TRIFIRÒ & PARTNERS AVVOCATI

HIGHLIGHTS

2018

Trifirò & Partners
avvocati

T&P

Trifirò & Partners

avvocati

HIGHLIGHTS T&P 2018

CONTENTS

01 pag.4 — **Editorial**
Interview with Mr. Salvatore Trifirò

02 pag.7 — **Labour Law**
New Legislation by Luca D'Arco

03 pag.9 — **Labour Law Case Law**
News by Tommaso Targa and Federico Manfredi

04 pag.11 — **Trade Union Case Law**
News by Tommaso Targa and Leonardo Calella

05 pag.13 — **Civil and Commercial Case Law**
By Vittorio Provera and Giovanna Vaglio Bianco

06 pag.15 — **Law Insurance Law**
By Teresa Cofano

07 pag.17 — **Events & Awards**
Events & Conferences | pag.18
Awards | pag. 18

08 pag.20 — **T&P Studio**
Partners e Associates | pag.20
Offices & Contacts | pag. 22

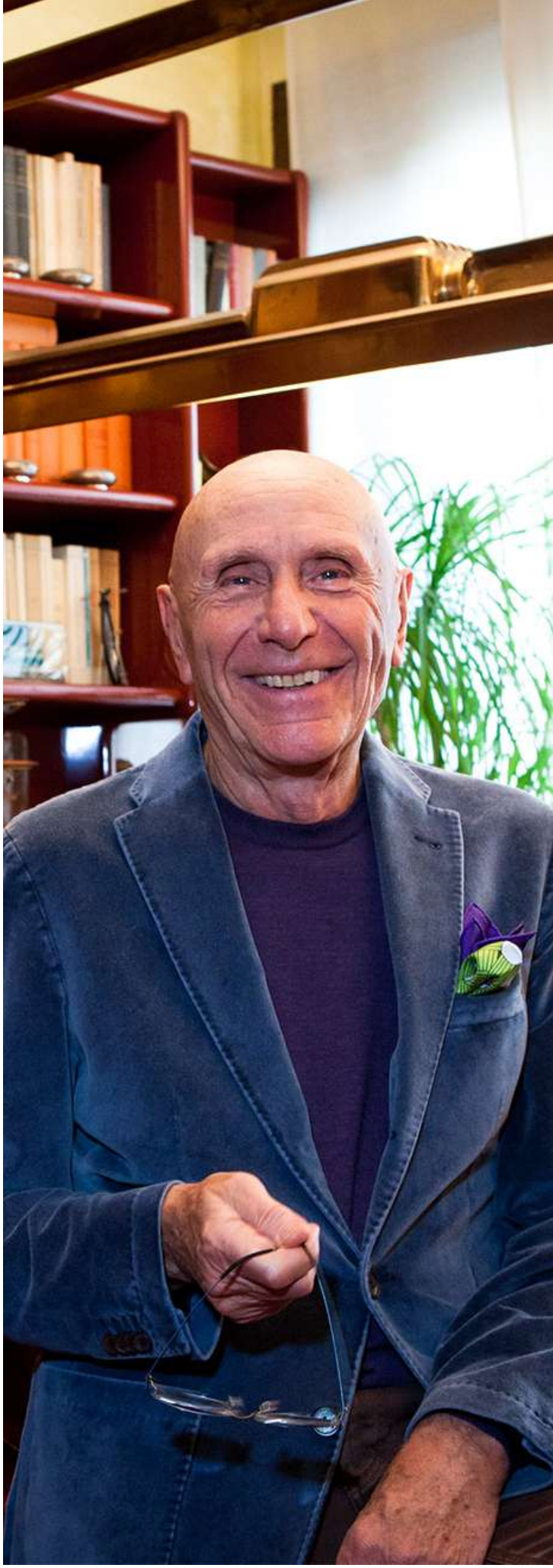
01

EDITORIAL
BETWEEN THE PAST, PRESENT AND FUTURE

Interview with Mr. Salvatore Trifirò, lawyer[1]

As the Career Award of the Le Fonti Awards has acknowledged, you are one of the main promoters of Labour Law thanks to your insights. Would you change anything and what would you change in your professional career and of which achievement are you most proud?

«I would not change anything about my professional career. And if I were to start all over again - that is to say from the day I graduated - I would do exactly the same things that I have done and that I continue to do. Study and work. Work and study. And then as a lawyer I listen to the objective the Client intends to achieve and, if shared, I do everything possible to ensure the Client achieves the desired result: with the gratification that is inherent in achieving that result. Even more so, if the result is the outcome of that insight that means the Law can progress in the desired direction and so find precedents from which to restart. Which achievement makes me proud? My next achievement. In fact, I have a ... revolving aim. It ends in order to begin again and so on. The achievement of which I should be most proud is already behind me. And I am proud to work alongside Colleagues with whom I share every day the stimulating experience of the profession, and who collaborate with me and encourage me to raise the bar even higher.»



[1] The interview with Mr. Salvatore Trifirò, lawyer, was published in the Green Economy Report, Golfarelli Publishing House, December 2018 issue, page 32.

You assisted "Confindustria" (Association of Italian Manufacturing and Service Companies), "Assolombarda" (the Lombardy Region's Industrial Association), "Federmeccanica" (Federation of Metalworking Industries) and the largest national and multinational companies during the years of terrorism. Which were the greatest challenges during those years?
You have marked historical judgements, which do you remember as being the most significant from the human and/or professional aspect?
«The years you are referring to were the years characterised by bullets and blood: the human resources managers of the companies who were the victims of tragic attacks; of witnesses shot in the legs the night before hearings; and much more besides.
The challenge I had was to oppose openly and with "legal weapons" the members of the Unitary Rank-and-File Committees ("CUBs"), the Front-line ("Prima Linea" - PL) and Red Brigade representatives who had infiltrated the companies, by serving them with court summons and urgent appeals to obtain the cessation and compensation for the damage resulting from all those forms of conduct which did not constitute the right to strike, but were unlawful events which caused the Companies a greater loss. The judgements passed by the Court of Cassation and by the Constitutional Court regarding the illegitimacy of the strikes, in which I played a leading role, have been of fundamental importance.»

All the same, the legal firm you founded receives numerous acknowledgements in the context of Labour Law. What is the operational approach with which you have sought to shape the activity and which are the priorities in order to remain competitive today?
«The operational approach with which I shaped my professional activity was that of being ready for major battles, but at the same time, being careful to identify the most appropriate moment to initiate positive negotiations. Above all when ideology becomes a component of the judgement. The experience gained in many thousands of trials has taught me that all issues always have an economic component. Therefore, it is a question of finding the right and shared balance in the common interest of the parties that, firstly, can avoid litigation, and secondly, can settle the litigation once legal proceedings have been started.»

You have never been tender-hearted about the Jobs Act. What is your opinion about the Dignity Decree ("Decreto Dignità")? Can labour legislation exist that envisages flexibility without it resulting in job insecurity?
«What do I think about the Dignity Decree?
That it will not create new jobs: because the increased rigidity regarding flexibility inherent in the Dignity Decree will probably lead to a turnover of workers who will once again experience a demotivating job insecurity. In my opinion, the worker needs to be essential to the Company in order to resolve the problem of job insecurity. On the one hand, training courses are required to create professionalism, and on the other hand, it is necessary for companies to be encouraged to hire personnel. This will be possible if the entrepreneur is motivated to produce more with a policy that determines an increase in internal demand, thereby creating the virtuous circle that will enable job stability, while flexibility will be a consequence of the competition's demand for professionals.»

02

LABOUR LAW

NEW LEGISLATION

By Luca D'Arco

2018 was "shaken" strongly by the so-called Dignity Decree ("Decreto Dignità") and by an important decision passed by the Constitutional Court regarding the Jobs Act following a substantial legislative immobility in recent years (characterised by limited legislative activities on a number of specific topics).

With regard to Privacy it is important to remember that **Legislative Decree No. 101/2018** was published in the Official Journal on 4 September 2018 in order to harmonise national legislation with EU Regulation No. 679 of 2016 (the "**General Data Protection Regulation - GDPR**"). The general part of the Italian Privacy Code has been replaced almost entirely by the provisions of the Regulation, so that the rules and regulations on principles, legal basis for processing, information notice and prior consent are now replaced by the European provisions. The particularly significant changes introduced during 2018 also include the inter-confederal agreement regarding industrial relations dated 9 March 2018.

"Confindustria" (Association of Italian Manufacturing and Service Companies) and the most representative trade union organisations (CGIL – CISL –UIL) introduced a new bargaining model with this Agreement.

However, this is a programme agreement that contains numerous declarations of intent, although there is no immediate effect on the industrial relations system and on employment relationships. Over and above the declarations of principle, the Social Partners focused on a series of general aspects.

Decree Law No. 87/2018, better known as the "Dignity Decree" was approved on 2 July 2018 and entered into the force the following 14 July.

According to the intentions of the Ministry, this Decree aims to improve the conditions of precarious workers deemed to be heavily penalised by the Jobs Act, and establishes a series of limitations on the use of fixed-term and temporary work regimes.

The most important innovation is represented by the reintroduction of reasons for renewing or extending the fixed-term employment contract after the first 12 months. Consequently, while up until 13 July 2018 it was possible to resort to fixed-term employment contracts up to a maximum of 36 months without the need to indicate any reason, from the date the Dignity Decree came into force, this is only possible for a maximum total period of 12 months (including extensions).

The indication of one of the following reasons will be required in every case of renewal (namely, a new fixed-term recruitment of the same worker, even if the previous employment contract had lasted for less than 12 months), or extensions exceeding 12 months, or the employer wishes to enter into an employment contract exceeding 12 months - but with a total duration that does not exceed 24 months:

- temporary and objective needs, unrelated to ordinary business activities
- substitutive reasons
- reasons related to temporary, significant and non-programmable increases of the ordinary business activities.

The Dignity Decree has also reduced the total number of extensions and possible renewals from 6 to 4.

Fixed-term employment contracts for seasonal workers remain excluded from this provision.
Another innovation introduced by the Dignity Decree was the extension of the fixed-term relationship regime to temporary work contracts (excluding the right to recruitment priority).

Lastly, the Dignity Decree has raised the minimum and maximum values (from 4 to 6 and from 24 to 36 months, respectively) of the compensation envisaged by the Jobs Act in the case of dismissal declared to be unlawful.

The important innovations which impact labour law legislation include the Constitutional Court's judgement No. 194 of 8 November 2018 that declared the unlawfulness of art. 3, paragraph 1 of Legislative Decree No. 23/2015, as announced by the Council in the press release dated 26 September last, because in conflict with the principles of reasonableness and equality and with labour law and employment protection ratified by arts. 4 and 35 of the Constitution, in the part where a progressive compensation is (was) envisaged only on the basis of the seniority of service in the event of unjustified dismissal in an increasing protection employment contract regime (so-called Jobs Act).

Following this judgement, a Court that will ascertain the unlawfulness of dismissal, in accordance with the criteria indicated by the Council, and without prejudice to the minimum and maximum threshold established by the legislator (6 - 36 months), may grant compensation that is no longer only related to the seniority of service, but must take into consideration the number of employees employed, the size of the economic activity, the conduct and the conditions of the parties.

Consequently, the Court may differ from the minimum compensation also in the case in which the worker dismissed unfairly was recruited only recently, but will be under an obligation to justifiably adjust the compensation, based on one or more of the criteria indicated by the Council.

03

LABOUR LAW CASE LAW

By Tommaso Targa and Federico Manfredi

1. Dismissing a worker who records and films the conversations of colleagues without their knowledge is unlawful, if the data are not disseminated, but collected in view of possible legal proceedings.

(Court of Cassation - Labour Division, Judgement No. 11322, 10 May 2018)

2. *(Court of Cassation - Labour Division, Judgement No. 20774, 17 August 2018)*

Mobbing can also cause occupational illness, with the consequent compensation of the respective resulting damage by "INAIL" (National Insurance Institute for Industrial Accidents). The Court of Cassation has deemed it appropriate to differ from previous decisions regarding this issue, by innovatively extending the insurance cover framework of illness caused by mobbing suffered by a worker in the workplace, in any event, without prejudice to the fact that the burden of proof is on the worker with regard to the illness being attributable to the employer's conduct.

3. *(Court of Cassation - Labour Division, Judgement No. 25872, 16 October 2018)*

A caretaker who was subjected to the "persecutory" behaviour by a number of condominium residents. The Supreme Court has considered that the worker was entitled to receive compensation for damages, inter alia, equal to more than € 82,000 as a result of mobbing, despite the fact that the conduct was different and was carried out by persons also partially differing from the figure of an employer.

4. **The worker's undue collection of a sickness allowance constitutes an offence of aggravated fraud, pursuant to art. 640, paragraph 2, sub-section 1 of the criminal code (in this case, the defendant had notified the company of his illness by submitting a certificate, had received the allowance provided by "INPS" (National Social Security Institute), and had worked for another company during the same time).**

(Court of Cassation - Criminal Division II, Judgement No. 47286, 17 October 2018)

The conviction of a worker for an offence of aggravated fraud was confirmed, the worker was absent on sick leave, and was discovered driving a vehicle on behalf of another company. Whereas, the Court of Cassation confirmed that the worker's undue collection of a sickness allowance constituted the offence of aggravated fraud, without attributing importance to the fact that the aspect of artifices and expedients had merely involved the presentation of a medical certificate indicating untrue information.

5. Persons who benefit from the paid leave set out in Law No. 104/199 in order to assist a disabled person, can benefit from the same paid leave to rest and enable the employee to recover from the hours dedicated to assisting a family member.

(Court of Cassation - Labour Division, Judgement No. 30676, 27 November 2018)

04

TRADE UNION CASE LAW

By Tommaso Targa and Leonardo Calella

Changing the working hours without prior consultation of the trade union delegation, as may be foreseen by the collective bargaining agreement is not anti-union.

(Court of Cassation - Labour Division, Judgement No. 88, 4 January 2018)

Failing to perform work cannot be sanctioned in disciplinary terms, if such non-performance is due to legitimately exercising the right to strike.

(Court of Cassation - Labour Division, Judgement No. 1392, 19 January 2018)

With a judgement destined to establish case law, the Court of Rome considered unjustified and anti-union the employer's exclusion of the representative trade union from the joint examination of the sector trade union agreement also ordering them to convene on separate tables.

(Court of Rome, Judgement No. 42516, 6 May 2018)

Allocating to employees remaining in service the duties assigned to striking workers, provided such duties are of inferior importance, or however, functionally ancillary and complementary to the duties normally performed is lawful.

(Court of Cassation - Labour Division, Judgement No. 12551, 22 May 2018)

Exercising the right to criticise in the workplace cannot take the form of expressions which are merely dishonourable and are unproven denigrating references.

(Court of Cassation - Labour Division, Judgement No. 18176, 10 July 2018)

An employer's refusal to allow trade union organisations to convene meetings within the company premises, where such trade union organisations are not established as a company union representative, but are signatories of the collective agreement applied in the production unit is anti-union.

(Court of Cassation - Labour Division, Judgement No. 25103, 10 October 2018)

05

CIVIL AND COMMERCIAL CASE LAW

By Vittorio Provera and Giovanna Vaglio Bianco

COURT OF CASSATION CASE LAW

Vexatious clauses: no protection for those that sign... with their "eyes closed"!

With regard to agreements entered into by signing prepared forms or questionnaires in order to govern given relationships uniformly, if such a clause is scarcely readable or is unreadable, the weak contracting party can demand that the counterparty provides a fully legible contractual form; if, however, this request is not made, the weak contracting party "*cannot complain in court proceedings of not having correctly understood the scope of the above-mentioned derogation clause*".
(Court of Cassation, Judgement No. 3307, 12 February 2018)

"Smoking kills" and the smoker is not entitled to compensation for the harm resulting from the use of cigarettes

Excluding compensation to the relatives of a smoker who died due to cancer, given that the Court with jurisdiction on the merits had applied correctly the principle of the "next significant cause" in this specific case, consisting of an act of free, aware and independent will by an individual endowed with the ability to act, such as, in fact, the choice to smoke despite the well-known harmful effects of smoking.
(Court of Cassation, Judgement No. 11272, 10 May 2018)

SMS, WhatsApp and e-mail ... be careful what you write!

Computer data (Sms, WhatsApp messages, e-mail messages downloaded or stored in the memory) found in a mobile telephone subject to seizure constitute documents, pursuant to article 234 of the code of criminal procedure, with the result that the respective acquisition does not fall within the scope of the rules established for correspondence, let alone the discipline governing telephone wiretapping.
(Criminal Court of Cassation- Judgement No. 1822, 16 January 2018)

Services contracts and '*ad nutum*' withdrawal before the due date

The provision of a term of duration for the relationship, with reference to a contract for professional services, in itself, does not exclude the right of '*ad nutum*' withdrawal in favour of the client, set out in art. 2237, paragraph 1 of the Italian Civil Code. Only the existence of a specific content in the negotiating regulation that demonstrates that the parties had envisaged a due date, and had intended to exclude the possibility of terminating the contract before the agreed due date could justify a different outcome.
(Court of Cassation, Judgement No. 25668, 15 October 2018)

After the resolution to approve the financial statements has lapsed, what becomes of the distributed profits?

Resolutions to approve financial statements and to distribute profits constitute separate acts, even though contextual and linked by a dependency constraint, in the sense that, when the former is contrary to law or to the deed of incorporation, then the latter is flawed by a resultant invalidity; therefore, once the resolution to approve the financial statements and the consequential resolution to distribute profits have lapsed, the respective payment becomes undue, pursuant to art. 2033 of the Italian Civil Code.
(Court of Cassation, Judgement No. 23950, 2 October 2018)

Investment services, a "single signature" framework agreement is valid

The requirement of a written form for a framework agreement relating to investment services, as set out in art. 23 of Legislative Decree No. 58 of 1998, is complied with where the contract is prepared in writing and a copy is delivered to the client, and only the investor's signature is sufficient, since the broker's signature is not required, as the broker's consent can be readily inferred by conduct implying an intent carried out thereby.
(Court of Cassation - Joint Divisions, Judgement No. 898, 16 January 2018)

06

LAW
INSURANCE Law

By Teresa Cofano

COURT OF CASSATION CASE LAW

Claims Made Clause

The third-party liability insurance model with 'on claims made basis' clauses that aims to indemnify the risk of impoverishing the insured's assets, however always following a claim, and understood as a material event, participates as a type of non-life insurance, as an exception permitted under art. 1917, paragraph 1, of the Italian Civil Code. It follows that a merit test regarding the interest pursued by the parties is not imposed, compared to the single insurance contract.
(Court of Cassation - Joint Divisions, Judgement No. 22437, 24 September 2018)

'Compensatio lucri cum damno'

In relation to '*compensatio lucri cum damno*', the deduction of the assets awarded and occasioned by the offence (or by non-performance) from the amount of compensation for the resulting damages, on a functional level, presupposes that the benefit is casually justified as a function of removing the harmful effect of the offence and, on a structural level, that the foregoing is accompanied by a subrogation or recourse mechanism that is able to avoid the amount disbursed by the third party to the damaged party resulting in an unexpected advantage for the responsible party.
(Court of Cassation - Joint Divisions- Judgement No. 12565, 22 May 2018)

Liability of the bank for paying a bank cheque that indicated a non-transferable clause to a person other than the legitimate bearer

Pursuant to art. 43, paragraph 2 of Royal Decree No. 1736 of 1933 (so-called bank cheques law), a negotiating bank called to answer for the damage resulting from the payment – due to an error in identifying the legitimate bearer of the instrument – of a bank cheque, drawing cheque or bank draft that indicated a non-transferable clause to a person other than the actual beneficiary, is permitted to prove that the non-performance is not attributable to it, since its obligation was fulfilled with the diligence required under section 1176, paragraph 2 of the Italian Civil Code.

(Court of Cassation - Joint Divisions, Judgement No. 12477, 21 May 2018)

Non-material damage

In relation to third party liability, the overall and all-inclusive nature of the non-material damage is to be interpreted in the sense that it may refer to any harm to an interest or value that is constitutionally protected and not subject to economic assessment, with the consequent obligation for the Court with jurisdiction on the merits, to take into account all the 'in peius' consequences resulting from the damage event for compensation purposes, none excluded, and with the concurrent limit of avoiding duplications by attributing different names to identical prejudices; it follows that for payment purposes, a complete preliminary investigation is to be carried out aimed at establishing the actual and not an abstract assessment of the damage.

(Court of Cassation, Judgement No. 23469, 28 September 2018)

Medical liability

The failure to comply with the burden of demonstrating the exactness of the medical care given and the absence of causal incidence regarding the failure to provide the health service on the production of the harm suffered by a patient does not automatically entail the recognition of the medical officer's liability, since it is necessary to ascertain beforehand compliance with the claimant's burden of proof that consists in demonstrating the negligent conduct of the person liable, the causal link between the latter and the harm suffered, and therefore, factors which constitute separate assessments.
(Court of Cassation, Judgement No. 29853, 20 November 2018)

Current account contract

The approval, including the tacit approval of the bank statement in a current account contract, pursuant to section 1832, paragraph 1 of the Italian Civil Code, does not prevent objections and exceptions being raised on the basis of substantial reasons related to legitimacy, in relation to the legal entitlement, with regard to the inclusion or elimination of account items.
(Court of Cassation, Judgement No. 30000, 20 November 2018)

Limitation period

The contracting party cannot exercise the rights resulting from the contract without the express consent of the insured that is the direct beneficiary of the rights resulting from the insurance relationship, pursuant to section 1891, paragraph 2 of the Italian Civil Code; with the result that, in the absence of an instruction or a clause that obliges the contracting party to act in the interests of the insured, the contracting party is not liable for the damage that the insured has suffered due to the limitation periods, by having failed to act in order to protect the rights arising under the insurance contract.
(Court of Cassation, Judgement No. 29422, 15 November 2018)

Third-party liability - causal link

The preponderance of evidence or the "more likely than not" rule is in force when the causal link is ascertained in relation to third-party liability, unlike criminal proceedings, where the evidence "beyond reasonable doubt" rule applies.
(Court of Cassation, Judgement No. 27720, 30 October 2018)

Bank's liability for an offence committed by an employee

The bank's liability for the performance of duties entrusted to employees exists when the offence is connected by an occasionality link required to perform the duties to which the employees have been assigned, so that the officer's wilful misconduct interrupts the casual link between the performance of its duties and the damage in a situation of unusual conduct by the saver, that is to say, even if collusion is not involved, at least in the presence of the saver's careless and reckless acquiescence to a breach of the rules.
(Court of Cassation, Judgement No. 7241, 23 March 2018)

07

EVENTS & AWARDS

Highlights 2018

Labour 2018 Awards by legalcommunity 01.10.18

confimi apindustria bergamo 50° 1965 - 2015

AGI Avvocati Giuslavoristi Italiani

AIDP ASSOCIAZIONE ITALIANA PER LA DIREZIONE DEL PERSONALE

EVENTS

Spring Labour & Employment EMEA Clinic

Convention Plurijus 2018 – Düsseldorf

Autumn Labour & Employment EMEA Clinic

AWARDS

Legalcommunity IP & TMT Awards 2018

SPECIAL PRIZE LEGALCOMMUNITY: Trifirò & Partners Avvocati

Le Fonti Awards – HR Forum

Trifirò & Partners Avvocati, Law Firm of the Year – Labor Law
Salvatore Trifirò, Career Award

Legalcommunity Labour Awards 2018

Angelo Di Gioia, award for the Employment Lawyer of the Year
Trifirò & Partners Avvocati, award for the litigation law firm of the year

08

STUDIO T&P

PARTNERS & ASSOCIATES

Salvatore Trifirò
view the profile »

Paola Siniramed
view the profile »

Giacinto Favalli
view the profile »

Bonaventura Minutolo
view the profile »

Vittorio Provera
view the profile »

Stefano Trifirò
view the profile »

Anna Maria Corna
view the profile »

Giorgio Molteni
view the profile »

Marina Olgiati
view the profile »

Marina Tona
view the profile »

Mario Cammarata
view the profile »

Luca Peron
view the profile »

Francesco Autelitano
view the profile »

Antonio Cazzella
view the profile »

Damiana Lesce
view the profile »

Mariapaola Rovetta Arici
view the profile »

Valentina Ruzzenenti
view the profile »

Luca D'Arco
view the profile »

Orazio Marano
view the profile »

Paolo Zucchinali
view the profile »

Tommaso Targa
view the profile »

Angelo di Gioia
view the profile »

Tiziano Feriani
view the profile »

Filippo Salvo
view the profile »

Paola Balletti
view the profile »

Claudio Ponari
view the profile »

Teresa Cofano
view the profile »

Paola Lonigro
view the profile »

Andrea Beretta
view the profile »

Francesco Chiarelli
view the profile »

Marta Filadoro
view the profile »

Francesco Cristiano
view the profile »

Valeria De Lucia
view the profile »

Sara Lovecchio
view the profile »

Diego Meucci
view the profile »

Jacopo Francesco Moretti
view the profile »

Barbara Fumai
view the profile »

Giuseppe Gemelli
view the profile »

Enrico Vella
view the profile »

Anna Minutolo
view the profile »

Giampaolo Tagliagambe
view the profile »

Francesco Torniamenti
view the profile »

Giovanna Vaglio Bianco
view the profile »

Roberto Pettinelli
view the profile »

Giuseppe Sacco
view the profile »

Michela Casula
view the profile »

Serena Previtali
view the profile »

Federico Manfredi
view the profile »

Ilaria Pitingolo
view the profile »

Alice Testa
view the profile »

Leonardo Calella
view the profile »

08

STUDIO T&P

OFFICES & CONTACTS

ONLINE CONTACTS

Web Site: www.trifiro.info
E-mail: trifiro.partners@trifiro.it
Trifirò & Partners Avvocati
@TrifiroPartners

MILANO

Via San Barnaba, 32
20122
Tel.: + 39 02 55 00 11
Fax.: + 39 02 54 60 391; + 39 02 55 185 052;
+39 02 55 013 295

ROMA

Piazza Giuseppe Mazzini, 27
00195
Tel.: + 39 06 3204744; + 39 06 37351176
Fax.: + 39 02 54 60 391; + 39 02 55 185 052;
+39 06 36000362

TORINO

Via Raimondo Montecuccoli, 9
10121
Tel.: + 39 011 53 06 15
Fax.: + 39 011 51 19 137

TRENTO

Via Galileo Galilei, 24
38122
Tel.: + 39 0461 26 06 37
Fax.: + 39 0461 26 44 41

PARMA

Strada XXII Luglio, 15
43121
Tel.: + 39 0521 23 94 65
Fax.: + 39 0521 23 0724

BERGAMO

Via Quarenghi, 13
24122
Tel.: + 39 02 55 00 11
Fax.: + 39 02 54 60 391; + 39 02 55 185 052;
+39 02 55 013 295

T&P

Trifirò & Partners

avvocati