COUNTRY REPORT
ITALY

Franchising

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1. LEGAL SOURCES.

What are the rules governing commercial franchising agreements (if any) in your country?

The main statutory source governing franchising contracts is law n. 129 of May 6, 2004, entitled “Rules on the regulation of franchising” (hereafter law 129/2004 or the "law"). Such law mainly deals with pre-contractual disclosure obligations, but also provides rules concerning the contents of franchising contracts, like the requirement of the written form, the obligation to include certain clauses in the contract and a three years' minimum duration for contracts for a fixed term.

A decree of the Ministry of Industry (Decree 204 of 2 September 2005, hereafter Decree 204/2005 or "Decree") states a number of special rules on disclosure applicable to foreign franchisors who, before the date of signature of the franchise contract, have operated exclusively abroad.

General rules on contracts as well as case law may also apply, especially with respect to issues not dealt with in law 129/2004.

There are also rules established by the three main franchise associations, i.e. the Codes of Ethics respectively of (i) Associazione Italiana del Franchising (Assofranchising); (ii) the Italian Franchising Federation (Federazione Italiana del Franchising) of and (iii) Confimprese.

Finally, antitrust rules (infra, 6.1) as well as the rule on the abuse of economic dependence (infra, 6.2) should also be considered.

As far as case-law is concerned, so far there are not many decisions of the Su-

preme Court, but several judgements of lower Courts, which interpret the rules in a way that does not always conform to each other.

2. NOTION OF FRANCHISING CONTRACT.

2.1 General notion of franchise contracts.

Which agreements are normally qualified as franchising agreements in your country?

Franchising contracts are contracts between a franchisor and a franchisee who sells goods or services (normally at the retail level) through an outlet characterised by a common image of the network and by the signs (trade name, trademark etc.) of the franchisor, in accordance with specific prescriptions of the franchisor as to the manner in which the business is to be operated. In most cases the franchisor will also supply secret know-how regarding the management of the business and will require a financial compensation (entry fee, royalties) for his services; however, also contracts where these aspects are lacking are normally called franchising contracts. As regards franchising contracts for the sale of products, they will normally be limited to the sale of the franchisor's products, but there are exceptions (e.g. grocery franchising retail).

Contracts with franchisees producing or transforming goods who do not act at the retail level (industrial franchising) normally fall outside the notion of franchising accepted in the business world (but may be considered as franchising by academics).

2.2 Agreements which are covered by special rules on pre-contractual disclosure.

Which are the agreements to which special rules on pre-contractual disclosure (if any) apply?

Article 1(1) of Law 129/2004 on franchising defines the franchising contract as follows:

> «Commercial affiliation (franchising) is a contract, no matter how called, between two legally and economically independent legal subjects, whereby one party grants the other, for consideration, the availability of a package of industrial or intellectual property rights regarding trademarks, trade names, shop signs, utility models, industrial designs, copyright, know-how, patents, technical and commercial assistance and advice, and inserts the franchisee in a system consisting of several franchisees spread in the territory, in order to market certain goods or services.»

Article 3(3) lists a number of elements which must be expressly indicated in the contract, such as in particular, the specification of the know-how - which must be secret, substantial and identified, according to the definition in Article 1(3)(a) - and the method of calculation and payment of the royalties. It would therefore seem that a franchising contract, in order to be a valid franchise under the law in question, must include the supply of secret know-how and an obligation to pay royalties.

It is therefore reasonable to assume that franchising contracts which do not imply the supply of secret know-how and the payment of a consideration to the franchisor (like many networks mainly characterized by the uniform image of the outlets) are not franchising contracts falling under the law 129/2004. However, the Supreme Court in a recent decision (decision No. 11256 of 10/5/2018) affirmed that know-how is not an essential element of the franchise contract, since the definition of the franchise agreement provided by Art. 1 of Law 129/2004, mentions the know-how among other IP rights, which all may (or may not) be present in the specific contract. Moreover, in such decision the Supreme Court affirmed that, even where the know-how is provided in the specific franchise agreement, the requirements listed in its definition, under Article 1.3, a) of Law 129/2004 (i.e. the know-how needing to be "secret", "substantial" and "identi-

fied") , considering the application to all sectors of economic activities, must be evaluated in a flexible manner, depending on the complexity of the franchise network concerned and, therefore, on the more or less regulated business activity.

Article 2 of Law 129/2004 furthermore provides that the provisions on franchise contracts also apply to master franchise agreements (i.e. agreements whereby an undertaking grants another undertaking, legally and economically independent from the former, for direct or indirect consideration, the right to exploit a commercial franchise for the purpose of concluding franchise agreements with third parties) as well as to contracts «whereunder the franchisee sets up, in an area at his disposal, a space dedicated exclusively to the commercial activity referred to in paragraph 1 of Article 1» (corner franchising).

2.3 Distinctive criteria with respect to employment contracts.

According to the law of your country, in which cases a franchisee may be considered as an employee, submitted to labour law?

A franchisee may be qualified as an employee only in rather extreme cases where he has almost no freedom to organise his activity. The fact that he is submitted to a strict control in order to warrant that he complies with the prescriptions given by the franchisor in order to warrant the uniformity of the network will not imply a lack of autonomy.

To the best of our knowledge there is only one case in which an Italian lower Court regarded the franchisee's employees as franchisor's employees, considering the franchisor and the franchisee (both companies) as one legal entity: in the case at issue[1], the franchisor had a very intrusive attitude in managing the franchisee's employees, by fixing their working times, work shifts and schedules, drafting letters of complaint and dismissal etc[2].

2.4 Distinctive criteria with respect to distributorship contracts.

According to the law of your country, how are franchising contract distinguished from distributorship contracts?

A possible risk of confusion mainly arises with respect to distributors selling at the retail level (as, for instance, car distributors), although the distributorship contract will normally lack certain characteristics (common image, provision of commercial know-how), etc.. There is one case where a Court has qualified the contract with a car distributor as a franchising contract[3], on the basis of the very close integration between the distributor and the supplier.

Of course, in the context of the much stricter definition of franchising contained in the law 129/2004, many contracts (like those for the sale of products in uniform outlets bearing the supplier's trade symbols, but without transfer of know-how and payment of royalties) which would normally be considered franchising contracts, will not fall under the legal notion of franchising and will be qualified as mere distribution contracts[4]. However, the recent decision of the Supreme Court mentioned in the above paragraph 2.2 (decision No. 11256 of 10/5/2018) shall be considered in this respect.

2.5 Possible reference to other contracts with respect to the sale of goods (for distribution franchising contracts).

Is it possible to include in the franchising contract rules whereby the fran-

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1 Trib. Milano, 25 June 2005, in *Riv. Giur. Lav.,* 2006, II, 97.

2 As an example in the opposite sense, see Trib. Pescara, 16 May, 2013.

3 Tribunale Crema, 23 November 1994, *Ford Italiana S.p.A.* v. *Campopiano,* in *I Contratti,* 1996, 52.

4 On the distinction between distribution and franchising, see App. Roma, 2 February 2006, *R.* v. *F.,* in *http://www.leggiditalia.it;* Trib. Isernia, 12 April 2006, *C.&C. di Cuccovia Nicola e Ciccone Paris* v. *ELCOM Elettrocommerciale*, in *Giur. Merito,* 2006, 74.

chisor puts the contractual products (which remain his property until they are sold to the end user) at the franchisee's disposal, and the franchisee sells the goods for the account of the franchisor (like a commission agent)? If yes, does this modify the nature of the franchising agreement?

In Italy solutions of this type are possible, and even advisable where the franchisor wishes to retain the property of the goods stored at the franchisee's premises.[5] In this case the franchisee will act, with respect to the supply of the goods to his customers as a commission agent or under a "contratto estimatorio".

In principle, this should not change the nature of the franchising contract: if, in the normal case of a franchisee acting as reseller, this does not modify the nature of the franchising contract, there is no reason why the answer should be different when he acts (only with respect to the sale of the goods) as a commission agent.

And since no protective rules apply to commission agents, there should be no risk of application of mandatory rules provided for commercial agents.[6]

A further problem to be considered in this context is whether the franchisor is entitled to impose the resale price when the franchisee is acting as a commission agent, which issue is analysed in the antitrust report.

3. PRE-CONTRACTUAL DISCLOSURE OBLIGATIONS.

3.1 Rules on disclosure in general.

Which rules govern pre-contractual disclosure obligations in your country?

In Italy pre-contractual disclosure is required under Law 129/2004 for the contracts falling under the definition of Article 1(1) of such law (see above, 2.2). Such information is listed in Article 4 and, as regards information to be included in the franchise contract, in Article 3(3).

In the past (before the law of 2004) the general rule on pre-contractual responsibility (Article 1337 civil code) has been invoked in some cases (*infra,* § 3.2).

There are also rules established by franchise associations: see, the Codes of Ethics of Assofranchising, Federfranchising and Confimprese.

3.2 The general rules on pre-contractual liability.

Which disclosure obligations arise in your country out of general rules on pre-contractual liability (if any)?

As in the context of any contract, the franchisor must act in good faith during contract negotiations. Article 1337 civil code states that the parties must behave in good faith during the negotiation and formation of the contract.

In this context there are several decisions of Italian lower Courts concerning lack or incorrect disclosure during negotiations, violation of the general principle of good faith and fair dealing during negotiations, withdrawal from contract negotiations as well as franchisees' claims for profits allegedly "guaranteed" by the franchisor during negotiations.

Although traditionally pre-contractual liability has always been regarded as an extra-contractual liability (with a full burden of prove on the damaged party and a 5 years' limitation of action's period), more recently some lower Courts and even the Supreme Court (although not with specific reference to a franchise relation-

[5] In fact, such clauses are commonly used in Italy.

[6] The problem would exist, of course, should the franchisee act as an agent, selling the franchisor's products in the name and on behalf of the latter.

ship) started regarding pre-contractual negotiations as a "special relationship" in which a more close relation is established between the parties (involving disclosure obligations, good faith etc.), than the typical situations giving rise to extra-contractual responsibility. Following this new approach, the liability is no longer considered extra-contractual, but a special type of contractual liability, where the damaged party is required to provide evidence of the violation of good faith, the suffered damage and the causation link between the illicit behaviour of the other party and the damage; however, it has no longer the obligation to prove the subjective element (fraud/negligence) of the damaging party and the limitation of action's period is of 10 years[7].

3.3 The rules contained in the specific statute (if any) on disclosure.

Which information is to be provided to the prospective franchisee before signing the contract?

According to Article 4 of the law 129/2004, at least thirty days before signing a franchise contract, the franchisor must provide the prospective franchisee with a **full text of the contract** to be signed, together with **some further information listed in such Article.** It should be noted that the law includes in the list of issues which must compulsorily be mentioned in the franchise contract itself some typically pre-contractual information (like, for example, the information required under Article 3(3)(a): «the amount of the investment and possible entrance fees to be incurred by the franchisee prior to commencing the activity»).

We will first deal with the information to be given in the annexes accompanying the draft franchise contract and thereafter with the information which must be included in the text of the contract itself.

3.3.1 Information to be included in the Annexes listed in Article 4.

The Annexes listed hereafter must be provided to the prospective franchisee[8], together with the full text of the contract to be signed, at least thirty days before signing the contract.

(a) main information concerning the franchisor, including the company name and registered capital and, at the request of the prospective franchisee, a copy of its balance sheet for the last three years or from the start–up of its business, if less than three years;

(b) the indication of the trademarks used in the system, specifying the terms of their registration or application, or of the license granted to the franchisor by any third party that may be the owner thereof, or documentation proving the actual use of the trademark;

It is not clear why the franchisor should supply this information also with respect to activities carried out outside Italy, as implied by Article 4(2), which says that the disclosure may be limited to Italy only for annexes d), e) and f). In any case, if the franchisor is a company incorporated in Italy (although controlled by a foreign company), one might argue that «the trademarks used in the system» are only those relating to Italy (except for the case where the franchisor previously operated exclusively abroad: *infra,* § 3.3.2).

(c) a concise description of the elements characterizing the activity which is the subject matter of the franchise;

(d) a list of the franchisees currently operating in the system, and of the outlets directly run by the franchisor;

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[7] See Trib. Milano n. 11862/2018 of 26/11/2018; Cass. No. 14188 of 12/7/2016. However, there are other decisions even of the Court of Cassation in the opposite sense.

[8] Article 4 states that the franchisor may refrain from providing information which is covered by objective and specific confidentiality requirements, but that he must in such case quote it in the contract. It is not at all clear what the provision means, i.e. which information might be considered as confidential and how the missing information should be quoted in the contract.

It is not expressly stated whether the addresses of the franchisees should be included. However, since the following annex regarding the changes of franchisees requires the indication of their location, it seems reasonable to include the same information here.

(e) an indication of the change, year by year, in the number of franchisees with their respective location in the last three years or from the beginning of the activity of the franchisor, if less than three years;

(f) a summary of any court or arbitration proceeding brought against the franchisor and ended in the last three years, related to the franchise system and commenced either by any franchisee or private third parties or public authority, in compliance with the Italian regulations on privacy currently in force.

This information is apparently limited to proceedings brought against the franchisor and should not include proceedings brought by the franchisor against a franchisee (while a different rule applies for franchisors who did not previously operate in Italy: see § 3.3.2.) It also regards only proceedings which are concluded, which seems to imply that only final judgments (not subject to appeal) must be included.

3.3.2 Special rules for foreign franchisors.

According to Article 4(2):

(a) the franchisor may supply, with respect to the annexes specified in the letters d), e), and f) of the first paragraph, only the information regarding the activity carried out in Italy, which implies that he must supply, with respect to the annexes a), b) and c) also the information regarding its operations outside Italy.

(b) the franchisor who previously operated exclusively abroad must supply the information regarding the annexes d), e), and f) in accordance with the special prescriptions contained in Decree 204/2005 which implements Article 4(2) of the law.

On the basis of the above rules a distinction must be made between foreign franchisors who already operate in Italy and foreign franchisors who are entering for the first time the Italian market.

As regards the franchisors who are already established on the Italian market, it is not clear whether the obligation to extend the information of annexes a), b) and c) also to the foreign markets only refers to «foreign» franchisors or also includes «Italian» franchisors owned (or controlled) by a foreign franchisor. In principle it would seem that an Italian subsidiary of a foreign franchisor, already established on the Italian market should only give the information relating to such market. In fact, as regards Article 4(1)(a) and (c), the information regarding the franchisor and the activity which is the subject matter of the franchise, apparently regards only the franchisor (i.e. the subsidiary) and not the company which controls the subsidiary, while the activity (of the franchisor) should be the activity carried out in Italy. And, as regards 4(1)(b), it is reasonable to argue that the trademarks used in the system are those used in Italy, since it would make little sense to oblige the franchisor (even where he is a foreign company) to give an extensive information about its trademarks all around the world.

As regards the franchisors who are entering for the first time the Italian market, the special rules provided by the Decree 204/2005 will certainly apply to foreign franchisors who conclude contracts with Italian franchisees[9]. The above rules should in principle also apply to an Italian subsidiary of a foreign franchisor and, probably, also to a sub-franchisor under a master franchise. Of course, one could object that these franchisors never operated abroad, but in this case they would be unable to respect the provision of Article 3(2), according to which the franchisor must have tested its business concept on the market. Considering all

[9] Except where the contract is submitted to a foreign law, so excluding the application of Italian law: see *infra,* § 3.5.

this, it seems reasonable to apply also in this case the rules on franchisors who previously operated exclusively abroad.

The special rules contained in Decree 204/2005 are the following.

Whereas the obligations set out in letters a), b) and c) of Article 4, paragraph 1, of law No. 129 of May 6, 2004 remain unaffected, the information to be provided under the letters d), e), and f), is the following:

- As regards the list of the franchisees currently operating in the system and of the outlets directly run by the franchisor, the foreign franchisor must provide the prospective franchisee with a numerical list of both the franchisees operating in the franchisor's system and the direct points of sale, selected by countries. However, upon the prospective franchisee's request, the franchisor must provide him with a list with the location and contact details of at least twenty existing franchisees and, should the total amount of the franchisees be less than such number, the franchisor must provide the whole list.

  This means that the franchisor may simply indicate for each country the number of franchisees and direct points of sale, and, only upon request of the franchisee, a more detailed information about the franchisees.

- The Decree further states that the lists of franchisees mentioned above can also be transmitted in electronic format or published on the franchisor's website.

- As regards the change in the number of franchisees, the franchisor must provide the indication of the changes, year by year, selected by countries, of the number of franchisees with the relevant locations in the last three years or from the beginning of the activity, in case it commenced less than three years before.

- As regards the judicial proceedings, the foreign franchisor must provide the prospective franchisee with a brief description of any judicial proceeding, defined with a final judgement in the three years preceding the term of paragraph 1, as well as of any arbitration proceeding with respect to which, in the same period, a final decision has been issued. The description of the judicial and arbitration proceedings, with respect to the franchising system, must include details of the parties, the authority involved, the claims and the decision ("dispositivo").

  When comparing this provision with the general rule of Article 4(1)(f) it appears that the foreign franchisor must mention all judicial and arbitral proceedings, and not only those brought against the franchisor.

Finally, the Decree provides that the franchisor, if the franchisee so demands, must provide the information concerning the franchise agreement and the relevant annexes in Italian (Article 3(1)) and that the prospective franchisee must use the information received according to Article 2 of the present decree only for the purpose of evaluating the offer to join the franchise system (Article 3(2)).

3.3.3 Information to be included in the contract.

In order to respect the disclosure rules the franchisor must provide the prospective franchisee, thirty days before signing the contract, together with the disclosure annexes, the full text of the contract which must mandatorily contain the indications listed in Article 3(4).

Article 3(4) distinguishes between indications that must in any case be included in the contract and indications that, where agreed between the parties, must be included in the text of the contract.

The indications which must be included in the contract[10] are the following:

[10] It should also be possible to include them in an exhibit or annex to the contract, possibly stating expressly that the annexes are part of the contract, but they should possibly be distinguished from the

1. The amount of the investment and possible entry expenses[11] to be incurred by the franchisee prior to commencing the activity (Article 3(4)(a)).

   It is not clear why this indication must be in the contract and not in the disclosure annexes. In any, case, in order to avoid any possible objections, parties are advised to put this information in the contract itself (or in an exhibit to the contract, to be distinguished from the annexes required by Article 4). It is likely that the investment which must be indicated only covers the expenses that the franchisee is bound to sustain for the performance of the agreement and not possible other expenses (like leasing or purchasing the sales outlet or purchasing a license).

2. The method of calculation and payment of the royalties, as well as an indication, if any, of a minimum encashment to be attained by the franchisee (Article 3(4)(b)).

   It is discussed whether this means that a franchising contract without an obligation to pay royalties is not a franchising contract falling under the law 129/2004, but simply a distribution contract. Some authors say that there must be a payment by the franchisee, which need not be a royalty. Others would even admit an indirect consideration included in the price of the products paid by the franchisee. Actually, considering the clear text of the law and the fact that the royalty is a defined term, it seems preferable not to include in the notion of franchising the contracts where the franchisee only pays a price for the products he resells.

3. The scope of the territorial exclusivity, if any, with respect to other franchisees or to channels and sales units directly managed by the franchisor.

4. The specification of the know-how provided by the franchisor to the franchisee (Article 3(4)(d)).

5. Possible criteria of acknowledgement of the contribution of know-how by the franchisee.

6. The characteristics of the services offered by the franchisor in terms of technical and commercial assistance, planning and outfitting, training (Article 3(4)(f)).

7. The conditions for renewal, termination, or possible assignment of the contract.

3.4 Consequences of the non-respect of the rules regarding pre-contractual disclosure.

What are the consequences of the non-observance of the rules on pre-contractual disclosure?

Law 129/2004 does not provide in general terms a sanction for the case where the rules on disclosure have not been observed. Article 8 of the law only provides that:

> If a party has provided false information, the other party may request the annulment of the contract as per Article 1439 of the Italian civil code, and claim damages, if due.

Actually, reference to Article 1439 c.c. (annulment in case of fraud) is confusing: in fact such provision would be applicable in any case, since it applies to contracts in general. Such reference could therefore be interpreted in the sense that, in case of false pre-contractual information in the framework of a franchise agreement, the prerequisites of Article 1439 c.c. (and in particular the existence of fraud which has induced the other party to an agreement which it would not have concluded otherwise) are not necessary. Some academics are in favour of such interpretation, but there is no uniform position in Italian case-law.

For instance, Trib. Venezia, 28 May 2009, *Affiliato* v. *H.T.M., Baiocco Cristiano*

"disclosure annexes" of Article 4. Of course, what matters is that the information is given 30 days before signing the contract, but it is better in any case to strictly follow the law (by putting in the contract what should be in the contract) in order to avoid any formalistic objection in the future.

[11] It should be noted that the term «entry expenses» (spese d'ingresso) is different from the term defined in Article 1. paragraph 3 (b), «entry fee» (diritto d'ingresso).

*and Baiocco Massimo (*in www.avvocatoandreani.it) declared the annulment of the contract, by applying Article 8 of law 129/2004, without having verified the existence of the franchisor's fraud without which the franchisee would not have concluded the contract. By way of contrast, in a case decided by the Tribunal of Benevento on 6 February 2008 (in *http://www.leggiditaliaprofessionale.it)* the franchisee brought an action against the franchisor stating that the latter had induced him to conclude the contract, by providing him with information which then resulted to be not true; the Court rejected the claim, because the claimant had not been able to prove the existence of the fraudulent conduct of the franchisor.

In addition to Article 8, the general rules on good faith in pre-contractual negotiations, and particularly Article 1337 of the civil code, will apply. It is therefore likely that the non-disclosure of information which are to be disclosed by law will amount to a violation of the good faith obligation. However, it is not certain whether the good faith obligation also applies in case a contract is concluded after the negotiation[12].

Actually, the most effective remedy would be to invoke the nullity of the contract because of the absence of one of the essential elements listed in Article 3(4). In fact, since the law requires the written form *ad substantiam,* the nullity does not only apply to contracts which are not in writing but also to contracts which do not contain (in writing) all the essential elements. Italian case law has not taken a clear position in this respect[13]: Therefore, since Article 3(4) together with the requirement of the written form, appears to be the most effective means to protect the franchisee in case of insufficient information, it is in any case advisable to make sure that the prescriptions of Article 3(4) are observed with the utmost care[14].

In one case, a lower Court (Court of Trani, 05/02/2018) regarded the lack of disclosure by the franchisor as a non fulfilment of the agreement.

Finally, some recent decisions of Italian law Courts have stated that the lack of respect of the rules on disclosure cannot have serious consequences (such as for instance the nullity of the contract), considering that the law does not even provide a fine for the relevant violation (see Trib. Reggio Emilia of 17/01/2018).

3.5 Choice of law and mandatory rules on disclosure.

Are the rules on disclosure to be observed in any case, even if the parties have chosen to submit the franchising contract to a law other than the law of your country?

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12 In fact, there is some case law according to which Article 1337 c.c. only applies when the parties have not reached an agreement; however, more recently, case law started to apply such provision also to cases in which the contract was thereafter concluded (e.g. Cass. 16 October 1998, No. 10249, *De Petris* v. *Enel*, in *Giust. Civ. Mass.,* 1998, 2095; see also Trib. Roma, 5 August 2008, No. 16509 quoted above).

13 There are some decisions which have declared the nullity of the franchise contract, due to the absence of an essential element of the contract, i.e. the know-how (see Trib. Bologna, 10/6/2015; Trib. Milano 29/1/2019, No. 871;). The lack of a sufficiently identified know-how in a franchising agreement was challenged in one case by a lower Court; however, when the case was brought before the Supreme Court, the latter declared that it could not decide on this aspect, because the claimant had not introduced in the proceedings before the Court of Cassation, the text of the franchise contract, in which the know-how was described (Cass., 21-12-2017, n. 30671). In another decision of 14/5/2012 (Trib. Trento, 14/5/2012, *T.L.* v. *Universal s.r.l.*) the Tribunal of Trento, rejected a claim of nullity of the franchise contract for lack of know-how, stating that the franchisee had not sufficiently proved it (but it decided for the judicial termination of the contract for non-fulfilment of the franchisor's obligation and condemned the franchisor to damages). Also Trib. Firenze of 16/1/2019 and Trib. Monza of 26/06/2018 evaluated the existence of the relevant elements of the know-how and confirmed the validity of the contract.

14 See, for a case in which the franchisor's behaviour has been regarded as a criminal fraud, Cass. Pen., sez. II, 19 February 2009, No. 12771, not published.

At first sight it would seem that the rules on disclosure provided by Law 129/2004 and Decree 204/2005 should be respected in any case, irrespective of the law governing the franchising contract, considering their purpose to protect franchisees established in Italy against possible insufficient information from franchisors, wherever established.

However, this conclusion seems to be contradicted by Article 1(2) of Decree 204/2005 which states that «the scope of application of the present regulation is limited to the cases in which, on the ground of the international private law rules, the contract is regulated by Italian law».

According to this provision (which applies only to foreign franchisor who are entering the Italian market for the first time) the franchising contract can be governed by a law other than Italian law and, in this case the provisions of the decree are not applicable. On this basis it has been argued[15] that the provisions of Law 129/2004 are not internationally mandatory rules and that they may be avoided by submitting the contract to a foreign law.

Considering the purpose of the law (in fact, by following such interpretation, Italian franchisees appointed by foreign franchisors may be discriminated against franchisees appointed by Italian franchisees) and the fact that a decree cannot go against the law, the above conclusion cannot be considered as certain. Therefore, even when parties decide to submit the contract to a foreign law, it is advisable that they also comply with the Italian disclosure rules.

4. OBLIGATION OF THE FRANCHISOR TO TEST THE BUSINESS FORMULA.

Is it necessary that the franchising formula has been tested before proposing it to prospective franchisees?

Article 3(2) of law 129/2004 states that:

> In order to establish a franchising network, the franchisor must have tested its business concept (literally "commercial formula") on the market.

The provision does not specify how and where the testing has to be made, neither does it state which consequences arise in case of non-observance.

In case of a foreign franchisor entering the Italian market for the first time, the experience made abroad may be considered (and this is confirmed by the fact that the franchisor will have to provide information about franchisees outside Italy: see above, § 3.3.2). It is likely that the same will apply where the franchisor is not a foreign company but an Italian subsidiary of a foreign franchisor or a sub-franchisor under a master franchise.

The law does not say if the franchisor can conclude franchise contracts during the testing period; it would seem that he can do so, provided he informs the prospective franchisee that he is still testing the system.

5. FORMALITIES REGARDING THE FRANCHISING CONTRACT AND ITS MODIFICATIONS.

5.1 Formalities required by law.

Is any formality (written form, notarisation, registration, etc.) required for the validity of a franchise contract in your country? If yes, what are the consequences of the non observance of the above formalities?

Written form.

[15] VENEZIA, *Il completamento della normativa italiana ed i contratti di franchising,* in *I Contratti,* 2006, 995 et seq.

Article 3(1) of law 129/2004 states that the franchise contract must be in writing and that it will otherwise be deemed null and void.

On the basis of principles generally applicable to contracts requiring the written form *ad substantiam,* it would seem that a written contract which does not contain all the essential elements required by law (such as those mentioned above, in § 3.3.3), should also be considered null and void.

It would also seem that any modification of the contract clauses can be effective only if made in writing.

The above principles should not apply to franchising contract which are outside the narrow definition of Article 1(1) of law 129/2004.

5.2 Contractual requirement of written form for modifications.

In case the contract requires the use of writing for possible future amendments, what are the consequences of non observance?

If the franchising contract requires the written form for subsequent modifications, oral modifications of the contract will be in principle considered as not valid. There are exceptions to this principle, in the sense that courts may recognize the existence of a tacit acceptance when the behaviour of the other party clearly implies acceptance of the proposed modification. However, if the contract falls under the definition of law 129/2004, modifications made orally will anyhow be ineffective.

5.3 Specific acceptance of onerous conditions contained in non-negotiated contracts.

Article 1341 c.c. states that when the contract has been prepared by one party and its contents have not been actually negotiated, possible "onerous clauses" («clausole vessatorie») are invalid, unless specifically approved in writing. According to Italian case law specific approval may be given through a second signature under a list indicating the "onerous" clauses contained in the contract.

It should be reminded that these principles apply only to standard contracts prepared by one of the parties which are not negotiated[16].

Since the specific acceptance is a form requirement, Italian law will govern this issue only if the contract is concluded in Italy and Italian law is applicable to the substance (see § 3.4).

Where this is the case, it would be appropriate for the franchisor to include a clause conforming to Article 1341 c.c., like the following:

> The Franchisee declares that he approves specifically, with reference to article 1341 of the civil code, the following clauses of this contract:
>
> Art. Y - Earlier contract termination
> Art. Z - Dispute resolution
> .....

In a case of a low Court[17] it has been decided that a clause which entitles both parties to terminate the contract by giving a period of notice is not an "onerous clause"; if contained in a standard contract made by one of the parties, such clause is valid without needing to be specifically accepted. According to another

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16 For a case in which the Court did not apply Article 1341 c.c. on the basis of the evidence given in Court of the circumstance that the contract had been negotiated, see Cass., ord. No. 23208 of 11 October 2013, *Speedy Food Music Soc. Coop.* c. *Itaka Network s.r.l.,* in *http://www.leggiditaliaprofessionale.it.*

17 Trib. Bari, 8 April 2005, *Geox* v. *Gruppo espansione,* in *Danno e responsabilità,* 2005, 983.

decision[18], also the exclusivity clause and the obligation not to compete are not "onerous clauses". The liquidated damages clause is also not considered by Italian case law as an onerous clause[19]. By way of contrast, the post contractual non compete obligation and the choice of forum clause in a franchise contract have been considered as "onerous clauses"[20].

5.4 Form requirements and applicable law.

How is the law governing the form of the franchising contract to be determined under the law of your country?

Under the Rome I Regulation form requirements are evaluated with respect to the most flexible law of those implied. In particular, Article 11 of the Regulation says:

> **"1.** A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.
>
> **2.** A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time."

So, if the contract is made between parties who, or whose agents, are in different countries when concluding the contract, the *lex causae* and the law of the countries where the parties are domiciled will be considered; if the contract is made between parties who, or whose agents, are in the same country at the time of conclusion of the contract, the law of the place of conclusion and the *lex causae* will be considered. This means that in most cases (except when the contract is concluded in Italy and submitted to Italian law) more flexible rules as to form contained in other laws will prevail over Article 3(1) of law 129/2004 and 1341 of the civil code.

6. OTHER PROVISIONS WHICH MAY HAVE AN IMPACT ON FRANCHISING.

6.1 Antitrust rules.

Are there any antitrust rules which should be taken into consideration when drafting (or carrying out) a franchising contract?

Besides the European Rules (e.g. Regulation 330/2010) directly applicable in Italy (as in all other EU member States), Italy has an antitrust law (law 287/90), which contains rules based on the EC rules of competition: a prohibition of restrictive agreements (Article 2) and possible exemption (article 4) and a provision on the abuse of a dominant position. According to Article 1(4) of the antitrust law, its rules must be interpreted on the basis of the principles of EC law regarding competition.

After the enactment of EC Regulation 1/2003, EC rules will be applied together with domestic rules, whenever the restrictive practice affects trade between member states; this means that franchising networks established at a national level will normally need to conform to the EC rules on competition.

Domestic case law is generally in line with the European principles.

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[18] Trib. Roma, 8 April 2011, in *http://www.leggiditaliaprofessionale.it.*

[19] See Cass. No. 6558 of 18 March 2008 and also Trib. Milano, July 18, 2013, *C.A., S.A.* c. *Tree Finance s.r.l.,* in *http://www.leggiditaliaprofessionale.it.*

[20] Trib. Potenza, 12/5/2015 in *http://www.leggiditaliaprofessionale.it.*

In one of the first cases, Il *Tucano franchising*[21], the Italian Antitrust Authority decided that a franchising network which had a very small market share (1%) was not capable of substantially affecting competition and consequently did not fall under the prohibition of Article 2 of law 287/90[22].

Another case concerns a very special situation, i.e. the case of the Italian telecom company (SIP, which at the time controlled the greatest part of the market) which had entered into franchising agreements with resellers of mobile phones[23]. The franchisees were under an obligation not to sell competing products, thus foreclosing the market to SIP's competitors. The Antitrust Authority found that SIP abused of its dominant position. It should be considered that there was a very special market situation, where SIP had been able to bind almost all the retailers having the necessary technical skills (and where it was very difficult for its competitors to find alternative retailers).

In several cases, franchisees attempt to claim in Court the abuse of dominant position of the franchisor; however, such claim is always brought in a vague and inconsistent way (often confusing the notion of “abuse of dominant position” with that of “abuse of economic dependence”) and is almost never accepted by the Courts[24].

Other cases regard situations which have been qualified by the parties as franchising, but which are actually rather different from typical franchising contracts, such as a "co-marketing" agreement between two producers of pharmaceutical products[25] and an agreement between two airlines[26].

6.2 Other rules.

Which other rules of general nature should be considered when dealing with franchising?

The possible abuse of economic dependence.

Article 9 of law No. 192 of 1998 on subcontracting prohibits the abuse of economic dependence, i.e., the situation which exists when a party is able to determine an excessive imbalance of rights and obligations for the other party.

Since the above provision, although worded in general terms, is contained in a law dealing with subcontracting contracts, it is discussed whether this rule also applies to other contracts. The trend is towards a wide application.

It is important to mention two cases where the above provision has been applied to franchising contracts.

In the case Paperoga v. Avis[27] the tribunal of Taranto found that a clause entitling the parties to terminate the contract with notice (six months), without stating the reasons of the termination, which made it impossible for the franchisee to recover the investments made, constituted an abuse of dependence and was null and void. Consequently, the Court suspended (as provisional measure) the effects of the termination. It is interesting to note that the Tribunal held that Article 9 was applicable because the contract actually fell under the definition of subcontracting. In any case, the decision was reversed by a later judgment[28] of

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21 Decision n. 5487 0f 13 November 1997, in *Bollettino A.G.C.M.,* 46/1997.

22 It may be interesting to note that the contract contained a clause under which the franchisees were to respect minimum resale prices.

23 Decision n. 1028 of 24 March 1993, *SIP,* in *Bollettino A.G.C.M.*, 6/1993.

24 See, for instance, App. Roma, 9 January 2018 (not published); Trib Milano, sez. spec. imprese, 6 December 2017.

25 Decision n. 7337 of 1° July 1999, *Server Italia/Istituto farmacobiologico Stroder* in *Bollettino A.G.C.M*, 26/1999.

26 Decision n. 6794 of 13 January 1999, *Alitalia/Minerva Airlines,* in *Bollettino A.G.C.M*, 2/1999.

27 Trib. Taranto, order of 17 September 2003, in *Foro it.,* 2003, I, 3440.

28 Trib. Taranto 22 December 2003, in *Foro it.,* 2004, I, 262.

the same tribunal, which stated that the rules on economic dependence are not applicable to franchising contracts.

In another case[29] the franchisee requested the termination for breach of the franchising contract because of the competing activity developed by the franchisor in his territory. In the specific case the franchisor only undertook not to appoint other franchisees in the exclusive territory of the franchisee and therefore argued that his decision to make direct sales in the territory was not in breach of the contract. The franchisee stated that such sales (which were made at prices lower that the resale prices the franchisee was bound to respect) were in breach of the principle of good faith and that the clause permitting such conduct (if interpreted in conformity with the franchisor's views) constituted an abuse of economic dependence and should be considered null and void. The Court accepted the franchisee's claim and declared the contract terminated for breach by the franchisor.

While the first case appears rather doubtful (and it should be reminded that it has been reversed by the same court), the second shows that the rule on the abuse of economic dependence may become a means for intervening in extreme cases (in fact, in most cases such claim is not accepted by Italian Courts[30]). In order to reduce this risk, it is recommended to avoid excessively unbalanced clauses and to explain, as far as possible, the reasons that justify provisions which might otherwise appear unjustified.

7. THE FRANCHISEE'S OBLIGATION NOT TO COMPETE.

7.1 Non competition during the contract.

If there is no contractual provision prohibiting the franchisee to sell competing goods or to engage with competing franchising networks, does it mean that the franchisee is free to act for competitors of the franchisor?

There are no statutory rules on this issue, which implies that a non competition obligation must be agreed contractually. If the contract falls under law 129/2004, such agreement must be made expressly (since the written form requirement will apply). For contracts not falling within the scope of the law 129/2004 an oral (or implied) agreement to this effect may be sufficient (provided the franchisor is able to prove it).

To what extent are contractual non-competition clauses admissible?

Contractual non competition clauses are very common, since it is normal that the franchisee should not sell competing products in the outlet. In general the violation of such a clause would justify termination of the franchising contract for cause[31].

Is it possible to extend the franchisee's non competition obligation to non competing goods?

It is rather common in franchising contracts regarding the sale of products in shops characterized by the image of the franchisor to have clauses which prohibit the sale by the franchisee of products other than those of the franchisor, unless expressly authorized by the latter. This type of clause should not give rise to problems, particularly if the prohibition to sell non-competing products is justified by the need to warrant a uniform image of the outlets of the network.

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29 Trib. Isernia, 12 April 2006, soc. C.&C. v. soc. E.E., in *Giur. merito,* 2006, 2149.

30 See, for instance Rome Court of Appeal, Section III, 1/3/2018; Court of Monza, 4/7/2017; Court of Turin, 9/5/2017; Court of Rome, Section VIII, 1/4/2017; Court of Bologna, 5/10/2016; Milan Court of Appeal, 15/7/2015.

31 See Court of Appeal of Milano, 4 June 1996, *Unali v. SEM Spa*, in *Contratti,* 1996, 589.

7.2 Post-contractual non-competition obligation.

Is it possible to agree with the franchisee an undertaking not to compete in the period after contract termination? If yes, is this obligation subject to specific conditions (i.e. time limit, territorial extension, etc.)?

Leaving aside the problem of its conformity with the antitrust rules (see EU antitrust report), a post-contractual non-competition obligation is in principle admissible.

In any case, according to the EC antitrust rules a post-contractual non competition obligation, in cases where they are allowed as per Article 5/3 of Regulation 330/2010, cannot exceed a period of one year and must be limited to the place from which the franchisee operated during the contract (see antitrust report).

In one case of a lower Court (Trib. Milano, 27/1/2017), a request of precautionary measure brought by a franchisor against his former franchisee with the aim of refraining him from competing after the contract termination, was not accepted by the Court, also considering the too wide scope of the clause and the limited value of know-how transferred. In another case of a lower Court (Trib. Firenze 16/1/2019), the Court decided that a 5 years' post-contractual non-compete obligation imposed to the franchisee was valid and effective, because the franchisee had not provided any evidence that the relevant contract had significative effects on competition and therefore national and EC antitrust rules were not applicable in the specific case.

8. EXCLUSIVITY.

8.1 Rights of the franchisee in the absence of contractual rules.

If there is no written contract or if the contract does not state anything about the franchisee's exclusivity, does it mean that the franchisor is free to appoint other franchisees and to sell the products or services in competition with the franchisee?

It is a well-established rule that the exclusivity is not a *"naturale negotii"* in franchising contracts and that, consequently, an exclusivity in favour of the franchisee will only exist where agreed between the parties[32].

As regards the possibility of a *de facto* exclusivity, based on a tacit agreement between the parties, it is unlikely that such a situation might exist in the framework of franchising contracts falling under the law 129/2004. In fact, such law provides that the contract must be in writing and furthermore Article 3(4)(c) states that in case a territorial exclusivity is granted, its scope must be specified in the contract.

With respect to franchising contracts not covered by law 129/2004, there may be some more space for a *de facto* exclusivity, although the existing case law appears rather to exclude such possibility. So, in a case where the franchisee had been *de facto* the only distributor appointed for a certain territory for ten years, the court decided that this did not imply an exclusive right in the absence of evidence that there was an actual agreement to this effect[33].

8.2 What is actually covered by exclusivity clauses?

What are the franchisor's obligations under a clause granting a territorial exclusivity to the franchisee?

The answer depends, of course, on the exact wording of the clause. However, there is a trend in case law towards a wide interpretation of exclusivity clauses,

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32 App. Milano, 9 October 2002, *Stefanel* v. *Benatti,* in *Giur. milanese,* 2003, 321.

33 Trib. Lecce, 9 February 1990, *Pantaleo* v. *Soc. Benetton,* in *Foro it.,* 1990, I, 2978.

especially in cases of indirect infringement of the franchisee's position (encroachment).

An interesting case with respect to this problem regards the franchisor's freedom to licence the same services which are sold by the franchising network to a third party which markets them through a different channel. This problem occurred in the Shenker case[34], with respect to a method for teaching the English language which had been franchised to a number of schools (with a territorial exclusivity), who were given the exclusive right to offer such service under the Shenker trademark. Thereafter the franchisor granted a third party the right to publish the same method and to sell it as a magazine together with audiocassettes (and with the possibility for the user to check his progress with Shenker's teachers). The franchisees claimed that Shenker violated their exclusive rights. The Court, although noting that there was a difference between the service offered by a school (i.e. with a personal contact between teacher and pupil) and the service resulting from the sale of a magazine with audiocassettes, decided that the grant of the licence to the publisher amounted to a violation of the exclusivity granted to the franchised language schools.

In another case[35], the franchisor undertook not to appoint other franchisees in the territory granted to the franchisee and reserving the right to make direct sales in the same territory. When the franchisor begun selling its products at a price lower than the resale price the franchisee was bound to respect, the franchisee claimed the termination of the franchise and the compensation of damages. The Court decided that the conduct of the franchisor implied the breach of the principle of good faith and an abuse of economic dependence[36].

In a more recent case[37] the Tribunal of Milan considered contrary to good faith the decision of a franchisor to open a new shop a few dozen meters away from the franchisee's outlet, although the contract did not grant any exclusivity to the franchisee[38].

9. RESPONSIBILITY OF THE FRANCHISOR FOR ACTS OF THE FRANCHISEE.

Under which circumstances the franchisor may be held responsible for acts of the franchisee? In which cases customers or employees of the franchisee may have a direct action against the franchisor?

As a general rule the independence of the franchisee will be recognized by the courts. The Court of Cassation has expressly recognized that a franchising contract implies that the parties are legally and economically independent[39].

Only in rather exceptional cases the Courts may find a responsibility of the franchisor for acts of the franchisee.

So, for example, in one very particular case[40], where a car dealer agreement was considered as a franchising contract (due to the "extreme" degree of integration between dealer and supplier) the supplier was held responsible for the dealer's conduct. Actu-

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34 Trib. Roma 20 July 1988, *The Shenker Method* v. *The Shenker Institute of English e.a. e soc. Gruppo editoriale Fabbri, Bompiani, Sonzogno, Etas,* in *Giur. it.,* 1989, I, 2, 869.

35 Trib. Isernia, 12 April 2006, *soc. C&C* v. *soc. EE,* in *Giur. Merito,* 2006, 2149.

36 For another case of recognised breach of the exclusivity by the franchisor, see Trib. Salerno, 23 December 2009, No. 2725, *D'A.G.* v. *Ge. Pelletterie s.r.l.*

37 Trib. Milano No. 2648/2017 of March 6, 2017, *Caring srl unipersonale* v. *H3G S.p.A.,* not published.

38 See also Trib. Milano 2/4/2019 No. 3225/2019; Trib. Milano 17/1/2019 No. 425/2019; Trib. Milano 6/12/2018 No. 12322/2018; Trib. Milano 21/6/2018.

39 Court of Cassation, 15 January 2007, n. 647, *Promogest* v. *Corvi's company.* In the case considered by the Court the franchisor made a complaint on behalf of the franchisee and the franchisee argued that such complaint would have interrupted the limitation period (prescrizione). The Court decided that only the franchisee was entitled to interrupt the limitation period. See also App. Catania, 7/11/2018.

40 Trib. Crema, 23 November 1994, *Ford Italiana S.p.a.* v. *Campopiano,* in *Contratti,* 1996, 52.

ally, the dealer delivered, before becoming insolvent, a car to a customer (who paid the price to the dealer), but the supplier (the car manufacturer) – who had not been paid by the dealer – refused to deliver to the final customer the documents which were necessary for the registration of the car. The court emphasized the strict integration between supplier and dealer in order to justify a direct responsibility of the supplier towards the final customer, and consequently the latter's right to obtain the documents from the car manufacturer.

In another case[41] the court considered the franchisor to be jointly responsible with the franchisee because the franchisee (a real estate broker) appeared towards the public as an agency of the franchisor and not as an independent undertaking. The court came to such conclusion considering in particular that the forms used by the franchisee only mentioned the franchisor's name, and that the franchisee appeared on the telephone directory as if he were a branch of the franchisor.

In a further case[42], a real estate broker, acting as franchisee of a network, became insolvent after having been paid by a client a sum of money for a transaction which was not carried out. The client made a claim against the franchisor and the court condemned the franchisor on the basis of the general rule on extra-contractual liability, because the franchisor should have verified the financial situation of his franchisee.

It is important to mention a case[43] in which the Tribunal of Torino envisaged the extra-contractual liability of the franchisor towards one of his franchisees' customer. Particularly, the franchisor terminated the contract with such franchisee, because the latter was not paying royalties and consequently the outlet was close down; in the meantime, one of the customers of such franchisee - who had paid for a weight loss program and had not participated to all the sessions – found the premises closed and was not able to be refunded by the franchisee for the sessions she had not participated to. Therefore the customer brought an action against the franchisor. The Court declared the extra-contractual liability of the franchisor, for lack of control over his franchisee, stating that the franchise system generated a trust in the customers that each outlet affiliated to the network would follow the same standards of quality and commercial correctness with his customers. The franchisor was then condemned to refund to the franchisee's customer the price she had paid for the sessions to which she had not been able to participate.

10. FRANCHISOR'S CONTROL OVER THE FRANCHISEE'S ACTIVITY.

10.1 General limitations.

Are there any rules of case law principles limiting the franchisor's right to impose a specific conduct upon the franchisee?

In principle there are no limitations, except in extreme cases where the franchisor's conduct may be considered against the principle of good faith or as an abuse of economic dependence.

10.2 Obligation to sell from the franchised outlet.

Would the franchisee's obligation to sell only from the franchised outlet be lawful under the law of your country?

In principle, yes.

10.3 Prohibition to change the place of the outlet.

Would a prohibition to change the place of the outlet without the franchisor's approval be valid under your law?

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41 Pret. Milano, 21 July 1992, *Grimaldi S.p.a.* v. *Bruno Magatelli e Immobiliare Effeci s.a.s.,* in *Giur. comm.,* 1993, II, 701.

42 App. Napoli, 3 March 2005, *Sarpi Franchising Group* v. *S.M.,* in *I Contratti,* 2005, 1133.

43 Trib. Torino, 17 October 2006.

Yes. Article 5(1) of law 129/2004 states that

> The franchisee shall not move its seat, whenever indicated in the contract, without the prior consent of the franchisor, unless in case of force majeure.

This provision probably refers to the sales outlet (since the seat of the franchisee should not be relevant). It confirms a rule widely accepted in practice.

The only strange aspect is the reference to force majeure. Does it mean that in case of force majeure (fire? war?), the franchisee may move his seat as he likes?

Since an answer is impossible, parties are advised to answer these questions through accurately drafted contractual clauses.

10.4 Use of Internet.

Is the franchisor free, under the law of your country, to sell through the Internet in competition with his franchisees?

In principle yes, except where such action would conflict with an exclusive right granted to the franchisee.

If the franchisee is granted no exclusivity or if the contract clearly states that such exclusivity does not exclude the franchisor's right to sell through Internet, there should be no problem (except in extreme cases, where the contractual rule as such could be considered against good faith).

Is the franchisor entitled, under the law of your country, to prohibit the franchisee to sell through the Internet (or otherwise limit his right to promote his business through Internet)?

In principle the franchisor should have the right to control the use of Internet by the franchisee, particularly in the context of the need to warrant a uniform image of the network.

However, possible antitrust problems may arise, especially under the EU antitrust rules (see the antitrust report).

10.5 Limitations as to the customers to whom the franchisee may sell.

Are possible limitations as to the customers to whom the franchisee may sell lawful under the law of your country?

This aspect would mainly be relevant for the application of the rules on competition (antitrust), which are dealt with in the antitrust report.

10.6 Resale prices.

Would a clause which obliges franchisees to respect certain resale prices of the products supplied by the franchisor be lawful under the law of your country?

This question should be answered under the EU antitrust rules which prohibit resale price maintenance: see antitrust report.

Italian Courts have applied the same principle to domestic contracts[44].

[44] See Trib. Milano, 13 November 1989, *Studio Trezzano 2 v. ILFI,* in *Giur. merito,* 1991, 1078. In this case the franchise agreement has been considered null and void due to the resale price maintenance clause (which has been considered to be essential, and thus capable of implying the nullity of the contract as a whole).

11. USE OF THE FRANCHISOR'S TRADEMARKS AND SYMBOLS.

11.1 Use of the trademarks and symbols during the contract.

Would a use of the franchisor's trademarks which does not conform to the franchisor's indications be a substantial breach, justifying contract termination?

No answer can be given without knowing the importance of the breach and the possible contractual clauses dealing with this issue. However, it is likely that, considering the importance of image of the network in franchising, a non immaterial violation of the obligations regarding the use of the trademarks would justify termination for cause of the franchising contract.

11.2 Obligation to cease using trademarks after contract termination.

Are clauses which require the franchisee to remove and cease using the franchisor's trademarks, after contract termination enforceable in your country?

There are in principle no problems as to the enforceability of these clauses. In the numerous cases examined by the courts[45], the franchisee has been condemned to cease the illegal use of the franchisor's symbols.

12. CONFIDENTIALITY.

12.1 *Is the franchisee obliged to treat the information received from the franchisor as confidential?*

According to Article 5(2) of the law 129/2004 the franchisee «undertakes to observe, and to have observed by its collaborators and employees, even after the termination of the contract, the utmost confidentiality as regards the contents of the franchising activity».

13. TERM AND TERMINATION OF THE CONTRACT.

13.1 Contract for a fixed period or for an indefinite period.

Is it possible to choose between a contract for a fixed term and a contract for an indefinite period? What are the main differences?

The main difference is that a contract for a fixed period expires at the end of such period while a contract for an indefinite term will continue until one of the parties terminates it. Normally parties tend to conclude contracts for a fixed period in order to make sure that a certain minimum duration is warranted.

Law 129/2004 apparently makes a difference between these two situations in Article 3(3) where it is said that

> Whenever the agreement is for a fixed period, the franchisor shall in any case guarantee the franchisee a minimum duration sufficient to amortize the investment, and in any case not shorter than three years, except for the case of earlier termination for breach of contract by one of the parties[46].

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[45] Trib. Milano, 30 April 1982, *Soc. Standa* v. *Soc. Arcobaleno Market,* in *Foro it.,* 1982, I, 2042; Pret. Empoli, 21 July 1987, *Associazione Vegé Italiana e Consorzio Vegè Italia* v. *Dis.Mo-Distribuzione Moderna s.r.l.,* in *Resp. civ. e prev.*, 1988, 111; Trib. Roma, 20 April 1995, *Soc. Itm Italia* v. *Soc. Coven,* in *Foro it.,* 1995, I, 306.Trib. Milano 13 October 1988, *Grandi Magazzini s.r.l.* v. *Standa S.p.a.,* in FRIGNANI, *Il contratto di franchising,* Milano, 1999, 66; App. Milano, 19 April 1991, *Grandi Magazzini s.r.l.* v. *Standa S.p.a.,* in FRIGNANI, *Il contratto di franchising,* Milano, 1999, 70.

[46] The Tribunal of Treviso (Trib. Treviso, 9 October 2010, No. 1700) condemned a franchisor to pay damages to his franchisee, because he had terminated the contract before the 3 year's period provided by law (and also before the 5 year's period provided for in the contract).

If this rule will be applied as it is written[47], the rule fixing a minimum duration necessary for amortizing the investment, should not apply where the parties choose to conclude a contract for an indefinite period.

13.2 Contract for a fixed period (without automatic renewal clause) which continues to be performed after its expiry.

What happens, under your law, if a contract concluded for a fixed term (and not containing a clause for automatic renewal) continues to be performed after its term?

There is no specific statutory rule on this issue, nor case-law. However, it is likely that Article 1750 c.c. regarding commercial agency contracts, will be applied by analogy. Such article provides, in accordance with the EC Directive 653/86, that a contract for a fixed period which continues to be performed after its expiry becomes a contract for an indefinite term.

13.3 Termination notice (contract for an indefinite period).

Does the legislation of your country require a minimum period of notice for the parties to terminate a franchise contract made for an indefinite term?

If yes, is such period mandatory? For both parties?

If no period of notice is required by law, will it be fixed by the courts?

In the latter case, will the courts intervene only if no period of notice has been agreed contractually? Or will the courts establish a reasonable period if the period agreed in the contract is considered too short?

There are no statutory rules fixing a mandatory minimum period of notice for franchising contracts. Law No. 129/2004 only provides a minimum duration for contracts for a fixed term.

Contracts for an indefinite period can be terminated at any time (regular termination) by respecting the period of notice stated in the contract or in the absence of such determination, fixed by the courts[48]. In principle the courts should respect the choice of the parties as to the length of the period of notice[49]; however it cannot be excluded that in case of too short periods of notice the courts may consider the contractual term as unreasonable[50].

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47 Actually, some authors affirm that the provision - which in fact makes little sense - should also apply to contracts for an indefinite term. However, this interpretation would contradict the plain meaning of the provision. In the only case dealing with this issue (Trib. Bari, 8 April 2005, *Geox* v. *Gruppo Espansione,* in *Danno e Responsabilità,* 2005, 983) the Court said that, since law 129/2004 only deals with contracts for a fixed term, there is at present no statutory rule regarding the termination of contracts for an indefinite term.

48 It is however very unlikely that such aspect is not covered in the contract itself, since franchising contracts are normally drafted by lawyers (or at least taken from model contracts drawn up by experts).

49 See, for instance, Tri. Milano, 11 June 2013, *C. s.a.s.* c. *Vaillant Saunier Duval Italia S.p.A.* c. *Duzioni s.r.l.* c. *A.S. & C. s.n.c.* and c. *Nobili Marco,* in http://www.leggiditaliaprofessionale.it., in which the franchisee challenged the termination made by the franchisor in compliance with the 3 months' notice period provided for in the contract. The business relationship between the parties had lasted for 30 years and the franchising contract was concluded since 9 years. The Court confirmed that the termination was not contrary to good faith, abuse of economical dependence, abuse of right etc., as alleged by the franchisee; on the contrary, the Court decided that, considering that the franchisee breached the non competition obligation, the franchisor acted in good faith, by giving the 3 months' notice for termination instead of terminating the contract with immediate effect by cause, also considering that – during the notice period – the franchisee was able to establish new contractual relationships with important companies of the field also taking advantage of the long lasting contractual relationship with the well known former franchisor.

50 Possibly by making reference, in extreme cases, to an abuse of economic dependence.

In the rather unlikely case that no period of notice has been stated in the contract, the courts will fix a reasonable period.

It is in any case advisable to provide contractually long periods of notice (e.g. six months of one year).

13.4 Form of the notice of termination and effectiveness.

Is there a form (e.g. registered letter) that must be respected for the termination notice to be effective?

Termination can be communicated in any form, also orally. Of course, this does not mean that parties should do so, since it very difficult to prove an oral communication.

Is the termination considered to have been validly given when it is sent or when it is received?

The termination notice is effective when it is received by the other party.

If the addressee is a company, is there a specific person to whom the notification must be made in order to be effective?

No. It is sufficient that the notice is sent to the address of the company.

In case the form imposed by law or prescribed in the contract has not been respected, what are the consequences?

If the contract prescribes a particular form, a termination notice not made in that form is in principle to be considered as ineffective. However, the answer may be different if the terminated party *de facto* accepts the termination notice which was given without respecting the required formalities.

13.5 Earlier termination.

Which reasons can normally justify earlier termination by the franchisee and/or by the franchisor?

The most common reason for earlier termination by the franchisor is non-payment (or delayed payment) of the goods purchased from the franchisor, but also other infringements, like the sale by the franchisee of products other than the franchisor's ones, breach of the non competition clause,'.

As regards earlier termination by the franchisee, termination for breach has been recognized, for instance, in a case where the franchisor was unable to provide the services according to the agreed standards, or for non conformity of the franchisor's products; in a case where the franchisor sold the products at lower prices in competition with the franchisee[51]; in several cases of breach of exclusivity, in a case where the franchisee closed down the shop and stopped performing its obligations, in two cases (referred to the same franchise network) in which the franchise network resulted not even existent, the trademark resulted to be registered by another company for totally different products, etc.[52].

Parties may also have recourse to the general rule on termination for breach of contract («risoluzione per inadempimento») and in particular to Article 1456 c.c. according to which the parties may provide that the contract will be terminated in case of breach of certain obligations expressly indicated in the clause («express termination clause», «clausola risolutiva espressa»).

Such clause allows the party in favour of which it has been provided to terminate the contract with immediate effect, without the need to have termination pro-

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[51] Trib. Isernia, 12 April 2006, *soc. C.&C.* v. *soc. E.E.,* in *Giur. merito,* 2006, 2149.

[52] Trib. Venezia, 5 June 2009, *Romano Giulio* v. *North International, Baiocco Massimo, Baiocco Cristiano;* Trib. Venezia, 28 May 2009, *Affiliato* v. *H.T.M., Baiocco Cristiano and Baiocco Massimo;* Trib. Venezia, 1 Octpber 2007, *affiliato* v. *North International,* both in www.avvocatoandreani.it.

nounced by a Court. However, it is important to carefully draft such clause, in order to be sure of its validity and effectiveness[53].

Can a party terminate the contract for a breach which such party has tolerated in the past without complaining?

In principle the answer is no, particularly if the previous conduct shows that the parties did not attach importance to the respect of a certain clause, but the solution may vary from case to case. So, for example, a party may prove that it tolerated certain breaches trusting that the other party would remedy and that it was forced to terminate the contract when the breach became unbearable[54].

If the answer is no, would the result be different if the contract contains a «waiver clause» (e.g. a clause saying that «Any waiver on the part of either party hereto of any right or interest shall not imply the waiver of any other right or interest, or any subsequent waiver»)?

Difficult to say. If the «waiver clause» is very general (i.e. if it does not refer to a specific breach) such clause would probably not be effective if its application would go against the principle of good faith. On the contrary, a clause referring to a specific situation is more likely to be effective.

13.6 Unjustified earlier termination.

What is the effect of an unlawful earlier termination of a franchising contract under the law of your country?

If the contract is for a fixed term an unlawful termination will be in principle ineffective and the contract will continue until its final term. However, since it is practically impossible to force the other party to perform the contract, the final result will actually be that the terminated party will be entitled to damages for the lost profit until the term of the contract.

If the contract is for an indefinite period, it is not clear whether the unlawful termination produces nevertheless the effect of putting an end to the contract (although giving the terminated party a right to damages) or if, on the contrary, the contract continues. In any case, the practical difference should not be very important, for the reasons expressed above.

13.7 Compensation for unjustified earlier termination.

Please, explain if there are legal rules (or principles established by case law) for calculating the amount of compensation for unjustified earlier termination.

There are no specific rules, but only general principles on the calculation of damages.

In one of the cases where this issue is dealt with[55], the court awarded the franchisor damages for loss of profit equal to the franchise fees of one year[56], plus a

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53 See Trb. Bologna, 24 September 2009, in *http://www.leggiditaliaprofessionale.it*, for a case in which the Court has deemed the clause not valid, since it referred to all the obligations provided for in the contract and not only to the main ones.

54 See Trib. Palermo, 2 September 2011, in *http://www.leggiditaliaprofessionale.it*, where the Court stated that the fact that the franchisor had tolerated in several occasions the franchisee's breach of the contract, by accepting delayed payments was certainly in conformity with the general principles of solidarity, fairness and good faith provided by the Italian Constitution and by the Italian civil code. However, such tolerance could not justify the breach of the contractual payment's obligation by the franchisee and could not be regarded as a waiver of the franchisor's right to terminate the contract, nor as an implicit consent by the franchisor to modify the payment terms contractually agreed. The Court therefore confirmed the validity and effectiveness of the franchisor's termination and condemned the franchisee to pay the outstanding sums due to the franchisor.

55 Trib. Milano, 23 November 1994, *Soc. A.B. Sportsman Club* v. *Soc. Squash Vico*, in *Giur. it.,* 1996, I, 2, 382.

56 Considering that, being this the period of the termination notice, it was reasonable to assume that

penalty for the abusive use of franchisor's signs after contract termination[57]. At the same time the court refused to award a compensation for the damage to the franchisor's image arguing that the franchisor had not proved that the breach by the franchisee of the obligations regarding the image of the network (like the non-use of the special uniforms by the franchisee's employees) caused an actual damage to the franchisor.

It has to be mentioned that, as far as liquidated damages clauses (typically included in franchise agreements) are valid and effective under Italian law, but Courts can reduce the relevant amount, either if the main obligation has been partially performed, or if the relevant amount is manifestly excessive (art. 1384 of the Italian civil code)[58].

Moreover, pursuant to Article 1382 of the Italian civil code, the party in favour of which the liquidated damage's clause has been applied, can claim further damages, if such right has been expressly provided in the contract.

14. GOODWILL COMPENSATION (INDEMNITY).

Does the law or jurisprudence of your country recognise a goodwill compensation to the franchisee?

No. Goodwill compensation is provided for commercial agency agreements, but these rules are not applied by analogy outside the scope of that contract. A franchisee may only be entitled to damages, in case of unlawful termination.

15. LIMITATION OF ACTION.

Does your legislation provide limitation periods (or similar systems) for the exercise of the rights of the parties under a franchise agreement and which is their duration?

The rights under the franchising agreement fall under the general prescription term of 10 years, except for those regarding periodical obligations (like the payment of royalties) to which the shorter term of 5 years applies.

As far as pre-contractual liability is concerned, as explain above under § 3.2, following the traditional approach to consider it extra-contractual liability, the term would be of 5 years. On the contrary, according to the new approach which considers it as a special type of contractual liability, the term would be of 10 years.

Can the limitation periods be contractually modified according to your law?

Article 2936 of the civil code expressly states that the rules regarding limitation periods («prescrizione») cannot be contractually derogated.

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this was the time needed by the franchisor to find another franchisee.

[57] Such contractual penalty (amounting to 500.000 Italian lire per day of breach) was however reduced by the court because the penalty was to cover the use of the signs and the use of the know-how, while in the actual case only the illegal use of the franchisor's signs was established.

[58] For cases of application of such principle, see Trib. Monza, 22/05/2007*;* Trib. Roma, 6/05/2009, No. 9508, *Profumidea S.p.A.* v. *FASM s.r.l.;* Trib. Roma, 8/04/2011; Trib. Milano 25/07/2018; Trib. Genova, 05/07/2018. By way of contrast, Trib. Milano, July 18, 2013, *C.A., S.A.* v. *Tree Finance s.r.l.*, Trib. Pescara 10/09/2018 and Trib. Vicenza 24/10/2018, decided not to reduce the amount of the liquidated damages clause, considering it not excessive, on the basis of the circumstances of the case.

16. APPLICABLE LAW.

16.1 Legal sources.

What are the rules of your legal system concerning applicable law to franchising contracts?

Rome Convention 1980 apply to contracts concluded before December 17, 2009 (as well as to contracts with Danish parties), and the EC-regulation 593/2008 (Regulation "Rome I") for contracts concluded thereafter.

As regards the pre-contractual liability (e.g. arising out of violation of the rules on pre-contractual disclosure; of illicit interruption of the contractual negotiation; etc.), EC regulation 864/2007 (Regulation Rome II) applies.

Namely, Article 12 of Regulation Rome II ("culpa in contrahendo"), provides:

"1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country."

Rules provided in both Rome I and Rome II regulations have a universal character, i.e. also apply to relationship between an Italian party and a party outside the EU.

16.2 Applicable law in the absence of choice.

If there is no choice of law by the parties, which criteria are used by the courts of your country for determining the applicable law in case of a franchising contract with a foreign counterpart?

In case of application of the 1980 Rome Convention, the law applicable is the law of the place of residence of the party who provides the characteristic performance of the contract. However, there is no common opinion about which party provides the characteristic performance in a franchise contract. Since there is no case law on this issue, it is impossible to foresee how the law applicable in the absence of an express choice might be determined.

Parties are therefore advised to expressly choose the applicable law.

In case of application of the Rome I Regulation, in the absence of choice, the law applicable would be the law of the country where the franchisee has his habitual residence (Article 4(e)).

16.3 Effectiveness of a choice of law excluding the law of the franchisee's country.

Is it possible to submit the contract with a franchisee belonging to your country to the law of a foreign country?

In principle the parties are free to choose the applicable law (see Article 3 of the Rome I Convention and Regulation).

However, the choice of a foreign law could be ineffective with regard to rules according to which the Italian legal system must be applied whatever law governs the contract («norme di applicazione necessaria», «lois de police», «overriding mandatory provisions»). It is not clear if some provisions protecting the franchisee, and especially those on pre-contractual disclosure, may have this character of «internationally mandatory rules». See, above, § 3.5.

17. JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS.

17.1 Legal sources.

What are the rules of your legal system concerning jurisdiction as well as recognition and enforcement of foreign decisions?

As regards contracts with parties of the European Union, EC Regulation 1215/2012 of 12 December 2012 applies to disputes started after January 10, 2015.

In the relations with Norway, Iceland and Switzerland the Lugano Convention of 30 October 2007[59] applies.

With respect to contracts with parties of other countries the «general» rules on jurisdiction and enforcement of foreign judgements contained in the law on private international law of 31 May 1995, No. 218 applies. This law refers to the 1968 Brussels Convention. Some Italian Courts interpret such reference as to Regulation 44/2001, after such Regulation having replaced the Brussels Conventionand one lower Court recently referred to Regulation 1215/2012); other Italian Courts are inclined to prefer a strict literal interpretation and keep applying the provisions of the Brussels convention.

17.2 Jurisdiction without a choice of jurisdiction clause.

If there is no valid jurisdiction clause, is a franchisee of your country entitled, under the procedural rules of your country to bring a claim before his courts against a foreign franchisor?

In case Regulation 1215/2012 applies, the first question to be answered is whether the franchising contract is a contract for the provision of services. In case of a positive answer, the second question is to decide who is supplying the service: the franchisor, who is supplying know-how and assistance, or the franchisee who is distributing the franchisor's products (but this would apply only in case of distribution franchising)? Probably the first solution is the right one for typical franchising (where the franchisor provides substantial know-how and services in exchange of remuneration), while the second is more likely to apply franchising without transfer of know-how and remuneration, which is more similar to a distribution contract. In both cases the services are to be provided at the franchisee's place of business, which means that the franchisee would be able, under Article 7(1) of Regulation 1215/2012 to bring a claim before the courts of his place of business.

In case the Brussels Convention of 1968 applies (i.e. in disputes between Italian parties and parties of countries outside the European Union or the countries of the Lugano convention), the franchisor will be able to bring a claim before the courts of the place where the contractual obligation which is the subject matter of the proceedings is to be performed.

If there is no valid jurisdiction clause, is a franchisor of your country en-

[59] This Convention replaced the previous 1988 Lugano Convention and entered into force for the European Union and Norway on January 1, 2010, for Switzerland on January 1, 2011 and for Iceland on May 1, 2011.

titled, under the procedural rules of your country to bring a claim before his courts against a foreign franchisee?

If the franchisee is within the EU and Regulation 1215/2012 applies, it is almost impossible for the Italian franchisor to bring a claim before his courts, because he cannot base the claim on Article 5.1, which makes reference to the place where the party which provides a service performs or has to perform such activity.

If the franchisee is in a third country, the rules the law of 31 May 1995, No. 218 will apply. These rules incorporate by reference the rules on jurisdiction of the Brussels convention and future modifications. Since, as mentioned above, some Italian Courts tend not to consider Regulation 1215/2012 as a modification of the Brussels convention the question, in those cases, the Italian franchisor may be able to bring a claim against a foreign franchisee before his courts.

17.3 Effectiveness of a jurisdiction clause in favour of foreign courts.

Do judges of your country have exclusive jurisdiction to settle disputes concerning franchisees, who carry out their activity between the boundaries of your country?

No. There is a special jurisdiction for labour disputes which also applies to individuals which are not employees (like commercial agents), but this does not apply to franchisees (as well as to distributors).

Would a clause contained in a contract between a foreign franchisor and a franchisee of your country under which a foreign court has jurisdiction on disputes arising out of the contract be valid in your country?

In principle, yes.

This is certainly the case if EC Regulation 1215/2012, or the Brussels or Lugano Conventions are applicable, since they recognise the validity of clauses on jurisdiction and prevail over possible domestic rules which provide otherwise.

If the parties choose a contractual forum outside the countries where the above regulation or conventions apply, reference must be made to Article 4/2 of the law on private international law of 31 May 1995, No. 218, which says that Italian jurisdiction can be validly derogated in favour of foreign courts or arbitration if the clause is proved in writing and the dispute regards rights of which the parties can dispose («diritti disponibili»).

The notion of rights of which the parties cannot dispose is unclear. It should be interpreted narrowly. In one case of a commercial agency contract the Court of Cassation (judgment of 30 June 1999, No. 369, *Air Malta v. Scopelliti*) considered that the agent's right to indemnity under Article 1751 c.c. was a «non disposable right» and that consequently the derogation of the Italian jurisdiction was invalid. The position taken by the Cassation court in this case is certainly wrong (since it confuses mandatory rules and rules protecting right of which the parties are not free to dispose). However, if this reasoning should be applied to franchising contracts, a court could of course challenge the validity of jurisdiction clauses arguing that the dispute regards mandatory rules protecting the franchisee. In fact, the risk is rather low, considering that a narrow notion of "rights of which the parties cannot dispose" ("diritti indisponibili") is generally accepted also with respect to franchising[60].

17.4 Recognition - enforcement.

Is it possible to recognise and enforce a foreign judgment against citizens of your country?

[60] See, for instance, Cass. 20 June 2000, n. 8376, *Evoluzione* v. *Sistema Italia 93,* where the Supreme Court affirmed the arbitrability of a dispute regarding a franchising contract.

Recognition is possible under the rules listed under 17.1 according to the circumstances of the case.

If EC regulation 1215/2012, the Brussels or Lugano convention are to be applied reference must be made to the relevant provisions of such texts.

If domestic Italian rules are to be applied (i.e. for judgements of other countries) reference must be made to Article 64 of the law on private international law of 31 May 1995, No. 218, according to which:

> A judgment rendered by a foreign authority shall be recognised in Italy without requiring any further proceedings if:
>
> (a) the authority rendering the judgement had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law;
>
> (b) the defendant was properly served with the document instituting the proceedings pursuant to the law in force in the place where the proceedings were carried out, and the fundamental rights of the defence were complied with;
>
> (c) the parties proceeded to the merits pursuant to the law in force in the place where the proceedings were carried out, or default of appearance was pronounced in pursuance of that law;
>
> (d) the judgement became final according to the law in force in the place where it was pronounced;
>
> (e) the judgement does not conflict with any other final judgement pronounced by an Italian court or authority;
>
> (f) no proceedings are pending before an Italian court between the same parties and on the same object, which was initiated before the foreign proceedings;
>
> (g) the provisions of the judgement do not conflict with the requirements of public policy *(ordre public)*

If enforcement is possible, how long does the proceeding take?

The first step in order to enforce a foreign decision in Italy is to obtain an enforcement decree from the competent Court of Appeal: this stage takes approximately six months.

Then, if the other party appeals against such decision, the proceedings may continue for other two/three years before the Court of Appeal and for a further year, if recourse is made before the Court of Cassation.

18. ARBITRATION.

18.1 Legal sources.

Is your country part of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)?

Italy is party to the New York Convention of 1958 and to the Geneva Convention of 1961.

Are there other rules applicable to international arbitration provided by the law or jurisprudence of your country?

Until March 2006 there was a distinction between domestic and international arbitration in Italy. Particularly, Articles 832-838 of the code of civil procedure governed international arbitration.

Legislative Decree 2-2-2006 No. 40 (in force since March 2, 2006) repealed Articles 832-838 of the code of civil procedure, which now apply to domestic arbitration only.

Articles 839-840 (still in force) regulate recognition and enforcement of foreign arbitral awards. Such rules conform to the New York Convention.

18.2 Arbitrability.

Are franchising contracts considered a subject matter capable of settlement by arbitration, according to your legislation?

In principle yes. It cannot be excluded that a court might consider disputes regarding franchising non-arbitrable on the basis of a wide interpretation of the notion of "rights of which the parties cannot dispose" ("diritti indisponibili") (see above, § 17.3). However, this interpretation, which confuses non-disposable rights with rights based on mandatory rules, is clearly unacceptable and is unlikely to prevail.

18.3 Arbitration clauses.

Would an arbitration clause providing for arbitration abroad, contained in an franchising agreement be valid in your country?

Yes.

Would the courts of your country refuse jurisdiction with respect to an franchising contract containing such a clause?

Yes, except for what is said under § 18.2 and 17.3.

18.4 Recognition of foreign awards.

Would a foreign arbitration award dealing with an franchising agreement be recognised by the courts of you country?

Yes, except in the unlikely case that a court might follow the wide interpretation of the notion of non-disposable rights, described in § 18.2 and in § 17.3.

Of course, courts will not recognize a foreign award if there are reasons for refusing recognition under the rules of the New York Convention.