’s domicile. At the same time, the Court ruled that the Swiss choice-of-forum clause contained in the bank account contract signed by the plaintiff herself was invalid.

This is a decision of some interest, since it enhances, for the purposes of the application of Article 15 of Regulation No. 1215, the activity aimed at promoting the conclusion of bank account contracts by Italian consumers carried out by a person other than the professional. In this regard, the Court considered the activity of the “external asset manager” as if it were directly to be related to the professional to whom the consumers were referred, thus effectively protecting consumers’ confidence and, at the same time, making it possible for the provider of services to foresee the application of the rules on consumer contracts jurisdiction.

4. (Continued): Rights In Rem Claims

Again with reference to the qualification of the action, a plaintiff who succeeds in proving that his claim concerns rights *in rem* in immovable property located in Italy, within the meaning of Article 24 of EU Regulation No. 1215, would succeed in rendering ineffective any clause on the choice of a foreign forum, since the “forum rei sitae” cannot be derogated by the will of the parties.

There is to be said, however, that such attempts, in the context that concerns us, are, as a rule, doomed to failure, since the European Court of justice, ever since *Webb v. Webb*¹⁵, has ruled that a dispute in which fiduciary positions, albeit relating to immovable property, are asserted, does not, as such, concern rights in rem in immovable property.

Italian case law confirms a restrictive approach to the notion of “real property rights” for the purpose of applying Article 24(1) of Regulation No. 1215.

Significant in this regard is a recent Supreme Court ruling¹⁶, which discussed whether an action for the release of immovable property, following the lapse of the title by which it was transferred to the other party, could be brought within this notion.

In the present case, the plaintiff had initially placed his real estate in a trust of which his daughter-in-law was trustee, and then sought the annulment of the relevant trust instrument for a variety of reasons.

An issue of jurisdiction had arisen, as the trust instrument contained a clause in favor of the jurisdiction of the English courts. The plaintiff argued, however, that his action concerned rights in rem and that, therefore, under Article 24, para. 1 of Regulation No. 1215, Italy had exclusive jurisdiction as *locus rei sitae*, superseding the English choice-of-court clause. He argued, in particular, that the plaintiff’s claim was not only for the annulment/invalidity of the trust but also for a declaratory judgment of his ownership over the assets conferred into the trust.

¹⁵ Court of justice, May 17, 1994, c. 294\92.

¹⁶ Cass., February 8, 2024, No. 3566.

The Supreme Court refers to the case law of the European Court of justice on exclusive jurisdiction in cases concerning rights in rem over immovable property. From such analysis, it emerges that Article 24, para. 1 of Regulation No. 1215 does not apply to any action involving rights over real estates, but only to actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest. On the other hand, disputes aimed at the declaration of the invalidity of a contract that provides for a transfer of real estate concern rights “*in personam*”, since they are based on obligation that can be enforced only against the defendant. Such actions are, therefore, excluded from the scope of the exclusive jurisdiction provided for Art. 24, para. 1.

Having made these premises, the Supreme Court goes on to analyze the distinction between in rem and in person actions and, in particular, between a personal action of restitution, to obtain the fulfillment of the obligation to deliver a thing that has been voluntarily conveyed by the plaintiff to the defendant by virtue of a transaction, and a *rei vindication* action, with an *in rem* nature, sought against the person who actually disposes of the property in the absence, even original, of any title and whose basis lies not in an obligatory *inter partes* relationship but in the right of property protected *erga omnes*.

The Supreme Court remarks that an action of vindication should be qualified as an action *in rem* when it is brought for the purpose of the release of immovable property and such a claim does not derive from the disappearance of a legal transaction that had justified the delivery of the thing and the factual relationship between the thing and the defendant.

At the end of a careful examination¹⁷, it is easy for the Court to conclude that, in this case, in order to qualify the action as an action *in rem*, it was not sufficient that the claim concerned a right *in rem* in real estate, since the claim brought by the plaintiff was to be

¹⁷ Previously, much more succinctly, see *Cass., sez. un.*, September 30, 2016, No. 19471.

qualified as an action *in personam* for restitution, precisely because it presupposed the elision of the effects of the instrument establishing the trust (and thus the transfer of the real estate to the trustee under the terms of a transaction to be declared invalid). From this point of view, on the other hand, the *in personam* or *in rem* effects of the disputed legal relationship were irrelevant.

Therefore, the Court upholds the decision of the Court of Appeals, which had declared the lack of Italian jurisdiction in favor of the English forum, based on the clause in the trust instrument.

5. (Continued): The Position of the “Antagonistic” Beneficiary

Finally, in order to overcome a choice-of-forum clause contained in the trust instrument, the “antagonistic” position of the claimant may be of relevance. It can happen, as a matter of fact, that the claimant has been named in such instrument as a beneficiary of the trust, but she does not intend to avail herself of that role and, on the contrary, claims rights that are incompatible with the validity and effectiveness of the trust itself [as is the case of the “mandatory” heir¹⁸ who sues to declare the invalidity of a trust established by the deceased, formally for the benefit of his or her heirs but without respecting the portion of the estate granted to the claimant by the law applicable to the succession].

In such situations, Italian case law is now well established in the sense of holding that the plaintiff, even though “party” to the trust relationship, is not bound by the choice-of-forum clause contained in the relevant trust instrument. This is arguably the main “corrective” to overcome the binding effects of choice-of-forum in this context (see paragraph 1).

An emblematic decision of the Italian Supreme Court in this area dates back to 2014¹⁹ and concerns a complex family affair that

¹⁸ I refer to the position of the persons who, under Italian law, have the right to claim a certain portion of the deceased estate, even when a will exists.

¹⁹ Cass., sez. un., June 20, 2014, No. 14041, on which see my article *Sull’opponibilità a un “terzo” di una clausola di scelta del foro contenuta nell’atto istitutivo di un trust*, in *Trust e attività fiduciarie*, 2015, p. 229.

resulted in a *lato sensu* succession dispute, in which the daughter, born out of wedlock, of the deceased settlor, upon the death of her father, sued the widow and the “legitimate” children of the *de cuius* as well as two *trustees*, in order to annul the trust established by her father and the transactions by which the fund of that trust was formed.

A question of jurisdiction thus arose, in light of the English choice-of-court clause contained in the trust instrument. The question, therefore, was whether the plaintiff, as a beneficiary of the trust, was bound by such a clause. In this regard, the Supreme Court, on the one hand, as seen above, confirms that, in our context, a choice-of-forum clause can bind even persons who have not formally accepted it but who are nonetheless parties to the substantive relationship; on the other hand, it remarks that, in the case at hand, the plaintiff had not sued in the position of beneficiary of the trust nor by asserting rights that could have been derived from the constitution of the trust. On the contrary, she had claimed the unenforceability against her of the trust instrument and of the subsequent deeds of transfer of assets to the trust fund, as they had been entered into not for her benefit but to her detriment. For the Supreme Court, therefore, the plaintiff had not placed herself in a line of continuity with the bargaining situation in which the *de cuius* found himself at the time of the establishment of the trust, but rather had placed herself in an antagonistic position, rejecting that stipulation and assuming that it was unenforceable against her.

In this particular case, therefore, the plaintiff was able to bring her action in Italy, overcoming the English choice-of-forum clause.

6. *(Continued): Actions in Matters of Succession*

The plaintiff may also attempt to render ineffective a choice-of-forum clause included in the trust instrument by characterizing the claim as relating to a succession.

In fact, neither Article 50 of Law 218 of 1995 nor Regulation EU 650 of 2015 allows for consensual derogation from the connect-

ing factors set forth in the statutory provisions applicable in this area of the law.

The issue arose, albeit indirectly, in the 2014 Supreme Court decision examined in the previous paragraph²⁰, in which, as noted, the plaintiff, although named as a beneficiary of a trust established by her deceased father, had acted for the annulment/invalidity of that trust, as a preliminary step to the (only prospective) succession dispute to be brought at a later date. The Supreme Court's decision not to consider the foreign choice-of-forum clause in the trust instrument as binding on the plaintiff is not based on the characterization of the proposed action as concerning a succession dispute, as much as on the "antagonistic" nature of that action with respect to the trust: but such antagonism is found precisely in consideration of the succession claims underlying the plaintiff's proposed challenges²¹.

Explicitly on point, however, is a 2019 decision²². In that case, the subject matter of the claim concerned the revision of an agreement for the division/apportionment of a property formerly owned by the plaintiffs' father and vested by him in a trust. Upon the father's death, the trust had come to an end and the two daughters had divided the relevant fund between them, precisely with the agreement one of them had then applied for judicial revision.

The Supreme Court has good game to rule that the claim brought by one sister against the other did not concern a succession dispute, since it did not concern a division of inheritance as such. Through the trust, in fact, there had been no devolution *mortis causa* of the settlor's estate.

²⁰ Cass., sez. un., June 20, 2014, No. 14041.

²¹ The judgment rules in this regard as follows: "the inheritance affair, while constituting the spring that moves the interest in the action, is in fact envisaged as eventual and subsequent [...] with respect to the lawsuit currently being brought, which aims solely at the elimination of the effects [...] of a set of business activities put in place during the lifetime of the plaintiff's father [...] so as to allow these holdings to be included in the estate of the *de cuius*; nevertheless, the perspective in which the action is placed, is inevitably influenced by the aforementioned inheritance affair, which forms the background and only in the light of which its meaning can be understood".

²² Cass., July 12, 2019, No. 18831, in *Trusts e attività fiduciarie*, 2020, p. 182.

In this regard, the Court affirms that, in the case of a liberal trust between living persons, which produces effects, on the beneficiary level, after the death of the settlor, “what the settlor has fully transferred during his lifetime does not contribute to forming the succession estate”. The consequence, as concerns the jurisdiction issue we are interested in here, is that Italian jurisdiction, in the case at hand, was to be determined using not the connecting factors provided for succession matters but those of civil and commercial matters. Therefore, the Court upheld the binding nature of the Swiss arbitration clause contained in the deed stipulated between the sisters for the division of the assets received by them at the end of the trust.

7. Actions Arising from Insolvency Proceedings

One last issue relevant in our context should be now analyzed.

In some trust disputes, in fact, the question has arisen as to whether jurisdiction should be determined under Regulation No. 1215 of 2012 on civil and commercial matters or under Regulation No. 848 of 2015 on cross-border insolvency.

Of particular relevance is Article 6 of Regulation No. 848, according to which the forum that opened the insolvency proceedings (normally, that of the center of the debtor’s main interests) has jurisdiction also over actions and disputes related to, arising out of, or ancillary to those proceedings. In particular, this jurisdiction covers actions arising directly out of the insolvency proceedings and closely related to them, such as actions for revocation.

There is a substantial body of the European Court of justice case law on the boundary between the two Regulations. On several occasions, the Court ruled precisely on the current requirements for the application of Article 6 of Regulation No. 848. From this case law, it can be inferred that:

- to determine whether an action arises directly out of insolvency proceedings, the determining factor in identifying the scope of an action is not the procedural context in which the action falls, but rather the legal basis of the action itself. In other words, one must

investigate whether the right or obligation that serves as the basis of the action has its source in the ordinary rules of civil and commercial law or in the special rules specific to insolvency proceedings²³. In contrast, actions brought by the insolvency proceedings and subject to the ordinary provisions, particularly those concerning claims that pre-exist the insolvency proceedings, fall within the scope of Regulation No. 1215;

- to determine the close connection between a claim and insolvency, on the other hand, the intensity of the connection between a claim and insolvency proceedings must be assessed²⁴. It is argued in this regard that the close connection test allows for the consideration of contextual elements other than those relating to the legal basis of the action²⁵.

As far as Italy is concerned, the question arises (also in relation to the context this paper is concerned with) whether the Italian ordinary revocatory action (*azione revocatoria ordinaria*) brought by the administrator of a judicial liquidation also falls under the *vis attractiva concursus* of Article 6 of Regulation No. 848.

As a matter of fact, under Italian law, two different claims for revocation exist: one is governed by Art. 2901 c.c. and applies, in general, to any claim against a debtor (*azione revocatoria ordinaria*); the other is provided for by Art. 166 of the Insolvency Code (*Codice della crisi d'impresa e dell'insolvenza*), has different grounds of application and presupposes the opening of insolvency proceedings. Art. 165 of the Insolvency Code, moreover, entitles the administrator of insolvency proceedings to bring an ordinary revocation action after the opening of the insolvency proceedings. In other words, the administrator of the proceedings may bring two different types of *azione revocatoria*, based on different grounds and with different time limits.

²³ See, among others, Court of justice, June 11, 2015, c. 649/13, *Comité d'entreprise de Nortel Networks SA v. Cosme Rogeau* and December 4, 2019, c. 493/18, *UB v. VA, Tiger SCI, WZ, Banque patrimoine et immobilier SA*.

²⁴ Most recently, Court of justice, c. *UB v. VA, Tiger SCI, WZ, Banque patrimoine et immobilier SA*, cit.

²⁵ Court of justice, November 14, 2024, c. 394/22, v. *Oilchart International NV v. O.W. Bunker (Netherlands) BV*.

As we have seen, therefore, the question is whether Art. 6 of Regulation No. 848 applies to establish jurisdiction over an *azione revocatoria ordinaria*, brought by the administrator of insolvency proceedings.

The issue is relevant for trust practitioners because the most common action in Italy in relation to a trust is precisely the ordinary or insolvency revocation action. It therefore becomes essential to be familiar with the relevant jurisdictional connecting factors.

In a case decided by the Supreme Court²⁶, in fact, the administrator of insolvency proceedings had brought an *azione revocatoria ordinaria* against defendants who had established certain trusts, characterizing the relevant action as directly arising from insolvency proceedings and closely related to them. The Supreme Court agrees with this approach, on the grounds that the insolvency revocation action would have its source in insolvency law and that the relevant legal standing is conferred exclusively on the administrator, who acts in the interest of the mass of creditors. Moreover, the insolvency revocation action, if successful, benefits all creditors and substantially brings back the disposed of assets within the insolvency proceedings. It therefore affirmed Italian jurisdiction as the State where the insolvency proceedings were opened.

This decision does not seem convincing to me: on the contrary, it appears contradictory insofar as it expands the jurisdiction of the insolvency forum in the absence of the prerequisites enunciated by the uniform European legislation, as interpreted by the Court of justice. It is true that the administrator of the insolvency proceedings is entitled to bring an *azione revocatoria ordinaria* under Art. 165 of the Insolvency Code: this provision, however, merely refers back to the prerequisites of Art. 2901 of the Italian Civil Code (and thus to general civil law). It is also true that the revocation action, after the opening of insolvency proceedings, is brought by the administrator for the benefit of all the creditors, but this does not change the nature of the action as such, except as concerns the collective and not merely individual benefit deriving from the allowance of the action. After all, the “extraordinary” standing of the administrator and the

²⁶ Cass., 26 April 2017, n. 10233.

collective “advantage” deriving from the administrator’s action are also found with respect to an action for the recovery of a credit of the insolvent debtor, exercised by the receiver under the ordinary rules on civil and commercial matters.

It should also be noted that, for the Court of justice, neither the appointment of a receiver nor the opening of insolvency proceedings has the effect of changing the legal basis of an action falling under the common rules of civil and commercial law so as to bring it within the scope of the specific rules of insolvency proceedings²⁷. It seems to me that the Supreme Court has not adhered to these indications, since an action under Art. 165 of the Insolvency Code is an “adaptation” of the ordinary revocation action to the context created by the opening of insolvency proceedings and does not ontologically derive from the opening of such proceedings. On this point, therefore, it is argued that Italian courts, at the earliest opportunity, should make a specific reference to the Court of Justice for a preliminary ruling.

On the other hand, a recent decision of the *Cassazione*²⁸ must be approved of. In that case, the Supreme Court, in compliance with the case law of the Court of justice, excluded from the scope of application of the European insolvency regulation an action of absolute simulation brought by the administration of insolvency proceedings to recover assets allegedly misappropriated by transferring them to several trusts, requesting an order for the trustees and the companies involved to return the assets thus received. In particular, the Supreme Court ruled out that the absolute simulation action brought against the trust “derived” from the opening of the insolvency proceedings, since it was an action governed by general civil law. It was, however, possible to grant jurisdiction to the Italian courts on the basis of the Italian domicile of one of the defendants, pursuant to the current Art. 8(1) of Regulation No. 1215 of 2012 (see paragraph 1).

²⁷ Court of justice, c. *Oilchart International NV v. O.W. Bunker (Netherlands) BV*, cit.

²⁸ *Cass., sez. un.*, September. 17, 2021, No. 25163.

8. *Conclusions*

The analysis made in these pages confirms, on the one hand, an overall consistency of the Italian case law, which correctly applies European sources of law, and, on the other, the flair of lawyers in their various attempts at forum shopping.

The centrality of the jurisdictional issue in the context of cross-border litigation is also confirmed. As a matter of fact, from such issue the efficiency (or inefficiency) of the forum seized, the quality of the procedural remedies available there, the determination of the law applicable to the relationship and, in the case of foreign law, any limits on its operability in the forum in the specific context of reference, derive.

