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Embezzlement and Arbitrary Exercise of Rights within Commercial Relationships

In Judgment no. 1304/2026, the Italian Supreme Court of Cassation, Criminal Division, consolidates the boundary between embezzlement and the arbitrary exercise of private rights in the face of unilateral set-offs executed against earmarked funds.

MG Metodo Giuridico Editorial Board Criminal Law & Property Offences 13 November 2026

Reading time 11 min

Current Legal Framework as of 9 November 2026: The Supreme Court reaffirms that invoking a set-off based on unliquidated commission claims does not justify the retention of earmarked funds, clarifying the boundary between embezzlement and the arbitrary exercise of rights while reasserting the strict exhaustiveness of the statutory criteria under Article 133 of the Criminal Code for granting non-registration of a conviction in criminal records.

ABSTRACT

The substantive demarcation between **embezzlement and the arbitrary exercise of rights** rests upon the specific legal title governing possession and the existence of a binding fiduciary earmarking purpose. In Judgment no. 1304/2026, the Italian Supreme Court of Cassation, Criminal Division, reaffirmed that the unilateral retention of funds collected on behalf of a principal fulfills the offense of embezzlement under Article 646 of the Criminal Code whenever the counter-claim asserted by way of set-off lacks the statutory attributes of **certainty, liquidity, and enforceability**. Furthermore, the decision rules out reclassification as the arbitrary exercise of one's own rights under Article 392 of the Criminal Code owing to the **absence of physical or moral coercion**, clarifies the consummatory moment of possessory interversion for the calculation of the statutory limitation period, and quashes the denial of **non-registration of the conviction** in criminal records grounded on non-statutory considerations of commercial market protection.

Key Takeaways

- **Fiduciary earmarking and monetary fungibility:** The collection of insurance policy premiums performed by a sub-agent takes place *nomine alieno*; the fungible nature of money does not convert accounting availability into the intermediary's exclusive ownership.
- **Inapplicability of the set-off defense:** Retaining earmarked sums against alleged commission claims that remain uncertain, unliquidated, and unenforceable satisfies both the objective and subjective elements of the offense under Article 646 of the Criminal Code.
- **Inapplicability of arbitrary exercise of rights:** The offense set forth in Article 392 of the Criminal Code presupposes acts of violence against property or coercion against persons alongside a right genuinely capable of being pursued before a court of law—elements structurally incompatible with the mere retention of cash or bank balances.
- **Exhaustiveness of statutory parameters under Article 175 of the Criminal Code:** Judicial assessment concerning the benefit of non-registration of the conviction in criminal records is strictly bound by the criteria listed in Article 133 of the Criminal Code, thereby precluding any refusal grounded on generic objectives of safeguarding commercial dealings.

CASE DOSSIER

JURISDICTION
Italy (Civil Law)

SUBJECT AREA
Criminal Law & Property Offences

LEADING DECISION
Italian Supreme Court of Cassation, Criminal Division, Judgment of 13 January 2026, no. 1304 — Establishes the offense of embezzl

Legal Principle / Editorial Headnote

With respect to offenses against property, the conduct of an insurance intermediary who retains sums collected on behalf of the principal as insurance policy premiums—invoking a unilateral set-off against commission counter-claims that are neither certain, liquidated, nor enforceable—constitutes the offense of embezzlement under Article 646 of the Criminal Code rather than the arbitrary exercise of one's own rights under Article 392 of the Criminal Code. Moreover, the decision on whether to grant the benefit of non-registration of the conviction in the criminal record certificate pursuant to Article 175 of the Criminal Code is governed exclusively by an assessment of the statutory parameters enshrined in Article 133 of the Criminal Code, excluding any reliance on non-statutory considerations aimed at protecting commercial relationships.

01. INTRODUCTION: JUDGMENT NO. 1304/2026 OF THE SUPREME COURT OF CASSATION AND THE DOCTRINAL CRUXES OF COMMERCIAL LITIGATION

The decision rendered by the **Italian Supreme Court of Cassation, Criminal Division, Judgment no. 1304/2026**, addresses with notable nomophylactic rigor the delicate line of demarcation between **embezzlement and the arbitrary exercise of rights** within commercial relationships characterized by the fiduciary management of monetary flows *nomine alieno*[1]. The dispute arose between an insurance sub-agent and the principal agency company following the **failure to remit collected policy premiums**, which the collaborator withheld in purported satisfaction of countervailing commission entitlements that remained undetermined. The ruling dispels recurring misconceptions that seek to downgrade misappropriative conduct into a purely civil accounting dispute or into extrajudicial self-help justified by an asserted right of set-off.

The systematic perimeter: Where an intermediary or manager holds liquid funds paid by clients for a specific causal purpose, the intrinsic fungibility of money confers no power of free disposal; unauthorized retention must therefore be classified as a **unilateral interversion of possession** rather than mere private self-help.

Across the fabric of commercial intermediation relationships, an operator constantly holds material control over assets belonging to the legal sphere of the principal. The imperative of ensuring stability in commercial dealings requires that recourse to self-help remedies remain strictly confined to the specific instances expressly authorized by the legal order, preventing the **material availability of earmarked funds** from being turned into bargaining leverage to compel settlement agreements. The Supreme Court reiterates that the existence of ongoing accounting negotiations does not undermine the criminal unlawfulness of the conduct where the reciprocal debit and credit items have not attained the threshold of **certainty, liquidity, and enforceability** prescribed by the Civil Code for statutory set-off.

Beyond the substantive classification of the criminal offense, the judgment under review carries central importance in pinpointing the *dies a quo* of the **statutory limitation period (*prescrizione*) extinguishing the offense** and in delineating the evaluative powers vested in trial courts regarding the **non-registration of a conviction** in criminal records. By ruling out that lenient sentencing benefits may be sacrificed in the name of vague formulas aimed at protecting trade, the Court restores strict legality to sentencing discretion, offering interpreters and defense counsel guidance of immediate practical relevance.

02. EMBEZZLEMENT AND ARBITRARY EXERCISE OF RIGHTS THROUGH THE LENS OF AGENCY RELATIONSHIPS

2.1 — Breach of Fiduciary Duty and Collection of Insurance Premiums *Nomine Alieno*

The institutional architecture of insurance distribution rests upon a strict separation between the intermediary's personal estate and sums collected from policyholders on behalf of insurance undertakings or principal agencies. Article 646 of the Criminal Code protects both the proprietary interest and the **fiduciary trust underlying the delivery** of movable property subject to a predetermined purpose. In the case scrutinized by the Supreme Court, the defendant, acting as an insurance sub-agent, received payments from clients as policy premiums under a contractual and regulatory obligation to remit those sums periodically to the principal agency. The circumstance that money represents the quintessential fungible asset produces no **transfer of ownership** in favor of the recipient where delivery takes place pursuant to a mandate restricting its specific allocation.

The interpretive boundary between **embezzlement and the arbitrary exercise of rights** calls for a rigorous examination of the provenance of the funds. As already highlighted in the systematic analysis concerning the boundaries between embezzlement and fiduciary earmarking within mandate relationships, the misappropriation of money is consummated at the very moment the agent performs an act of dominion incompatible with the underlying title of possession. Breaching the earmarking purpose transforms **qualified custody held in the interest of another** into possession *uti dominus*. Within an agency relationship, collecting an insurance premium does not merely give rise to an obligatory duty of accounting rendition; rather, it entrusts the agent with the safekeeping of strictly segregated financial resources, over which any unagreed withholding immediately fulfills the **conduct of material misappropriation** penalized under criminal law.

Premium segregation and IVASS regulatory rules: Sector-specific insurance supervision strictly prohibits commingling assets within agency accounts. Because the intermediary holds no proprietary entitlement over insurance remittances, failing to transfer collected premiums goes beyond mere civil breach of contract and constitutes the classic **possessory interversion** punished by Article 646 of the Criminal Code.

2.2 — Unilateral Set-Off, Unliquidated Counter-Claims, and Subjective Intent

The cornerstone of the defense argument rested upon invoking a set-off between the retained premium collections and the commission claims that the defendant alleged to hold against the principal company, contending that general criminal intent (willful misconduct) was absent in light of unresolved accounting balances. The Supreme Court rejected this contention, reaffirming that the **unilateral retention of sums collected** *nomine alieno* fulfills the offense under Article 646 of the Criminal Code even where the defendant is in turn a creditor of the principal, unless full proof emerges as to the certainty, enforceability, and precise liquidity of the counter-claim asserted[1]. In the case at hand, the accounting items were the subject of open dispute, to the point that the parties were still negotiating the determination of the final balance without having reached any settlement agreement.

From a doctrinal standpoint, statutory set-off governed by Article 1241 of the Civil Code requires stringent preconditions that cannot be replaced by mere credit expectations or unliquidated claims asserted in litigation. Claiming the authority to execute a unilateral set-off *motu proprio* over earmarked funds amounts to a **usurpation of the adjudicative prerogatives** reserved to the judicial authority. Furthermore, the subjective element of the property offense is not negated by the agent's mere subjective belief in holding valid credit claims, provided the agent is fully aware of the fiduciary origin of the money and of the counterparty's lack of consent to the commission deduction.

> The unilateral retention of sums collected *nomine alieno* never mutates into justified self-help where the asserted counter-claim is uncertain; likewise, the denial of non-registration in criminal records cannot rest upon non-statutory grounds of market protection.

2.3 — Structural Distinction Between Violence Against Property and Interversion of Possession

The defense request to reclassify the facts under Article 392 of the Criminal Code encounters the insurmountable barrier of the structural statutory elements defining the arbitrary exercise of one's own rights. In a comparative analysis between **embezzlement and the arbitrary exercise of rights**, the offense of unlawful private self-help presupposes, as an indispensable constituent element, that the perpetrator act through **violence against property or coercion against persons** in order to satisfy an alleged right enforceable before an ordinary court. Neither withholding bank remittances nor failing to hand over cash entails any violent conduct, alteration of intended physical use, or material damage to the economic medium; rather, the conduct consists solely of an omission to transfer aimed at consolidating proprietary appropriation.

In addition, Article 392 of the Criminal Code postulates that the actor seeks to obtain the exact legal utility to which they would be entitled through a judicial ruling, operating within the bounds of a legally actionable claim. Conversely, when an agent disposes of funds entrusted under a fiduciary earmarking obligation and diverts them to personal purposes to cover alleged unliquidated claims, the conduct transcends any conceivable form of private self-help and

assumes the character of an **outright expropriation of another's asset**. Supreme Court case law has consistently emphasized that this principle admits of no exception within accounting or auxiliary professions, ruling out the arbitrary exercise of rights whenever an autonomous and definitive diversion of managed assets takes place.

03. CASE LAW FRAMEWORK: STANDING TO FILE A CRIMINAL COMPLAINT AND THE BOUNDARY WITH THEFT

3.1 — Protection of Corporate Assets and Shareholder or Member Standing to File a Complaint

Classifying misappropriative conduct committed within collective bodies or corporate structures requires a rigorous identification of the parties holding standing to initiate criminal prosecution. Following the statutory reforms enacted by delegated legislation—which generalized prosecution upon criminal complaint by the injured party for property offenses not aggravated by public-interest circumstances—proper fulfillment of this procedural precondition has acquired decisive weight. On this point, the **Italian Supreme Court of Cassation, Criminal Division, Judgment no. 4601/2026**, clarified that where embezzlement is committed by the legal representative or executive body to the detriment of the managed entity, standing to file a valid criminal complaint also vests in an individual association member or minority shareholder[2].

The Court moved beyond formalistic readings that sought to subordinate the right of complaint to bylaws governing legal representation—an approach that would risk paralyzing criminal enforcement in the face of an **insurmountable conflict of interest** between the material perpetrator of the offense and the injured entity. An individual member or shareholder does not merely hold the status of a civilly damaged party, but is a direct holder of the legal interest protected by the criminal provision, identifiable in the **integrity of the common corporate or associative estate**. This principle consolidates a substantive conception of procedural prosecutability, preventing the corporate or associative veil from turning into a shield of immunity for executives who divert resources earmarked for collective purposes.

3.2 — Autonomous Dispositive Control and Custody *Nomine Alieno* on the Boundary with Theft

Whereas the boundary vis-à-vis the arbitrary exercise of rights hinges upon the underlying credit claim, the demarcation vis-à-vis aggravated theft rests entirely upon the nature of the factual power exercised over the asset. From this perspective, the **Italian Supreme Court of Cassation, Criminal Division, Judgment no. 31016/2026**, drew a sharp distinction between criminal-law possession and mere subordinate technical or material custody[3]. In the case adjudicated by the Court, an employee of a professional firm who withdrew funds earmarked for judicial enforcement proceedings by using pre-signed bank slips was held liable for aggravated theft committed by fraudulent means under Articles 624 and 625 of the Criminal Code, rather than embezzlement, because she lacked any autonomous dispositive dominion over the monies deposited in court accounts.

Possession relevant under criminal law does not coincide with the civil-law concept grounded upon *animus rem sibi habendi*; rather, it consists in a **power of autonomous dispositive availability** exercised outside the direct oversight and supervision of the owner. Where an individual acts merely as a material executor of circumscribed tasks or within powers strictly bound to an employer's directives, technical access to payment instruments amounts only to precarious custody *nomine alieno*. Taking control of the asset by breaching the owner's sphere of supervision consequently fulfills the conduct of theftuous subtraction, whereas embezzlement presupposes that the perpetrator had already lawfully and autonomously acquired possession of the property prior to diverting it to purposes extraneous to the underlying title.

Decision / Citation	Factual Scenario	Legal Rule Applied
Supreme Court of Cassation, Criminal Division, no. 1304/2026	Retention of insurance premiums by a sub-agent by way of set-off against unliquidated commissions.	Art. 646 Crim. Code Embezzlement is established; arbitrary exercise of rights is excluded due to lack of claim liquidity and absence of violence.
Supreme Court of Cassation, Criminal Division, no. 4601/2026	Misappropriation of association funds committed by the president of a sports association.	Standing An individual member or acting vice-president qualifies as an injured party with standing to file a complaint protecting common assets.
Supreme Court of Cassation, Criminal Division, no. 31016/2026	Diversion of bank funds by an employee using blank-signed withdrawal slips.	Art. 624 Crim. Code Aggravated theft applies rather than Art. 646 where autonomous dispositive dominion *nomine proprio* is lacking.

04. OPERATIONAL PROFILES AND SENTENCING IMPLICATIONS: *TEMPUS COMMISSI DELICTI* AND NON-REGISTRATION OF THE CONVICTION

4.1 — When Interversion Is Consummated: *Dies a Quo* and the Limitation Period Regime

Pinpointing the exact consummatory moment of embezzlement represents a primary procedural turning point, governing both the calculation of the criminal limitation period (*prescrizione*) under Article 157 of the Criminal Code and the identification of the applicable statutory regime. In the practice of ongoing agency or intermediation relationships, the boundary between **embezzlement and the arbitrary exercise of rights** surfaces acutely when determining consummation: defense counsel frequently seek to backdate the *dies a quo* to the date of initial premium collection or to the formal expiration of periodic remittance deadlines, arguing that the offense has already been extinguished by limitation. Judgment no. 1304/2026 refutes that contention, reiterating that possessory interversion is not completed through mere accounting delay, but rather coincides with the **definitive breakdown of the fiduciary relationship**.

In operational terms, interversion manifests externally only when the contractual relationship is formally terminated and the agent or sub-agent fails to comply with a **formal demand for restitution** issued following internal corporate audit inspections. With respect to the limitation period, the judgment clarifies that offenses consummated between August 2017 and December 2019 remain governed by the suspension rules introduced by the Orlando Reform (Law no. 103 of 23 June 2017), as neither retroactive application *in malam partem* nor the subsequent rules introduced by the Cartabia Reform may be invoked. For defense counsel preparing procedural objections at trial, sound **litigation strategy** requires scrutinizing formal demand notices and accounting reconciliation records with strict chronological precision.

4.2 — Limits on Judicial Discretion Over Non-Registration Under Articles 133 and 175 of the Criminal Code

The aspect of greatest doctrinal and practical interest in the judgment lies in its upholding of the appeal against the refusal to grant non-registration of the conviction in the criminal record certificate. The lower courts had denied the benefit under Article 175 of the Criminal Code by invoking a perceived need to protect the defendant's future commercial counterparties against potential accounting irregularities. The Supreme Court firmly censured that reasoning, holding that the grant of non-registration is governed exclusively by an **assessment of the exhaustive statutory parameters** set forth in Article 133 of the Criminal Code, thereby barring extralegal criteria aimed at the generic protection of the business community[1].

Within the systematic design of the Criminal Code, publicizing a criminal conviction vis-à-vis third parties serves general deterrence functions that the legal order entrusts solely to specific, statutorily enumerated ancillary penalties. Where a trial court grants conditional suspension of the sentence on the basis of a **favorable prognosis against recidivism**—supported, inter alia, by the defendant's cessation of the relevant professional activity—it cannot arbitrarily withhold non-registration without pointing to concrete countervailing elements drawn from Article 133 of the Criminal Code. This strict standard ensures that judicial discretion does not degenerate into sentencing arbitrariness, enabling the Supreme Court of Cassation to quash the challenged sentencing ruling without remand and to grant the lenient benefit directly.

⚖ **Operational guidance and case-law distinguishing for criminal defense counsel:** The judicial **distinguishing** analysis demonstrates that a set-off defense **does not apply** to negate criminal intent where an asserted commission counter-claim is unliquidated and unascertained, in contrast to a **distinct factual scenario** involving a certain, liquidated, and enforceable claim already established by documentary evidence. As a matter of **litigation strategy** at trial, the defense bears the documentary **burden of proof** demonstrating the immediate enforceability of the asserted credit claim, alongside formulating targeted **procedural objections** challenging any refusal of non-registration grounded upon extra-statutory considerations foreign to Article 133 of the Criminal Code.

References & Authorities Cited

Statutory Provisions

- ⚖ Article 646 of the Italian Criminal Code — Embezzlement of money or movable property entrusted by way of possession.
- ⚖ Article 392 of the Italian Criminal Code — Arbitrary exercise of one's own rights involving violence against property.
- ⚖ Article 393 of the Italian Criminal Code — Arbitrary exercise of one's own rights involving violence or threat against persons.

- Article 120 of the Italian Criminal Code — Right of criminal complaint and standing of the injured party.
- Article 124 of the Italian Criminal Code — Time-limit for filing a criminal complaint and commencement of the statutory period.
- Article 133 of the Italian Criminal Code — Guiding parameters and statutory criteria for assessing the gravity of the offense.
- Article 157 of the Italian Criminal Code — Statutory limitation period (*prescrizione*) and ordinary term extinguishing the offense.
- Article 159 of the Italian Criminal Code — Statutory grounds for suspending the running of the criminal limitation period.
- Article 175 of the Italian Criminal Code — Grant of the benefit of non-registration of the conviction in criminal record certificates.
- Articles 624 and 625 of the Italian Criminal Code — Simple theft and aggravating circumstance of employing fraudulent means.
- Legislative Decree no. 36 of 10 April 2018 — Reform of the regime governing prosecution upon criminal complaint and transitional rules.
- Law no. 103 of 23 June 2017 — Amendments to the Criminal Code concerning suspension of the statutory limitation period.

Case Law Cited

1. **Italian Supreme Court of Cassation, Criminal Division, Judgment of 13 January 2026, no. 1304** — Establishes the offense of embezzlement and rules out the arbitrary exercise of rights where earmarked funds are withheld by way of set-off against an unliquidated counter-claim; grants non-registration of the conviction under Article 175 of the Criminal Code, quashing reliance on non-statutory commercial protection grounds. Outcome: quashed in part without remand and declared inadmissible as to the remainder. Para.: Conclusions of Law, Sections 1–4.
2. **Italian Supreme Court of Cassation, Criminal Division, Judgment of 3 February 2026, no. 4601** — Recognizes standing to file a criminal complaint for embezzlement in favor of an individual association member or minority shareholder where corporate or associative assets are misappropriated by the entity's executive body. Outcome: quashed the challenged order and remanded. Para.: Conclusions of Law, Section 2.

3. **Italian Supreme Court of Cassation, Criminal Division, Judgment of 12 August 2026, no. 31016** — Defines the structural boundary between embezzlement and aggravated theft, holding that the latter is committed where an auxiliary lacking autonomous dispositive dominion subtracts assets held *nomine alieno* under the principal's supervision. Outcome: declared inadmissible. Para.: Conclusions of Law, Sections 1–2. ↑

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AUTHOR • METODO GIURIDICO

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