

Dispute Resolution

Italy

I. INTRODUCTION TO ITALIAN LAW**I.1 LEGAL SYSTEM**

The Italian Legal System is a Civil Law system. Civil law is a codified system of law that sets out a comprehensive system of rules that are applied and interpreted by judges. It has its origin in Roman law and in its modern form descends from the codification movement of the 19th century when the most important codes came into existence.

The original difference between Common Law Systems and Civil Law Systems is that, historically Common Law developed from custom, whereas Civil Law developed out of the Roman Law of Justinian's Corpus Juris Civilis.

In the modern age many Common law jurisdictions have codified parts of their laws and thus the difference between civil law and common law systems lies less in the mere fact of codification, but in the methodological approach to codes and statutes.

In Italy, like in most civil law countries, legislation is seen as the primary source of law, Courts reason on the basis of general rules and principles in the codes, drawing analogies from statutory provisions to fill lacunae and achieve coherence.

I.2 SOURCES OF LAW

- The Constitution
- The laws voted by parliament which include the four codes (Civil, criminal, Civil procedure and Criminal Procedure)
- The regional laws
- Regulations which implement the laws
- Uses

The above list shows the hierarchy of the sources of law, so for example an ordinary law will be of no effect if it is in contrast with the Constitution.

As a result of Italy's membership in the European Union and of a number of EU Directives many parts of the Civil Code have been substantially modified (e.g. the sections on corporate structures, agency contracts, product liability).

Furthermore Italy is part of many international conventions which must be consulted as they substitute internal law where they apply.

I.3 LIMITATION PERIOD (PRESCRIZIONE ARTICLES 2934-2963 CIVIL CODE)

All rights, except non disposal rights, are extinguished if they are not exercised within the time limit fixed by the law. The time limit runs from the day when the right can be enforced.

Except where otherwise provided limitation period is of ten years. For instance, the law provides for specific limitation period of 5 years for compensation of damages, payment of interest, leases,

rights arising from corporate relationships; rights arising from forwarding and transport of goods have a one year limitation period.

The limitation period is interrupted by any act with which the creditor claims his rights and asks for the fulfilment of the debtor's obligations, it can therefore be interrupted without commencing proceedings, merely by sending a registered letter to the debtor. Where limitation period is interrupted a new limitation period begins.

Thus where judicial proceedings are commenced, the limitation period is interrupted and a new limitation period runs only when the judicial decision has become final.

Where arbitration proceedings are commenced the limitation period does not run from the moment when the request of arbitration is served until the award has become final and is not subject to appeal or the appeal decision has become final.

2. ADMINISTRATION OF JUSTICE AND JUDICIAL FUNCTION

2.1 JURISDICTION

Jurisdiction is one of the three fundamental functions of a democratic State – together with the legislative and governing ones – and it aims at giving actual application to the laws regulating the legal system.

The Italian system of courts has two distinct categories: the *ordinary jurisdiction* and *special jurisdictions*. The ordinary jurisdiction is administered by career judges – provided for and governed by the laws regulating the system of courts – who are competent for civil and criminal matters, with the exclusion solely of those matters reserved to the jurisdiction of special judges.

The special jurisdictions of the Italian legal system are:

- the administrative jurisdiction, exercised by the *Tribunali Amministrativi Regionali* – TAR (Regional Administrative Courts) and by the *Consiglio di Stato* (Council of State) for controversies against the civil service;
- the auditing jurisdiction, exercised by the *Corte dei Conti* (State Auditors' Department) for matters concerning public accountancy;
- the military jurisdiction, exercised by the *Tribunali Militari* (Military Courts), by the *Corti Militari di Appello* (Military Appeal Courts) and the *Tribunali Militari di Sorveglianza* (Military Surveillance Courts), for military offences committed by members of the Armed Forces;
- the fiscal jurisdiction, exercised by the *Commissioni Tributarie Provinciali* (Provincial Fiscal Commissions) and by the *Commissioni Tributarie Distrettuali* (District Fiscal Commissions), for matters concerning taxes.

The organs which provide for the administration of the ordinary civil and criminal justice are:

- *Giudice di pace* (Justice of the Peace)
- *Tribunale ordinario* (Trial Court)

- *Tribunale di sorveglianza* (Court responsible for the enforcement of sentences)
- *Tribunale per i minorenni* (Juvenile Court)
- *Corte di appello* (Court of Appeal)
- *Corte di cassazione* (Court of Cassation – the highest court of appeal)

There are also special organs: the *Corte di Assise* (Court of Assize), composed of two career judges and six lay judges, competent for very serious crimes; the *Tribunale Regionale delle Acque Pubbliche* (Regional Court of Waters) and the *Tribunale Superiore delle Acque Pubbliche* (High Court of Waters), competent for controversies on waters which are property of the State.

3. CIVIL LEGAL PROCEEDINGS

3.1 COURT SYSTEM

Generally speaking the decisions of a first instance Court can be appealed to a higher Court, to the Court of Appeal and the Supreme Court of Cassation.

The three levels of jurisdiction are:

First instance

Giudice di Pace, where the deciding body is an honorary magistrate holding office for 4 years. He is competent for civil controversies of value below Euro 2.582,28.

Tribunale, where the deciding body is a single professional judge

Appeal

Court of Appeal where the deciding body is a college of three judges. The Court of Appeal reviews the first instance decision from the point of fact and law.

Supreme Court

Corte Suprema di Cassazione, based in Rome with jurisdiction over the whole territory. This is the highest court of the judicial system and ensures the precise application and uniform interpretation of the law. It decides conflicts of competence between the lower courts, conflicts of jurisdiction. It also has power to re-examine decisions on appeal from the lower courts but only on points of law. It is a collegial body and decides with a college of five. It has three civil divisions and hears cases of particular importance in united session.

3.2 CIVIL PROCEDURE

The Italian procedure is sometimes considered inquisitorial in comparison with the adversary procedure in common law systems . With reference to the civil procedure this is not strictly true ,except in the case of compulsory liquidation proceedings, as a case proceeds to decision only if it is pursued by at least one of the parties, otherwise it is cancelled from the roll.

These notes refer to ordinary proceedings , corporate litigation procedure, proceedings of court order for the collection of credits, interim measures , enforcement proceedings .

3.2.1 Ordinary Action

(PROCESSO DI COGNIZIONE ARTICLES 163 - 448 CIVIL PROCEDURE CODE) whereby the plaintiff submits a claim before the competent Court to obtain a decision against the defendant.

The first instance proceedings are commenced by a Summons served on the defendant calling him before the court with at least 90 days notice. The summons must specify all claims brought by the plaintiff and evidence of the same, and the first reply of the defendant must include all arguments brought by the defendant and evidence of the same. The procedure develops with three time limits for the parties fixed by the judge, a 30 days time limit fixed at the first hearing of the case to file pleadings amending or specifying pleadings made in the writ of summons and first defence, a further term of thirty days to submit objections and submit further evidence, a term of twenty days to provide evidence in rebuttal.

All first instance decisions are subject to appeal.

Alternatively first instance proceedings can be brought under the rules of corporate litigation. A plaintiff wishing to act under these rules must include this in the summons and obtain the adherence of the defendant in the first reply.

3.2.2 Corporate Litigation Procedure

Corporate litigation procedure was introduced by D. Lgs January 17th, 2003 No. 5. The procedure is commenced by a summons that provides for the defendant to submit his first defence within 60 days and is then streamlined in a pre-trial phase during which the parties exchange briefs within fixed time limits without the involvement of a judge. The parties then request the Court to schedule a hearing, and a judge is appointed by the President of the Court to decide the case on the basis of what has emerged during the pre-trial period.

3.2.3 Court Order Proceedings for the Collection of Credits

(PROCEDIMENTO DI INGIUNZIONE ARTICLES 633 - 656 CIVIL PROCEDURE CODE), where the creditor has written proof of a debt, certain in its amount and overdue, it is possible to obtain a court order against the debtor by submitting written evidence to the court.

The Order is issued without hearing the other side and becomes enforceable if it is not opposed within forty days from service by the debtor. In certain instances the court will grant leave to enforce the order immediately, notwithstanding opposition .

3.2.4 Interim Measures

(ARTICLES 669 - 705 CIVIL PROCEDURE CODE)

Italian procedure provides for interim measures designed to protect the rights of the claimant outside proceedings, to decide on the claim or during proceedings. These are granted considering the preliminary evidence submitted by the claimant and considering the damage that might be suffered by the claimant's rights if a measure is not applied at short notice. In certain cases, such as restraining orders or urgent measures granted under article 700 of the civil procedure code, the interim measure is not necessarily followed by an ordinary action, in other cases, after interim measures are granted the parties have sixty days within which ordinary proceedings must be commenced.

3.2.5 Enforcement Proceedings

Article 474 of the civil procedure code provides that enforcement proceedings can be carried out on the basis of an enforcement order. There are essentially two types of enforcement orders, judicial enforcement orders granted to enforceable decisions and interim measures and extra judiciary enforcement orders relating to bills of exchange and other negotiable instruments and acts received by the notary or other public officer authorised to receive them, recording monetary obligations.

Enforcement proceedings available in Italy are:

- forced expropriation procedures (*espropriazione forzata*), aimed at satisfying a money debt whereby the enforcement is carried out through the attachment of assets belonging to the debtor followed by auction sale governed by special rules and assignment of sums to the creditor or direct assignment to the creditor;
- procedures for the forfeiture of moveable goods, or possession of real property (*esecuzione per consegna o rilascio*) and
- procedures for forced execution for specific performance or non-performance (*esecuzione di obblighi di fare o non fare*).

3.2.6 Enforcement of Foreign Decisions

Foreign decisions are recognised in Italy if:

- the judicial authority that issued the decision was competent according to the laws of the country where it was issued;
- the act introducing proceedings was duly served on the defendant and the fundamental principles of a fair right of defence were not violated;
- the parties have duly filed appearance or were duly declared in default; the decision has become final;
- the decision is not contrary to a decision issued by an Italian judge that has also become final;
- no proceedings are pending before an Italian judge with the same object, between the same parties that was commenced before the proceedings held abroad; the provisions of the decision are not contrary to the Italian principles of public order.

The enforcement order is granted to the foreign decision by the Court of Appeal that ascertains that the above conditions are satisfied. The debtor has a right of opposition against the order.

4. ARBITRATION

4.1 ARBITRATION IN ITALY

Italian arbitration law underwent a major reform in 2006 (Legislative decree 40 of February 2006) and contains provisions which are very favourable to the conduct of international and domestic arbitrations, with minimal scope for interference by the Italian courts.

According to Italian law, a case may be referred to arbitration or other type of ADR proceeding only if the parties agree or have provided for arbitration with a contractual clause.

Italian Law recognise three kinds of arbitration:

- national or domestic – mostly will be between two Italian parties, although in certain circumstances even an arbitration between Italians can qualify as international;
- international – when the arbitration has its site in Italy and at least one of the parties had its residence or its place of business abroad; or a relevant part of the obligation connected with the matter which gave rise to the dispute is to be performed abroad;
- foreign – when the arbitration is located outside Italy.

The Italian system provides for two types of domestic arbitration:

- formal arbitration - art. 806-831 and 823-840 (*arbitrato rituale*) and
- informal arbitration (*arbitrato irrituale*).

The main difference between formal and informal arbitration in Italy is that an arbitration will be considered "*formal*" when the parties determine in the arbitration agreement that the award will have effect between them not only at a private level (that is, in the same way as a binding contract), but also that it can be submitted to the State judge for recognition.

The implications of this are that, once recognised by the court, the award of a formal arbitration has the same status as a court judgement.

In "*informal*" arbitration, the parties only intend to obtain an award with the effect of a private ruling. An informal award cannot be recognised by the State judge or enforced like a court judgement. Under Italian law, if the parties do not specify whether the arbitration should be "*formal*" or "*informal*", or if the arbitration agreement does not make this clear, the arbitrator will establish the nature of the arbitration. The arbitrator to define the arbitration will look at the wording of the arbitration clause, and at the agreement as a whole and at the surrounding circumstances. If the nature of the arbitration remains in doubt, Italian law assumes that the parties desire "*formal*" arbitration.

Italian Law recognises:

- administrative arbitration –whereby the parties decide to settle their disputes with arbitration administered by an Arbitration Body that applies a pre-existing set of rules;
- ad hoc arbitration – when the parties decide to settle their dispute submitting to arbitrators who will set their own administrative rules.

There are a number of organisations that specialise in conducting arbitrations in various fields. The most important in Italy are:

- The Milan Chamber of Commerce
- The Italian Arbitration Association
- The Venice Chamber of National and International Arbitration

4.2 PROCEDURE

The parties can submit their disputes to an arbitration if they have included an arbitration clause in their contract or, if they did not, by stipulating a submission agreement. Particular attention must be given to the drafting of the arbitration clause.

If the parties do not choose any institutional procedural rules or do not otherwise agree on the conduct of the proceedings, then the conduct of the arbitration will be decided by the arbitrators and governed by general Italian arbitration procedure. "Formal" arbitration is principally governed by the Code of Civil Procedure, which sets out rules for the commencement and conduct of the proceedings, the making of the award and its effect between the parties.

4.3 APPEAL

The Code of Civil Procedure contains a list of possible means of appeal against a "formal" arbitral award, before the State Court. These include:

- action in nullity before the Court of Appeal (*impugnazione per nullità*);
- extraordinary revocation (*revocazione straordinaria*);
- third party opposition (*opposizione di terzo*).

5. ALTERNATIVE EXTRA-JUDICIAL DISPUTE RESOLUTION IN ITALY

Alternative Dispute Resolution, which constitutes possible response to access to justice problems connected with the number, cost and length of proceedings, are inspired by a concept of "private justice"; different from arbitration in the strict sense, during which the decision of the arbitrator aims at replacing that of the Court.

5.1 ALTERNATIVE DISPUTE RESOLUTIONS

The Italian legal system provides a variety of forms of Alternative Dispute resolution.

In a very general sense, they can be illustrated as follows:

- Consensual transactional agreements provided for by article 1965 of the Civil Code;
- Mediation or Conciliation, where the parties turn to an independent third party thereby arriving at an agreement.

Other forms of non judicial dispute resolution are provided for by specific legislation :

- Law No. 108 of 11 May 1990, on extra-judicial dispute resolution in labour matters which provide for mediation proceedings that must precede judicial proceedings;
- Law No. 92 of 18 June 1998 providing for mediation prior to judicial proceedings or arbitration in controversies concerning sub-contracting;

- Law No. 320 of 2 March 1963 providing for compulsory mediation before judicial proceedings in agricultural controversies;
- Legislative Decree No.5 January 17th 2003 providing for special mediation proceedings to settle corporate controversies.

5.2 MEDIATION

By choosing Mediation, the parties elect to resolve the controversy directly by examining the circumstances that have led to the controversy and the different possible solutions, operating outside the provisions of law that may establish rights and obligations .

The characteristics of Mediation can be summarised as follows :

- it is a voluntary procedure as it can be effective only if the parties are willing to take part;
- it involves the parties directly and they are the subjects that will determine the outcome of the proceeding;
- it is flexible because the parties in finding the solution are not tied by rules of law, and can find any type of solution they think fit;
- it is rapid, a mediation rarely takes more than two meetings of about six hours each;
- it is confidential as one of the basis principles of mediation is that nothing that emerges during the proceeding can be used outside the proceeding;
- it is neutral as recourse to arbitration does not prejudice in any way recourse to arbitration or to the courts , where conciliation fails.

5.2.1 Procedure

Mediation can be provided for within the terms of a contract or be agreed as a chosen procedure by the parties when a controversy arises.

There is no fixed procedure for Mediation. The Mediator will decide with the parties which is the best method to examine the question. However mediation Centres have rules, that must be accepted by the parties and the Mediator that define the principles and aim of the proceeding, the way in which minutes and agreement should be drafted and the criteria with which costs and Mediator's fees are established.

The standard Mediation procedure consists of a series of meetings between the mediator and the two parties (and their advisors) and between the Mediator and each of the parties separately and a final meeting during which the agreement is drafted.

The agreement reached with mediation is considered an effective solution to the controversy as very rarely the parties will breach its terms, however it is also possible to give this agreement the same enforceability as a Court decision by notarialisation. Further, mediation agreements reached with proceedings held by recognised mediation centres concerning corporate controversies as defined by D. Lgs. January 17th, 2003 No. 5, approved by the President of the Court having jurisdiction in the place where the Centre has its offices, are enforceable titles, just like a Court decision.

In Italy there are active recognised Mediation Centres operating within the structure of the main Chambers of Commerce.

5.2.2 Advantages and Disadvantages

The world is becoming smaller and markets are extended every day, the natural consequence of this is that business has become international and subjects with different cultures and different legal systems have to interact. This is not easy and, although rules of international trade have developed, often operations that should lead to advantages for parties concerned are ruined by misunderstandings.

The advantages of mediation are that it offers a solution which is practical, immediate and economically convenient and specifically takes into account each party's point of view.

The disadvantage of mediation lies in its very characteristic: it can only be of effect if the parties are willing to take part in a constructive manner.

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