ITALY

Italy

PART I: CONTRACTUAL - NO OFFICE IN THE TARGET COUNTRY

A. Direct sale

A.1. Without written agreement - general terms

1. What are the formalities a foreign seller must complete in your jurisdiction in order to make sure that its terms and conditions of sale are binding and enforceable towards local purchasers? Are these conditions enforceable towards non-commercial parties?

Subject to the considerations set out in 1) below, the following outline sets out the formal requirements that a foreign seller must comply with in order to make sure that its terms and conditions of sale are binding and enforceable towards local purchasers when a sale contract is regulated by Italian law, either on the basis of an agreement between the parties or the applicable rules on conflict of laws (i.e. international private law).

- PRELIMINARY CONSIDERATIONS

  Italy has signed a number of international conventions and has implemented certain laws which regulate the formalities a foreign seller must comply with in the Italian jurisdiction in order to make sure that its terms and conditions of sale are binding and enforceable towards local purchasers.

  Italy has implemented laws to protect consumers. In case of an international sale from a foreign seller to a consumer, Italian laws provide for a series of minimum protection provisions. Therefore, for the purpose of this report, it is necessary to distinguish between sale contracts made with commercial purchasers and those made with non-commercial purchasers (consumers).

  Italy is a signatory of the 1980 United Nations Convention on the International Sale of Goods (CISG), which applies to international sale contracts governed by Italian law. However, the contracting parties are free to choose not to apply the CISG. The rules contained within the CISG differ from those provided by Italian law as to the formalities a foreign seller must complete in order to make sure that its

terms and conditions of sale are binding and enforceable towards local purchasers.

Therefore, for the purpose of this report, it is important to draw a distinction between terms and conditions of sale that are regulated by Italian law with the express exclusion of the CISG (see ♦.2), and terms and conditions of sale that are regulated by Italian law without exclusion of the CISG (see ♦.1).

Italian law provides for specific rules which apply to:

- ♦ general conditions of agreement1 drafted by one party and not negotiated with the other party2, and
- ♦ contracts concluded by the signature of standard forms which one party has drafted to uniformly regulate a series of contractual relationship.

- SALES TO COMMERCIAL PURCHASERS

♦.1 General Conditions of Sale that are regulated by Italian law without exclusion of the CISG

Pursuant[3] to article 11 of the CISG "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

Therefore, the General Conditions of Sale may be validly concluded without the need to meet any formal requirements. However, it would be advisable to have the terms and conditions of sale accepted in writing by the buyer.

♦.2 General Conditions of Sale that are regulated by Italian law with exclusion of the CISG

There are a number of formalities a foreign seller must complete in order to make sure that its General Conditions of Sale are binding and enforceable towards local purchasers. General Conditions of Sale drafted by the seller and not negotiated with the purchaser:

1. If such General Conditions of Sale have not been accepted in writing, then they are binding on the

1 *This includes general conditions of sale, hereinafter "General Conditions of Sale".*

2 *Article 1341 of the Italian Civil Code.*

3 *Article 1342 of the Italian Civil Code.*

purchaser only if the latter is aware of, or has had the possibility to become aware of, the same[4].

By way of example, it may be argued that the purchaser had the possibility to become aware of the general conditions where these were set out in writing:

- in a document delivered to the purchaser at the time of to the conclusion of the contract, at the very latest;
- on clearly visible and readable panels affixed within company premises.

If a dispute arises the seller is obliged to prove that the purchaser was aware of, or had the possibility to become aware, of the General Conditions of Sale.

2. Even if the purchaser has accepted in writing such General Conditions of Sale, terms set out therein are considered unfair when they provide for[5]:
   - the exemption or limitation of liability of seller;
   - the right of the seller to withdraw from the contract;
   - the right of the seller to suspend the execution of the contractual obligations;
   - deadlines, short periods of time and conditions that the purchaser must comply with under penalty of forfeiting or losing his/her contractual rights;
   - restraints on the possibility of raising exceptions/ objections;
   - restrictions as to contractual freedom with third parties;
   - the tacit renewal of the contract;
   - an arbitration clause;
   - jurisdiction terms / a choice of forum.

   Such unfair terms are without effect unless the purchaser declares that s/he has explicitly accepted them in writing[6].

4 *Article 1341 n° Italian Civil Code.*

5 *Article 1341 n° 2 Italian Civil Code. The formal requirements set out in this point 2.2, letter b), also apply to contracts concluded by the signature of standard forms which one party has drafted to uniformly regulate a series of contractual relationship (see point 1.3, letter b).*

6 *Article 1341, § 2, Italian Civil Code.*

Therefore to make such unfair terms valid and binding upon the purchaser, it is necessary that the purchaser places two signatures on the General Conditions of Sale: one signature accepting the sale contract as a whole and one accepting the unfair terms contained in the General Conditions of Sale.

To this end, it is sufficient that all the unfair terms be listed at the bottom of the text of the General Conditions of Sale by making reference to the number (and preferably also to the title) of the article containing the unfair term, with the purchaser signing such list for acceptance[7]. The formalities outlined in this point ♦.2 must be taken into consideration when Italian law applies to the General Conditions of Sale, however it should be noted that pursuant to article 9 of the Rome Convention 1980:

– a contract concluded between a foreign seller and an Italian purchaser who signs the contract in the same country is formally valid if it satisfies the formal requirements of Italian law or of the law of the country where the contract is concluded; while

– a contract concluded between a foreign seller and an Italian purchaser who sign the contract in different countries is formally valid if it satisfies the formal requirements of Italian law or the law of one of those countries.

Based on the above, article 9 of the Rome Convention of 1980 greatly reduces the chances of the formal requirements of Italian law producing adverse effects towards the seller in terms of the validity or efficacy of the General Conditions of Sale.

7 *To this end, the following statement, to be signed by the purchaser, can be inserted at the bottom of a contract:*

Purchaser declares that it has read and explicitly accepts, pursuant to articles 1341 and 1342 of the Italian Civil Code, the following clauses:

article 1 - exclusion of liability

article 5 - tacit renewal of the contract

article 12 - jurisdiction

Place and date _____

The Purchaser

_____

- SALES TO NON-COMMERCIAL PURCHASERS (CONSUMERS)

  The rules outlined in ♦.2 above also apply to General Conditions of Sale contracts when the purchaser is a non-commercial purchaser (consumer). In addition, a non-commercial purchaser enjoys the protection granted by the provisions of the Consumer Code (Legislative Decree 206/2005) which contains, amongst others, provisions implementing EU Directive 93/13.

  The Consumer Code sets out twenty unfair terms, which are very similar to the unfair terms listed within EU Directive 93/13, providing an indicative and non-exhaustive overview of those conditions which are regarded as unjust, allowing the consumer to prove that a particular clause creates a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

  The seller has the right to prove that such unfair terms are not unfair where they have been individually negotiated.

  In addition to the twenty unfair terms defined by law, the consumer has the right to prove that other terms are unfair if she proves that such terms cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

  Finally, the following terms are always considered unfair, and, therefore, null and void, even where they have been individually negotiated, where they have the object or effect of:

  ♦ excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer, or personal injury to the latter, resulting from an act or omission of the seller or supplier;

  ♦ inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller, supplier or another party in the event of total or partial non-performance, or inadequate performance, by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against it;

  ♦ irrevocably binding the consumer to terms which s/he had no real opportunity of becoming acquainted with before the conclusion of the contract.

The terms which are found to be unfair become null and void while the General Conditions of sale themselves remain unaffected.

A.2. With a written agreement

2. What are the clauses a foreign seller should integrate in a written sales agreement (or in its general terms and conditions) and the reasons why?

(a) ***Retention of title:*** *Is this provided for in your jurisdiction? What are the conditions to make it enforceable towards local purchasers and third parties?*

Yes, in Italy retention of title is admitted, providing that it is inserted in the contract by means of a special clause[8].

Given that, according to Italian law, ownership of the goods to which a contract refers passes from the seller to the purchaser at the time when the parties conclude the sale contract, a retention of title clause must be agreed upon, at the very latest, at the time in which the sale contract is concluded.

In order to render a retention of title clause valid between the parties, it is sufficient that such clause be inserted in the contract, while in order to make it objectionable towards a third party, it is necessary that the latter is aware of the same.

For certain types of goods, the fact that a third party is aware of the existence of the clause need not be demonstrated as this is taken as being given where the same results as being recorded in special public registers (article 1524 of the Italian Civil Code). The publishing regime varies according to the type of products.

For example:

- For registered movable and immovable assets the retention of title clause must be transcribed in the special public register;
- For production machinery or equipment, law 1329/1965 demands due marking of the goods and transcription of the retention of title clause in the special public register.

In addition, on the basis of article 11 of legislative decree n° 231 dated 09.10.2002 (which incorporates Directive 2000/35/EC of the European Parliament and Council dated 29th June 2000, on

8 *Retention of title is governed by articles 1523-1526 of the Italian Civil Code and by other laws containing specific related provisions.*

combating late payment in commercial transactions), retention of title, as per article 1523 of the Civil Code, is objectionable to creditors of the buyer only if confirmed in individual invoices with a date recognized as preceding that of the seizure and duly registered in the accounting records[9].

The retention of title is not valid, according to Italian law, if it is inserted in the General Conditions of Sale, in so far as this does not allow for the goods to be sufficiently identified. The clause must thus necessarily be agreed upon on each occasion by the parties with reference to each individual sale contract.

(b) **Interest and penalty clause:** *Are these clauses enforceable in your jurisdiction? Can they be reduced or annulled? What are the consequences if this clause is not integrated in the agreement? What is the legal rate in your jurisdiction?*

- Interest
  - ♦ Sales to commercial purchasers

    Italian Decree n° 231/2002 implemented Directive 2000/35/ EC of the European Parliament and Council of 29th June 2000 on combating late payment in commercial transactions. Italian Decree n° 231/2002 substantially reflects Directive 2000/35/EC.

    Interest shall become payable from the day following the date or the end of the period for payment fixed within the contract. If the date or period for payment is not fixed in the contract, interest shall become payable automatically without the necessity of a reminder upon expiration of a 30 day period[10]. Unless otherwise agreed

9 *Article 11 of Legislative Decree 9th October 2002 n° 231 "Attuazione della direttiva 2000/35/CE relativa alla lotta contro i ritardi di pagamento nelle transazioni commerciali".*

10 *The commencement date for the 30 day period varies as follows:*

(a) *30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment; or*

(b) *if the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 days after the date of receipt of the goods or services; or*

(c) *if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 days after the receipt of the goods or services; or*

(d) *if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the equivalent request for payment*

between the parties, the interest rate shall be the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, plus at least 7%. For October 2012 the interest rate was 8.00%.

Except in cases where the debtor is not responsible for the delay, the creditor shall be entitled to claim reasonable compensation from the debtor for all relevant recovery costs incurred through the latter's late payment.

The agreement on the date for payment or on the consequences of late payment which is materially unfair to the detriment of the creditor shall be null and void.

- Sales to non-commercial purchasers (consumers)

  Interest shall become payable from the day following the date or the end of the period for payment fixed in the contract (article 1282 of the Italian Civil Code).

  Unless otherwise agreed between the parties, the interest rate is fixed by law (article 1284 of the Italian Civil Code). For October 2012 the legal interest rate was 2.50%.

  There are no specific provisions as to the right of the creditor to claim reasonable compensation from the debtor for all relevant recovery costs incurred through the latter's late payment. However, pursuant to article 1224 of the Italian Civil Code, the creditor is entitled to claim any damages suffered as a consequence of debtor's late payment.

  The parties are free to fix the interest rate, however the interest rate must be agreed in writing, otherwise the legal interest rate shall apply.

  In addition, the interest rate must not exceed the usurious interest rate. If the agreed interest rate exceeds the usurious interest rate, then the creditor is not entitled to any interest[11].

earlier or on the date on which such acceptance or verification takes place, 30 days after this latter date.

11 *Law 108/96.*

- Penalty clause
  - ♦ Sales to commercial purchasers

    A penalty clause is admitted and provided for by articles 1382-1386 of the Italian Civil Code.

    The purpose of a penalty clause is to limit and liquidate damages to the promised penalty, unless compensation has been agreed upon for additional damages with the creditor not needing to submit to the courts proof of damages.

    Under Italian law, a fixed penalty sum may be cumulated with additional damages; however, the right to additional damages must be agreed between the parties (in this case the penalty clause is simply advance liquidation of the damages which remain to be absorbed, in the event of proof of further and additional damages, within the total amount of damages liquidated by the courts).

    The courts may reduce a penalty which is grossly excessive.

    The existence of a penalty clause may not constitute a means for permitting a debtor to avoid his responsibilities in the sense that notwithstanding the presence of the penalty limiting the reimbursable damages, the debtor will be held responsible, without limitation, if s/he acts with willful misconduct or gross negligence.[12]

  - ♦ Sales to non-commercial purchasers (consumers)

    The rules set out above also apply to non-commercial purchasers (consumers). In addition, the Consumer Code (in compliance with EU Directive 93/13) provides that a penalty clause may be considered an unfair term if the amount of the penalty is overly excessive.

    If the penalty clause is considered unfair it becomes null and void while the contract itself remains unaffected.

(c) ***Applicable law and competent jurisdiction:*** *Are these clauses enforceable in your jurisdiction? What are the consequences if such clauses are not integrated in the agreement?*

- **Applicable law**
  - ♦ Sales to commercial purchasers

12 *Court of Cassation n° 6293/1996.*

Clauses by which the contracting parties choose the law applicable to an international sale contract are enforceable under Italian law[13].

Pursuant to article 2 of the Hague Convention of 15th June 1955 on the law applicable to international sales of goods[14], a sale shall be governed by the domestic law of the country designated by the contracting parties. Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract.

In case the parties do not choose the law applicable to the sale contract signed between themselves, the contract shall be governed by the domestic law of the country in which the seller has his/her habitual residence at the time when s/he receives the order. If the order is received by an establishment of the seller, the sale shall be governed by the domestic law of the country in which the establishment is situated. Nevertheless, a sale shall be governed by the domestic law of the country in which the purchaser has his/her habitual residence, or in which s/he has the establishment that has placed the order, if the order has been received in such country, whether by the seller or by his/her representative, agent or travelling rep[15].

Pursuant to article 4 of the Hague Convention 1955, in the absence of an express clause to the contrary, the domestic law of the country in which inspection of goods delivered pursuant to a sale is to take place shall apply in respect of the form in which, and the periods within which, the inspection should be carried out.

- Sales to non-commercial purchasers (consumers)

  Clauses by which the contracting parties choose the

13 *Article 57 Law n° 218/1995.*

14 *With reference to international sale contracts, Italy has signed the Hague Convention of 15th June 1955 on the law applicable to international sales of goods (Hague Convention 1955). The provisions of the Hague Convention 1955 apply in the Italian jurisdiction pursuant to article 57 of Italian law n° 218/ 1995 on the conflict of laws which provides that contractual obligations are governed by the Rome Convention on the law applicable to contractual obligations (Rome Convention 1980), unless derogated by other applicable and prevailing international conventions. The Hague Convention 1955 is considered to prevail over the Rome Convention 1980.*

15 *Article 3 of the Hague Convention 1955.*

law applicable to an international sale contract are enforceable under Italian law. However, there are a number of national and international provisions that limit the effect of the choice of a foreign law to the detriment of a consumer domiciled in Italy.

As a matter of fact, pursuant to article 5 of the Rome Convention 1980[16], a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him/her by the mandatory rules of the law of the country in which s/he has his/her habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him/her or by advertising, and s/he had taken in that country all the steps necessary on his/her part for the conclusion of the contract, or
- if the other party or his/her agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his/her order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

- **Competent jurisdiction**
  - ♦ Sales to commercial purchasers

    Clauses by which the contracting parties choose the competent jurisdiction to an international sale contract are enforceable under Italian law[17].

    In case the parties do not choose the court which has jurisdiction over disputes that might arise in connection

16 *The provisions of the Rome Convention 1980 apply in the Italian jurisdiction pursuant to article 57 of Italian Law n° 218/1995 on conflict of laws, which provides that contractual obligations are governed by the Rome Convention on the law applicable to contractual obligations (Rome Convention 1980), unless derogated by other applicable and prevailing international conventions. Even though the Hague Convention 1955 is considered to prevail over the Rome Convention 1980, the first does not expressly regulate sales to consumer, therefore it can be argued that the Rome Convention 1980 regulates sales to consumers on the basis of the principle of speciality.*

For the sake of clarity, with reference to point 1 above, pursuant to article 5 of The Hague Convention 1955, the same does not regulate the form of the contract.

17 *Article 4 Law n° 218/1995.*

with the international sale contract signed between themselves, jurisdiction must be determined pursuant to Council Regulation (EC) N° 44/2001[18], where the defendant is domiciled within the EU, and by article 3 of Italian Law n° 218/1995 where the defendant is not domiciled within the EU.

Therefore, when the defendant is domiciled within the EU, the defendant can be sued either in the courts where s/he is domiciled[19], or in the courts where, under contract, the goods were delivered or should have been delivered[20]. While, when the defendant is not domiciled within the EU, article 3 of Italian law n° 218/1995 provides that Italian courts have jurisdiction if:

– the defendant has a representative in Italy which holds a special or a general power of attorney if the defendant does not have his/her domicile o residence in Italy[21];
– in the cases provided by sections 2, 3 and 4 of title II of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968[22].

18 *Council Regulation (EC) N° 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*

19 *Article 2 of the Council Regulation (EC) N° 44/2001.*

20 *Article 5 of the Council Regulation (EC) N° 44/2001.*

21 *Article 77 of the Italian Civil Procedure Code.*

22 *We hereby reproduce an excerpt of articles 2, 3 and 4 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.*

Article 2

Subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state.

Persons who are not nationals of the state in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that state.

Article 3

Persons domiciled in a contracting state may be sued in the courts of another contracting state only by virtue of the rules set out in sections 2 to 6 of this Title.

Article 4

If the defendant is not domiciled in a contracting state, the jurisdiction of the courts of each contracting state shall, subject to the provisions of Article 16, be determined by the law of that state.

As against such a defendant, any person domiciled in a contracting state may,

- Sales to non-commercial purchasers (consumers)

  Clauses by which the contracting parties choose the competent jurisdiction to an international sale contract are enforceable under Italian law.

  In case the parties do not choose the court which has jurisdiction over disputes that might arise in connection with the international sale contract signed between themselves, jurisdiction must be determined pursuant to Council Regulation (EC) N° 44/2001[23], when the defendant is domiciled within the EU, and by article 3 of Italian Law n° 218/1995, when the defendant is not domiciled within the EU.

  Therefore, when the defendant is domiciled within the EU, the rules are set out in articles 15-17 of Council Regulation (EC) N° 44/2001[24].

whatever his/her nationality, avail him/herself in that state of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of article 3, in the same way as the nationals of that state.

23 *Council Regulation (EC) N° 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*

24 *We hereby reproduce an excerpt of articles 15-17 of Council Regulation (EC) N° 44/2001 of 22nd*

December 2000:

Jurisdiction over consumer contracts

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his/her trade or profession, jurisdiction shall be determined by this section, without prejudice to article 4 and point 5 of article 5, if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable in instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the member state of the consumers domicile or, by any means, directs such activities to that member state or to several states including that member state, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party which is not domiciled in the member state but which has a branch, agency or other establishment in one of the member states, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that state.

3. This section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 16

While, when the defendant is not domiciled within the EU, article 3 of Italian law n° 218/1995 provides that Italian courts have jurisdiction if:

– the defendant has a representative in Italy which holds a special or a general power of attorney if the defendant does not have his/her domicile or residence in Italy;

– in the cases provided by sections 2, 3 and 4 of title II of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

In addition, the clause containing the choice of a court other than that where the purchaser has his/her residence or domicile is considered an unfair term and, therefore, the rules outlined in point 3 above apply.

B. Commercial Intermediaries

3. What types of commercial intermediaries exist in your jurisdiction?

- **Franchising:** An agreement between two legally and economically independent parties, whereby one party (franchisor) grants to another party (franchisee), against consideration, a set of industrial or intellectual property rights related to trademarks, trade names, shop signs, utility models, industrial designs, copyright, know-how, patents,

1. *A consumer may bring proceedings against the other party to a contract either in the courts of the member state in which that party is domiciled or in the courts for the place where the consumer is domiciled.*

2. *Proceedings may be brought against a consumer by the other party to the contract only in the courts of the member state in which the consumer is domiciled.*

3. *This article shall not affect the right to bring a counter-claim in the court in which, in accordance with this section, the original claim is pending.*

Article 17

The provisions of this section may be departed from only by an agreement:

1. *which is entered into after the dispute has arisen; or*

2. *which allows the consumer to bring proceedings in courts other than those indicated in this section; 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.*

technical and commercial consulting and assistance, under which the franchisee joins a system (network) constituted by a number of franchisees operating in the territory, for the purpose of distributing specific goods and services. In order to set up a franchise network, the franchisor must have already tested its commercial formula on the market.

- **Distribution agreement:** An agreement between two legally and economically independent parties, whereby one party (supplier) agrees with another (distributor) to supply the latter with products or services for the purpose of resale. The distributor sells the products or services in its own name and on its own account.
- **Commercial agent:** An agreement between two legally and economically independent parties, whereby one party (principal) appoints another party (agent) to negotiate the sale or purchase of goods on behalf, and in the name, of the Principal.

4. *What legislation applies in your jurisdiction with regard to the above-mentioned types of distribution agreements?*

   - **Franchising:**
     - Franchising agreements are governed by Law 129/2004, as well as by Ministerial Decree n° 204, dated 2nd September 2005.
     - The franchisor must at all times behave towards the prospective franchisee with loyalty, fairness and good faith and must promptly provide the prospective franchisee with any data and information the latter deems necessary or useful for the purposes of signing the franchising agreement, except in the case of objectively confidential information or where such disclosure would violate the rights of a third party.
     - At least 30 days before the signing of a franchising agreement, the franchisor must provide the prospective franchisee with a complete copy of the agreement to be signed, together with the following annexes:
       1. principal information as to the franchisor, including corporate name and corporate assets and, if the prospective franchisee so requests, a copy of the franchisor's balance sheets for the last three years, or since the beginning of its activity should it have

been running for less than three years;

2. an indication of the trademarks used within the system, including details relating to their registration or filing, or to the license granted to the franchisor by the third party who owns the trademarks, or any documentation proving the effective use of the trademark in the system;
3. a brief description of the elements characterizing the activity of the franchising;
4. a list of the franchisees currently operating in the network, as well as a list of the franchisor's direct outlets;
5. an indication of the variation, year by year, of the number of franchisees, including their location during the last three years, or from the date of the setting up the franchisor's business should it be less than three years old;
6. a short description of any judicial or arbitral proceeding raised in relation to the franchising system against the franchisor and concluded during the last three years, whether initiated by franchisees, private parties or public authorities.

- The franchising agreement must be set down in writing; otherwise it is null and void.
- The franchising agreement must contain:

1. the amount of investments and other possible entry fees that the franchisee shall bear before beginning its activity;
2. the manner of calculating and paying royalties, as well as the possible indication of the minimum turnover to be achieved by the franchisee;
3. the existence of any exclusive territorial rights granted to the franchisee;
4. details of the know-how provided by the franchisor to the franchisee;
5. details of the services offered by the franchisor in terms of technical and commercial assistance, setting-up and furnishing of the outlet and training;

6. the conditions for the renewal, termination or assignment of the agreement.

- The franchising agreement may be signed for a fixed or for an indefinite term. If the, franchising agreement provides for an indefinite term, the franchisor must guarantee the franchisee a minimum term in order to allow the latter to depreciate/amortize its investments, which in all cases may not be less than three years.
- In case of disputes over the franchising agreement, the parties can agree that before taking the case to court, or to arbitration, they must seek conciliation through the Chamber of Commerce & Industry where the franchisee's registered office is located.

- **Distribution agreement:**
  - There is no specific legislation regarding distribution contracts, therefore the parties are free to enter into distribution contracts as they wish. Within the Italian Civil Code an attempt was made to identify distribution contracts as a particular type of supply contract. However, although some authors and jurisprudence consider a distribution contract to be a particular type of supply contract, majority opinion is in favor of classifying a distribution contract (commonly called «contratto di concessione di vendita») as an «atypical» contract, i.e. a contract that does not fall within any contract type expressly regulated by the law.

    At present, prevailing opinion considers a distribution contract as a «framework contract» («contratto quadro») whereby a distributor agrees to promote the sale of a supplier's products which it will purchase through separate contracts of sale.
  - Exclusivity

    According to Italian case law, a distributor's exclusivity cannot be implied from the contract itself. Therefore, if the parties enter into a distribution agreement without specifying that the distributor has exclusive rights, then the latter will, in principle, have no exclusivity.

    If it can be implied from the context that the parties' intention was to grant exclusivity to the distributor, then the latter may be considered as being exclusive even in

the absence of a specific clause. Thus, if a distributor has been granted a territory for which it is responsible as well as a de facto exclusivity, it would be dangerous for the supplier to assume that there is no exclusivity, and consequently that it could appoint others for the same territory.

In principle, the fact of granting exclusivity to the distributor should imply that the supplier must not sell to customers within the contractual territory while however remaining free to sell to customers outside the territory, even where it knows, or should know, that they intend to resell the goods within the distributor's territory.

- Obligation not to compete

  In principle the obligation not to market competing products cannot be implied from the distribution contract and must be expressly agreed between the parties.

  Consequently, the fact of having entered into a distribution agreement is not sufficient to imply that the distributor must avoid selling competing products. However, this does not exclude the possibility of a tacit (or oral) agreement, especially if there are several elements demonstrating that the parties actually wished the distributor not to deal with competing products.

- Obligations regarding the supply of information to the other party

  Since there are no legal rules governing distribution contracts, no specific obligations of this type exist.

- Termination notice (contract for an indefinite period).

  The Courts demand reasonable notice to be provided, applying by analogy article 1569 of the Civil Code on supply agreements or article 1725 on the contract of mandate, both of which make reference to an appropriate notice («congruo preavviso»). Thus, if the parties have not fixed the period of notice, the Court will fix an appropriate period: in the past three, four and six months have all been considered as appropriate.

  If the parties have fixed the period of notice in the

contract, Courts tend to respect their choice, even if such period is short. It has happened, for example, that a contractual period of notice of 15 days has been admitted.

- Goodwill compensation (indemnity)

  No goodwill compensation is foreseen under Italian law. If the contract is lawfully terminated the distributor has no right to indemnity, regardless of the importance of the goodwill created.

  Only in case of breach by the supplier (e.g. unjustified earlier termination) the distributor will be entitled to recover damages.

- **Commercial Agent:**
  - Rules on commercial agency agreements:
    1. ITALIAN CIVIL CODE: The main rules are contained in Articles 1742-1753 of the Italian Civil Code of 1942. These articles were amended in 1991 and 1999 in order to implement EC Directive 653/86. Further amendments were made in the years 1999 and 2000. General rules on contracts (Articles 1321 ss. of the Italian Civil Code) also apply.
    2. COLLECTIVE AGREEMENTS: A peculiar characteristic of the Italian system is the presence of collective agreements (Accordi Economici Collettivi, AEC) concluded between the organizations of principals and agents. There are, at present, four different collective agreements that apply on the basis of the category to which the principal belongs (AEC Industria - AEC Commercio - AEC Artigianato - AEC Confapi). In principle, collective agreements apply only where both parties belong to the associations which signed them. They also apply if incorporated by reference into the agreement. This means that collective agreements will not apply to contracts between a foreign principal and an Italian agent (or between a foreign agent and an Italian principal), unless expressly incorporated into such by reference.
  - Remuneration

A commercial agent is entitled to remuneration consisting of a fixed fee or commission. In the absence of any agreement, a commercial agent shall be entitled to the remuneration that is customarily allowed in the place where s/he carries out his/her activities.

A commercial agent shall be entitled to commission on transactions concluded during the period covered by the agency contract:

1. Where the transaction has been concluded as a result of his/her actions;
2. Where the transaction is concluded with a third party which s/he has previously acquired as a customer for transactions of the same kind;
3. Where s/he is entrusted with either a specific geographical area or group of customers and where the transaction has been entered into with a customer belonging to that area or group.

A commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated:

1. if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period of time after that contract terminated; the Collective Agreement states that commission shall be due only if the transaction is concluded not later than four months after termination, and provided that the commercial agent has informed the principal in detail as to such pending business at the time of termination of the agency contract.
2. if the order of the third party reached the principal or commercial agent before the agency contract terminated.

In the absence of contractual rules to the contrary, the agent's right to commission arises when the principal fulfills his/her performance or when s/he would have to perform pursuant to the sale contract signed with the customer (Article 1748 of the Italian Civil Code). Thus, unless the parties make a derogation to this rule (as

they normally do), the right to commission arises when the principal performs the sales contract, normally by delivering the goods. The parties are free to contractually postpone this term, but only to a point not later than the moment in which the buyer fulfills, or would have to perform, his/ her obligation. It is common practice to make use of this option and to provide within the contract that the right to commission only arises when the customer pays for the goods.

- Termination of the agreement

  If the agency agreement is concluded for an indefinite term, either party may terminate the same by providing notice.

  An agency agreement for a fixed period, which continues to be performed after its expiry, becomes an indefinite term agreement.

  The minimum termination notice is one month within the first year of duration of the agreement, two months during the second year, three months during the third year, four months during the fourth year, five months during the fifth year and six months during the sixth year or thereafter. Unless otherwise agreed, termination is effective at the end of the calendar year.

  The collective agreements of 2002 provide the following terms for termination by the principal: three months within the first three years of duration of the agreement, four months during the fourth year, five months during the fifth year and six months during the sixth year or thereafter (longer terms are foreseen for commercial agents who work exclusively for only one principal, as single-brand agents, the so-called «agenti monomandatari»).

  If it is the agent who terminates the agreement, then the term is three months (5 months for the single brand agent). If a party fails to respect the period of notice, compensation is due. As a general rule, the compensation payable is an amount equal to the monthly average of commission earned by the commercial agent in the previous year multiplied by the months of the period of notice.

- Goodwill compensation

  Italy has implemented the EC directive by choosing the «German» indemnity system. Article 1751 of the Italian Civil Code literally incorporates most of article 17.2 of the directive. Indemnity is due when the following conditions are met:

  1. the agent has brought new customers or has considerably increased business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and
  2. the payment of such indemnity is equitable having regard to all circumstances and in particular the commission lost by the agent on business with such customers.

  The indemnity is not due:

  1. where the principal terminates the contract for a breach by the agent of such importance that the relationship cannot continue, not even temporarily;
  2. where the agent terminates the contract, unless termination is justified by circumstances for which the principal is responsible or by circumstances regarding the agent, such as age or illness, under which s/he cannot be reasonably requested to continue his/her activity;
  3. where, by virtue of an agreement with the principal, the agent assigns his/her rights and duties under the agency agreement to a third party.

  The amount of the indemnity cannot exceed a sum equal to a yearly indemnity calculated on an average of the commission earned in the last five years.

  As to the calculation of the indemnity under Article 1751 of the Italian Civil Code, court-pronounced solutions relating directly to the application of this provision are not at all homogeneous.

  In some cases no indemnity at all has been granted considering that the agent had not given evidence of the development of new customers, limiting him/herself to show an increase of commission.

At the other extreme, there are cases where the maximum amount (one year commission on the average of the last five years) has been granted without an in-depth evaluation of the various circumstances.

Finally, in several cases a reduction of the maximum amount has been made (recognizing an indemnity ranging from 30% to 80% of the yearly average) taking into account a number of elements such as the importance of the new customers, the impact of the principal's trademark and advertising, the advantages for the principal, etc. Only in one case was an attempt made to use the system of calculation developed by German courts.

- Obligation not to compete

  According to Article 1743 of the Italian Civil Code, the agent cannot act, in the same area and for the same type of business, for competitors of the principal. This implies that even in the absence of a contractual provision prohibiting the agent to sell competing products, the law prevents him/her from doing so.

  However, the above rule is not mandatory. The parties are free to derogate from such provision permitting the agent to act for competitors.

  It is possible to make a post-contractual non-competition obligation agreement with the agent.

  However, in compliance with the EC Directive, the relevant clause shall be valid only to the extent that it is concluded in writing and relates to the same geographical area, customers and goods as the agency contract.

  The duration of the obligation cannot exceed a period of two years after termination of the contract and, for agents who perform their activity individually, or as a partnership, or as corporation with a sole partner, or as corporation of commercial agents, it must be remunerated by the payment of an indemnity.

  If the amount of the indemnity, or the method for its calculation, has not been agreed between the parties, the amount will be determined by the courts taking into account:

1. the average of the commission received during the course of the contract;
2. the reasons for termination of the contract;
3. the extension of the geographical area assigned to the agent;
4. the circumstance of being a single-brand agent.

Since the courts have wide discretionary power for determining the amount, it is highly recommended to expressly state in the contract the criteria for calculating indemnity.

PART II: BRANCH - OFFICE IN THE TARGET COUNTRY BUT NO LEGAL PERSON:

5. *What are in your jurisdiction the differences between starting up a branch and starting up a company (subsidiary)?*

A branch is not regarded as a separate legal entity from its parent company, whereas a subsidiary is. The obligations incurred through such branch can be therefore enforced on the assets of the foreign company, even if they are located abroad.

Conversely, as the subsidiary is a separate legal entity, its liability is limited to its own assets. The shareholders will therefore not be personally affected by the liabilities of the subsidiary beyond the amount of subscribed capital.

The financing of the branch may be carried out through a specific loan agreement with the parent company, whereas the starting up of a subsidiary, whether as a limited liability company ("SRL") or a joint stock company ("SPA"), requires a minimum capital to be paid in.

It may be advisable to consider opening a branch in Italy when the Italian operations are expected to incur losses during the initial year, which can be offset against profits earned by the foreign parent company from other activities.

6. *What formalities must be fulfilled for opening a branch?*

- **In the jurisdiction of the head office**

In order to register a branch in Italy, the following documents must be prepared in the jurisdiction of the head office:

- ♦ Corporate resolutions: The board of directors of the

head office must formally adopt resolutions deciding to open the branch office and appoint in Italy a legal representative for the purposes of managing the branch and representing the foreign parent company in dealings with third parties and in legal proceedings in connection with the activities of the branch. The resolution must also include the address in Italy where the branch will physically be located.

- ♦ a certified copy of the registration certificate of the foreign parent company within the foreign Companies' Register or at the Chamber of Commerce;
- ♦ a certified copy of the Article of Incorporation and By-Laws of the foreign parent company;

The above documents must be certified and legalized by means of the " Apostille" procedure provided for by the Hague Convention of October 5th, 1961. An Italian sworn translation is also required.

- **In Italy**

In order to register a branch in Italy, the following formalities must be performed.

The documents prepared in the jurisdiction of the head office must be translated into Italian by a certified translator and then deposited within the office of an Italian notary public, who shall in turn file the same documents with the competent Italian Companies Register.

While performing deposition formalities, a certified signature of the branch's representative must also be acquired.

In addition, a VAT and tax ID number must be requested no later than 30 days from the beginning of operations. At the same time, the representative must present the VAT office with a declaration as to the beginning of the activities, valid for VAT purposes.

7. *Why would you advise a foreign seller to set up a branch and not a company in your country, or vice versa?*

- **Advantages of a branch**

- ♦ A branch has no minimum capital requirements thus the foreign company is not obliged to pay in any start-up capital and the branch does not need to comply with requirements such as a board of directors or

shareholders' meetings.

- A branch benefits from the reputation of the head office.
- The head office can more easily allocate expenses to a branch.
- A branch is recommended when no double taxation treaty exists between Italy and the country of origin.

- **Disadvantages of a branch**
  - The head office is fully liable for the actions of the branch and any debts it may occur.
  - A branch's annual filings will reveal financial information about the foreign entity that the latter may prefer to keep confidential.
  - Since a branch may have limited assets within the Italian territory, local market players may be reluctant to enter into transactions with such entity.

8. *Is a branch authorized to act before the court, to engage people, ...?*

   Yes. A legal representative must be designated for the purposes of managing the branch and representing the company in dealings with third parties and in legal proceedings in connection with the activities of the branch.

9. *What is the liability of the legal representative of the branch?*

   The legal representative of a branch has the same liability towards third parties as the director of an Italian company.

10. Is there an automatic liability of the head office for the operations or acts of the branch?

    The head office of the foreign company is entirely liable for all undertakings of the branch office in Italy.

11. *Which language will the documents be in?*

    Branches are subject to Italian regulations on the use of languages and thus all documents required by law must be drafted in Italian.

12. *What are the accounting requirements for a branch?*

    A branch has the obligation to keep a separate set of accounts yet it is not required to submit a copy of these. The branch must also keep VAT records in accordance with Italian tax rules with

any profits it earns being subject to Italian corporate tax. As a permanent establishment, a branch must file its own corporate income tax return together with the annual accounts of the foreign parent company.

PART III: SUBSIDIARY - LEGAL PERSON (SEPARATE LEGAL LOCAL ENTITY) IN THE TARGET COUNTRY

13. *What are the advantages of establishing a subsidiary compared to establishing a branch?*

- Because the subsidiary and the parent company are separate legal entities, the parent company is not exposed to any liabilities of the subsidiary. In contrast, a foreign company remains fully liable for all the commitments of its branch. Obligations incurred through a branch can be enforced on the assets of the foreign company, even if they are situated abroad.
- A subsidiary offers a significant degree of flexibility from a structural and governance stand point.
- Although taxation rules are very similar for both, a subsidiary can benefit from several tax advantages:
  - The ability to repatriate or distribute net profits with little or no dividend withholding tax: in fact, subsidiaries in most cases qualify as "parent companies" under the EU Parent-Subsidiary Directive.
  - Subsidiaries can benefit from the advantages afforded under the double tax treaties concluded by Italy;
- Annual filing requirements are less stringent for subsidiaries than for branches. A branch's annual filing will reveal financial information about the foreign entity that it may prefer to keep confidential.
- In addition, it should be borne in mind that, in some cases, the registration of a branch may be compulsory when a foreign company wishes to participate in Italian public contract tenders.

14. *Can you present the main characteristics of the company forms existing under your jurisdiction in the following schedule:*

A foreign investor who desires to set up an enterprise in Italy may choose from among several types of business entities. The most popular forms of incorporation for foreign entities and

individuals entering the Italian market are:

- a Limited Liability Company (S.r.l.);
- a Corporation (SPA).

In theory, foreign investors could also choose to incorporate an Unlimited Partnership[25] (Società in Nome Collettivo) or a Limited Partnership[26] (Società in Accomandita Semplice) or a Partnership Limited by Shares[27] (Società in Accomandita per Azioni). However, in practice, said business entities are rarely used by foreign investors entering the Italian market. Below you will find the characteristics of the business entities mostly often used:

COMPANY FORM	SNC Società in Nome Collettivo (Partnership)	SAS Società in accomandita semplice (Limited Partnership)	SRL Società a Responsibilità Limitata (Limited Liability Company)	SRLS Società a Responsibilità Limitata Simplificata (Simplified Limited Liability Company)	SPA Società per Azioni (Joint-Stock Company)
Limited liability	NO	NO for general partners / YES for sleeping partners	YES	YES	YES
Free transferability of the shares	No	No	Yes	Yes to individuals under 35 years of age	Yes
Statutory Auditors	No	No	Yes, upon attainment of certain requirements	No, the shareholders can either opt for an external auditor or for a single auditor not forming a Board of Auditors	Yes

25 *An unlimited partnership is a partnership whose partners have unlimited liability for all the acts and transactions entered into by the partnership. AH or any of the partners may be appointed as directors of the partnership. Italian law generally restricts the transfer of a partner's interest in the unlimited partnership.*

26 *A limited partnership has a combination of limited and unlimited liability. There are two categories of partners: general partners who have unlimited liability and special partners who are liable only to the extent of their capital contributions to the partnership. Only general partners may be appointed as directors of the partnership.*

27 *The structure and characteristics of a partnership limited by shares are similar to those of a limited partnership, except that the capital contribution of the partners is represented by shares and generally, the law relating to joint-stock companies applies.*

Minimum capital	No Minimum	No Minimum	10,000.00 EUR (25% to be paid up front:100% in case of a single shareholder)	1.00 EUR to maximum of 10,000.00 EUR (100% to be paid up front)	120,000.00 EUR (25% to be paid up front: 100% in case of a single shareholder)
Number of founders	2 minimum	2 minimum	1 minimum	1 minimum	1 minimum
Notarial deed	No	No	Yes	No, however a public deed is necessary	Yes

15. *Which of the company forms is used most frequently in your jurisdiction?*

    Investors most frequently use SRL and Spa forms as business vehicles.

16. *Which company form is used most frequently in the case of small or family businesses?*

    Small or family businesses very often select an SRL as the ideal vehicle for doing business in Italy.

    In fact, the SRL is equivalent to a private limited company where capital participation is represented by quotas instead of shares.

    The provisions applicable to an SRL are simpler in comparison to those applicable to an SPA. Indeed, most of the rules applicable to an SRL are not compulsory and, therefore, can be derogated by the parties, consequently enhancing self-ruling and entrepreneurial skills.

    As opposed to an SPA, the participants in an Italian SRL may contribute to the capital of the company by means of their work or services, know-how, good-will and other personal rights, as long as the participants, at the time of the contribution, provide the company with an adequate insurance policy or bank guaranty covering the value of the contributed assets.

    The quota-holders have the greatest freedom in choosing the form of corporate governance which best meets their needs (sole director or board of directors). The sole director or the directors may be foreign citizens and do not necessarily need to be resident in Italy.

    Thanks to corporate reform, pursuant to article 2468 of the Italian Civil Code, the articles of association of an Italian SRL may validly state that profits and losses of the SRL can be shared and

distributed to quota-holders in accordance with a ratio that does not correspond to the percentage of ownership rights of each quota-holder. Thus, an Italian SRL owned 50 - 50 by two quota-holders could validly distribute profits and losses according to a 60 - 40 ratio, or indeed any other ratio.

Finally, as of 29 August 2012, it is possible to establish in Italy a Società a responsabilità limitata semplificata ("Simplified SRL"), which is a simplified limited liability company.

The Simplified SRL allows young entrepreneurs under the age of 35, who do not want to sustain costs or who have limited financial resources, to access the benefits of an SRL.

In fact, while an SRL must be established with a share capital of at least € 10,000.00 by either individuals or legal entities through a public deed drawn up by a Notary Public, a Simplified SRL is established:

i. with a share capital equal to at least € 1.00 but less than € 10,000, 100% of which must be paid up front;

ii. through the filing of the so-called "standard" Articles of Association (approved with Ministerial Decree n. 138/2012): as a result, the costs associated with the drafting of the Articles of Association as well as their subsequent registration with the Company Registry are eliminated: a registration duty equal to € 168.00 must however still be paid.

In light of the economic facilitations outlined above, the establishment of a Simplified SRL presents some limitations, namely:

– the rigidity of the "standard" Articles of Association, which must be mandatorily adopted;

– the characteristics of the shareholders, who must necessarily be individuals and must be under the age of 35;

– the impossibility of transferring shareholdings to individuals of 35 years and over.

17. *What are the main formalities a foreign company has to comply with in order to establish a subsidiary (filial/filiale)?*

The legal steps involved in establishing a subsidiary are similar for most types of company structure and usually consist of the following steps:

1. Name checking and name reservation;
2. Drafting of Company Articles and Memorandum of Association;

   The Articles and Memorandum of Association must include:

   i. the full personal or company name, date and place of birth or formation, domicile or registered office and citizenship details of each shareholder or quota-holder;

   ii. details of the municipality in which the company's registered office and any secondary offices, are situated;

   iii. the company purpose;

   iv. the amount of the subscribed and paid-up capital;

   v. the value attributed to assigned credits and goods;

   vi. company rules on functioning, administration, vii. representation and duration.
3. Pre-payment of 25% of the share capital;

   This usually involves the paying in of 25% of the share capital (100% in the case of a single person SRL or single person SPA), with an accumulating bank account opened in the name of the company to be established. In the case of an SRL, the payment may be replaced by an insurance policy or bank guarantee for the corresponding amount. The bank will issue a certificate, which must be delivered to the notary on the date of execution of the incorporation deed, confirming that the paid-up amount of the capital is in the bank account.
4. Appraisal report on contributions of credits or goods in kind;

   The shareholders or quota-holders may also make a contribution in kind to the company consisting of assets other than cash, provided that such assets have an economic value (e.g. real estate, shares in another company, a claim for the payment of an amount of money, etc.).
5. Execution of the Memorandum of Association in front of an Italian notary public;
6. Submission of deed of incorporation and of other relevant documents to the Companies' Register by the appointed notary public;
7. Registration of the company with the Companies' Register

and awarding of a company registration number;

8. Application for any government authorizations required for particular activities;
9. Registration with local VAT authority and application for a VAT identification number;
10. Opening of the operating bank accounts;
11. Execution of the cash capital contribution and the contribution in kind.

18. *What are the costs of establishing a subsidiary in your jurisdiction?*

Legal fees may result as being in the region of 2,000.00 EUR for an SRL and 3,500.00 EUR for an SPA, while notarial fees may amount to around 1,500.00 EUR with other registration fees being in the region of 600.00 EUR - 700.00 EUR.

19. *How long does it take to establish a subsidiary in Italy?*

A subsidiary can be fully established and operative within approximately one month. Generally speaking, the setting up of formalities takes around 15 days, with registration formalities requiring a further 15 days.

20. *Is there specific legislation with regard to the liabilities of the founders and the directors of the most used company form?*

Although the founders of an SRL or SPA constitute a separate legal person, in which the shareholders potential liability is normally limited to their subscription, the founders can be held personally and unlimitedly responsible if the same act on behalf of, and use the name of, the company during negotiations with third parties prior to the legal entity being fully registered within the Company Registry held by the competent local Chamber of Commerce.

The directors of an SRL or SPA can incur liabilities as follows.

- Directors can be held liable in the following circumstances:
  - ♦ Liability for the improper execution of their tasks as directors;
  - ♦ Liability for the violation of Italian corporate laws or the charter of the company.
- In addition, directors can be held liable for wrongful acts and/or for gross negligence.
- A director may also be held liable if s/he had a direct or

indirect personal interest in a decision and obtained an unjustified advantage to the detriment of the company as a result of that decision.

- Furthermore, Italian corporate laws provide that directors can be held personally and jointly liable if it can be established that a clearly wrongful act committed by them contributes to the bankruptcy of the company.

PART IV - MISCELLANEOUS

A. Real estate

A.1. Purchase of real estate

21. Who do you turn to in order to close a valid purchase agreement?

To draft and close a valid purchase agreement, you normally turn to an attorney and a notary public. The attorney is responsible for structuring the transaction from a legal and contractual point of view, while the notary must handle all the formalities connected with the execution of the notarial deed by way of which the property title and rights are transferred from the seller to the purchaser.

In practice, real estate purchase agreements may be executed either by private deed or by public instrument. In the former case, the lawyers of the parties draft the purchase contract and the seller and buyer sign the same before an Italian notary public, while in the latter case the contract of purchase is drafted by an Italian notary public and is signed before the notary himself.

It is customary, although not obligatory, for the seller and buyer to sign a preliminary contract known as a "contratto preliminare di compravendita" or "compromesso" which sets out essential details of the agreement, such as the purchase price, payment terms, financial sources and, most importantly, the purchase completion date.

The only obligatory contract that must in all cases be signed by both the buyer and seller in relation to the purchase of real estate in Italy is the "contratto di compravendita". Such contract may be signed either by the parties personally or by their duly appointed representatives holding the necessary power of attorney and is usually executed before a notary public.

Upon signature of the final real estate contract, the notary public

delivers both the seller and the buyer with a certified copy of the real estate contract. Starting from the execution date of the purchase contract, the buyer becomes the lawful owner of the real estate with respect to the seller.

The notary public is then required by law to register the original copy of the purchase contract with the Land Registry (Conservatoria dei Registri Immobiliari) and only from the date of said registration does the buyer become the lawful owner of the real estate with respect to any third parties.

As a final step, once the purchase has been completed, the seller must provide the buyer either with a certificate of habitability, in cases where the real estate in question has been purchased for residential purposes, or with a certificate confirming the purpose for which the property may be used, where the real estate has been purchased as commercial property.

22. *What are the costs related to the purchase agreement?*

A variety of fees (also called closing or completion costs) are payable when you buy a property in Italy. These vary considerably according to the purchase price, whether the property is new or old, whether the purchaser is buying via an agent or privately, and whether it has employed a lawyer or other professionals. Most property fees are based on the 'declared' value of a property, which is usually less than the actual purchase price or its 'market' value.

The fees associated with buying property in Italy may include registration tax, land registry tax, value added tax (VAT), notary's and estate agent's fees, and mortgage completion costs, and will range from around 9 to 15 percent for a non-resident (the average being around 13 percent), although they can be as high as 20 percent for luxury properties. Before signing a preliminary contract, it is advisable to check exactly what fees are payable and have them confirmed in writing.

However since January 2006, in respect to residential properties only, the buyer (who must not be a company) has the option of choosing to pay the above taxes on the cadastral value rather than on the actual purchase price. This allows him/her to save approximately half the previously payable costs.

- Registration Tax

  Registration tax (imposta di registro) is the main tax on property and is levied at between 0 and 10 per cent of the

declared or official value (rendita catastale). The amount payable depends on whether the property constitutes the first and only, or the second home of the purchaser, whether it is a new home and whether the purchaser is resident, as per below:

- Buyers of new properties do not pay registration tax but are liable to pay VAT;
- On his/her first home, a purchaser is eligible for a reduced tax of 3 per cent. The property must be his/her principal home for residential use and be located in his/her present or future municipality of residence (or in the municipality where s/he has or plans to have his/her main place of business) and must not be classified as a 'luxury' home.
- This concession is theoretically available once only, although this is not always the case in practice.
- The registration tax for non-residents and those buying second homes is 7 percent, so purchasers planning to become resident in Italy are advised to obtain officially Italian residency before buying a home there. Registration tax is payable on completion.

- Land Registry Tax

  Land registry tax (imposta catastale) is payable on all property purchases and, as with registration tax, the amount payable depends on whether the property is a first and only home, whether it is a new home and whether the purchaser is already resident. First home resident buyers of new properties pay a fixed fee of € 168.00 whereas buyers of second homes and non-residents pay 1 percent of the declared price.

- Mortgage Fees

  There are fees associated with mortgages (spese istruttoria). All lenders charge an arrangement fee for setting up a loan, usually around 1 percent of the loan amount. There is also a mortgage tax (imposta ipotecaria) of € 168.00 for resident first-home buyers, set at 1 percent for other buyers, and a fee of 0.25 percent (imposta sostitutiva) payable to the notary (notaio) for registering the charge against the property at the registry (catasto).

Most lenders also impose an 'administration' fee of around 1 percent of the loan value with it being compulsory to take out insurance cover with the lender against fire, lightning strikes and gas explosions. The insurance is usually a one-off payment of 0.21 percent of the property value and valid for 20 years.

- Notary

  Notary fees will also be due and will vary according to the price of the real estate declared on the purchase contract, amounting to between one and one and a half percent of the price of the real estate declared in the purchase contract, plus VAT, if applicable.

- Real Estate Agent

  Furthermore, buyers making use of the services of a real estate agent will also be required to pay commission to the same, the rates of which range from one to three percent of the price of the real estate. As this rate is usually open to negotiation, buyers are recommended to agree on the relevant real estate agency rate at the very start.

23. *Is there in your jurisdiction legislation that can slow down the purchase process (e.g. environmental legislation requiring preliminary soil examinations)?*

    No, apart from some very specific cases of minor significance

A.2. Real estate rental

24. *Is there imperative law in your jurisdiction with regard to the rent of offices, industrial real estate or commercial real estate? Can you give a summary of the major stipulations of these regulations?*

    Italian rental and lease contracts are regulated by Articles 1571 -1614 of the Italian Civil Code, by Law n° 392 of 07/02/1978 and Article 11 of Law 359 of 08/08/1992, as modified by Law Decree 333 of 07/11/1992, with the latter establishing minimum terms and maximum rent charges, as well as rent adjustment limitations.

    The current legal provisions cover and regulate two main categories of immovable assets:

    - premises used for the purpose of dwelling, and

- premises used for purposes other than dwelling.

The minimum term for premises used for dwelling purposes is fixed at four (4) years. A landlord may only serve a disdetta - a registered letter of notice to be sent at least six months before contract expiry - to coincide with the end of the standard 4 year period.

Depending on the specific kind of lease contract entered into, the right of the landlord to terminate the contract may be subordinated to the existence of a just cause provided for by proper Italian laws governing lease agreements for dwelling purposes.

A tenant is instead always free to terminate the lease contract, provided that s/he sends the landlord a six month prior notice by registered letter with return receipt.

Failure to do so automatically renews the contract for another 4 years.

The minimum term for premises used for purposes other than dwelling is fixed at six (6) years, while lease contracts concerning hotels shall have a minimum term equal to (9) years. Also in this case, a landlord may only serve a disdetta - a registered letter of notice to be sent at least twelve (12) months before contract expiry - to coincide with the end of the standard 6 or 9 year period.

Failure to do so automatically renews the contract for another 6 or 9 years.

Tenants of properties leased for commercial use in sectors where there is contact with users or the general public, may, according to the nature of their activities, be entitled to goodwill indemnity (amounting to 18 months' rent) should the contract be terminated by the landlord for reasons other than default, notice of termination or termination by tenant, or due to tenant insolvency.

Tenants have right of first refusal on re-renting the property once the original rental contract terminates by reason of expiration.

Should ownership of the property be transferred, the new landlord will be held to respect the first refusal rights of an existing tenant where the same carries out activities in contact with the public, is not in default with payment and has not sent notice of termination.

25. *Are there any formalities to fulfill in order to enforce lease agreements towards third parties?*

    All rental contracts of more than 30 days in length must be registered within 30 days of their commencement and are subject to a proportional registration tax of 2% of annual rent, with a minimum of 67.00 EUR.

A.3. Environmental issues:

26. *For what types of activities is an environmental permit required?*

    Among others, activities aimed at handling, processing or disposing of waste and/or managing the water cycle of both fresh water supplies and waste water treatment, need permits and authorization.

    Italy generally relies on strict environmental regulations, which are called for in national policies but are defined and implemented mostly by regional and, to an extent, provincial governments. The country has been very aggressive in using police to enforce environmental laws.

27. *Can you describe briefly this procedure? How much time will this procedure normally take?*

A.4. Employment:

28. *Are there any specific regulations with regard to the outsourcing of employees?*

    - Preamble

      The field of employment legislation has been the object of wide reform with the approval of Law 276/2003 known as the "Biagi Reform". This is an extremely wide reform act that was designed to be gradually implemented, meaning that some of the institutions referred to and analyzed below may still be in the process of implementation, or subject to amendments or adjustments.

      Employment legislation was further reformed with Law n. 92/2012, which introduced flexible employment contracts, modified dismissal regulations and reformed the social security and unemployment benefit system.

      The most common types of employment contracts.

    - Employment for an indefinite period.

The type of relationship considered "normal" by law, and presumed to exist in the absence of a different and valid choice made by the parties, is that of an "employee for an indefinite period". With a view to protecting the worker, this contract, which is general and residual in nature, does not require any special form, although written forms are generally used for this type of contract.

- Fixed-term employment contract.

  In addition to employment for an indefinite period, the parties may opt for a fixed-term employment contract.

  For the application of this type of contract, technical, production or replacement reasons must exist. On expiry of the period, the relationship ends automatically, without the need for notice or formal notification.

- Project work.

Finally, the parties may also elect to enter into a project work type of employment contract.

Project work is characterized by:

- ♦ collaboration: it must relate to one or more specific projects or work programs, or phases thereof;
- ♦ collaborator's independence in performing work;
- ♦ necessary coordination with the client's organization;
- ♦ irrelevance of the time taken to provide the service;
- ♦ the contract period is, or may be, established.

The scope of the regulations exclude in particular, commercial agents and representatives, temporary employment, intellectual professions and members of the company's administrative and supervisory bodies.

- Aspects of civil law and social security.

  On making an appointment, the employer is subject to a series of measures.

  On commencing employment, insurance covering business risks must be arranged with the Istituto Nazionale Infortuni sul Lavoro [National Worker's Compensation Institute] (INAIL) and several compulsory registers must be signed. The employee also has to be registered with the Istituto Nazionale per la Previdenza Sociale [National Social Security

Institute] (INPS). The employer must open a social security account for the payment of contributions due for its employees and, at the time of appointment, the employer has to provide INAIL and the competent employment office with all the necessary information. In some cases, preventive measures exist.

29. *Applicable legislation according to the type of employment (differences between employment by a local company or by a head office for the local branch)*

    In principle no differences exist with regards to the labor law and social security applicable to employees employed by the head office for a local branch or by a subsidiary.

    - Labor Law

      The applicable labor law in cases containing cross-border elements (a foreign employer, a foreign employee, a foreign law choice...) is mainly regulated by the Convention on the law applicable to contractual obligations signed in Rome on 19 June1980.

      Parties can, under certain conditions, choose the applicable labor law, although this cannot deprive the employee of the protection given by the normally applicable law and does not, in given cases, prevent the application of the compulsory labor law of a certain third and involved country.

      When no choice has been made, the law of the country where the employee usually performs the labor is applied regardless of the fact that it concerns employment by a branch (with no separate corporate personality) or by a subsidiary (with a separate corporate personality). The normally applicable law will thus be the Italian labor law.

      When the law of the country where the employee usually performs labor cannot be determined, the law of the country of the establishment or branch of the employer is applied.

    - Social security

      The applicable social security system is in general regulated by the national law of each country.

      The Italian social security law is of public order and an employee is subject to Italian social security law when employed in Italy by an employer established/settled in Italy, or when the employer is established/settled abroad

and the employee is employed under a registered office or a permanent establishment in Italy.

In general international agreements (more specifically regulation 1408/71 - in the future to be replaced by regulation 883/2004), applicable to Italy and concerning social security, it is stipulated that the employee is subject to the law of the country s/he works in, even when the employee lives in a different country or when the employer or the registered office is established in another country.

An important exception however exists in the case of the posting ("detachering") of an employee who usually works in one country, to another country for a temporary period of a maximum of 12 months. This employee is, under certain conditions, allowed to remain subject to the social security of the original country of labor.

30. *Legal engagement and dismissal requirements and formalities*

An employer should always have a valid reason for withdrawing from the employment contract, as in the absence of such its withdrawal will be invalid. Free withdrawal may occur in marginal cases. Individual dismissal may take place for subjective reasons connected with the conduct of the employee, or objective situations, irrespective of whether or not s/he is at fault. Collective dismissal may depend solely on causes relating to the company, such as resizing or transformation of the business activities for economic or organizational reasons, and is subject to special trade union procedures. In all cases of termination of employment, the worker is entitled to severance pay (T.F.R.).

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EUROJURIS INTERNATIONAL BUSINESS GROUP:

who we are

Eurojuris International

Eurojuris was formed in the late 1980s with the objective of providing clients with access to legal advice and representation from local lawyers throughout Europe and worldwide.

Eurojuris is now the leading network of law firms in Europe and worldwide with over 600 member firms and approximately 5000 lawyers. In addition Eurojuris can, through its correspondent firms, provide access to local firms in many other countries throughout the world. Members and correspondents are always well established medium sized independent law firms satisfying the Eurojuris criteria.

Eurojuris aims to provide more than just a reliable directory of legal firms. A permanent headquarters with full time staff to manage the organisation was created in 1993 and its responsibilities include co-ordinating numerous national activities, publishing brochures, newsletters and guides, organizing meetings and congresses, promoting specialist groups and setting up an organisation to provide cohesion among different legal systems and business cultures.

The Eurojuris commitment to quality is paramount and is maintained by ensuring that management procedures and work methods are tailored to match the client needs and are dynamic and open to constant improvement. It is also essential that all Eurojuris International members understand and implement approved work methods and that regular internal and external control procedures are reviewed on a systematic basis.

Eurojuris International Business Group

The Eurojuris International Business Group (Eurojuris IBG) is one of a number of the Eurojuris practice groups. Eurojuris IBG is a proactive, business generating group that was formed to enable a small group of Eurojuris members to focus on the needs of business clients. Members of the Eurojuris IBG are experienced in their practice areas and leaders in the international legal and business community.

Eurojuris IBG members aim to provide a Partner level service to clients and, through close co-operation with European colleagues, to provide a consistent and seamless service.

Eurojuris IBG aims to offer a uniform presentation and mutual legal education schemes with common practices and to develop common services for the clients of member firms.

As more and more businesses find that improved communication and access opens the way to more international trade, the need for legal representation throughout a number of jurisdictions becomes essential. Eurojuris IBG provides access to expert local knowledge through a lawyer in the jurisdiction of the client's head office.

The members of Eurojuris IBG maintain close levels of co-operation and knowledge of each other's firms. This is achieved not only via the usual media of email, fax and telephone, but also through regular meetings, some of which take place in the offices of the member firms to enable members to understand the way in which they can better serve their client's needs.

The members of Eurojuris IBG fulfill very strict criteria: they are business minded, they work with business clients across Europe and overseas, they all work in the English language and have some knowledge of other European languages. Importantly they are equipped with the most up to date information technology systems and maintain substantial Professional Indemnity Insurance.

How to expand your business across borders

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