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ANTHONY COLMAN

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Italy

PART A—GENERAL SECTION

(1) STRUCTURE OF THE ITALIAN COURTS

(a) Courts where Commercial Litigation is Initiated

A1.1 The Italian 'ordinary' judiciary system is structured as a unit in the sense that the setting up of special courts or tribunals is specifically forbidden by constitutional law; it follows therefore that all civil claims including those listed under the specific section herein (except one) are dealt with by the ordinary civil courts.

A1.2 There is also one further major 'quasi' judicial system, which concerns the public administration both in relation to disputes within its organization and in relation to disputes where the administration in its 'public' capacity is a party vis-á-vis outsiders. This system is based on a number of *Tribunali Amministrativi Regionali* (Regional Administrative Courts) which are evenly located throughout the national territory and which constitute an entirely autonomous system where the 'judges' are part of the executive power and not of the judiciary. An analysis of what is known as 'Administrative Justice' will be made only where necessary in the specific section.

A1.3 Constitutional law forbids the creation of special courts but allows the setting up of specialized sections in the ordinary courts; what has therefore happened is that within the courts located in the major commercial cities, one or more sections have specialized in commercial matters simply by dealing as a matter of routine with commercial cases allocated to that section by the court's internal distribution system.

A1.4 The ordinary civil courts are structured as follows:

1. Court of First Instance (*Pretore/Tribunale*);
2. Court of Appeal;
3. Supreme Court or Court of Cassation (*Corte di Cassazione*).

The Courts of First Instance as well as the Court of Appeal consider both facts and law whereas the Supreme Court is empowered to consider only the correct application and interpretation of the law.

(b) Limits on the Courts's Jurisdiction

(i) Monetary Value of the Dispute

A1.5 The jurisdiction of the *Pretore* encounters its first limitation in relation to the value of the claim; the *Pretore* can decide only upon disputes with a value up to Italian Lire 5.000.000 and if the dispute exceeds this value or if the value of the dispute cannot be ascertained, the jurisdiction rests with the tribunal.

A1.6 In order to ascertain the value of the dispute the following criteria apply: the value will be ascertained by taking into account the claim for capital and interest together with any penalties which may be imposed together with any counterclaim from the defendant. If there are several plaintiffs or defendants the value of the dispute is derived from the total aggregate figure.

(ii) Issue Related Limits

A1.7 There is little that can be said in relation to limits connected with the issues or the nature of the claim in commercial disputes save that the *Pretore* has exclusive jurisdiction, whatever the amount of the claim, in relation to certain enforcement and attachment proceedings, boundary disputes, and certain eviction proceedings; the tribunal in relation to the status and capacity of persons and the authenticity of documents; and the Court of Appeal in relation to recognition and enforcement of foreign judgments, whatever the state of origin.

(iii) Other Limits

A1.8 Italy has ratified both the Brussels Convention of 1968 on Civil Jurisdiction and Enforcement of Foreign Judgments, which is in force in almost all the EEC countries, and the Convention on the Arrest of Sea-Going Vessels signed at Brussels in 1952 which in some respects affect the position relating to the court's jurisdiction, and the New York Convention 1958 in relation to arbitration which allows litigants to opt for arbitration in preference to court proceedings.

A1.9 One limit which is always applicable in the Italian courts' system is the geographical one within the Italian territory. Essentially, the *Pretore* has jurisdiction over a small geographical area and in any event over a particular town whereas the Tribunal's jurisdiction usually embraces a geographical area which corresponds to a 'province', and the Court of Appeal's jurisdiction which may extend from one large province to an entire region. There is only one Supreme Court for the whole of Italian territory and it is located in Rome.

A1.10 The rules which determine the territorial jurisdiction as defined above, and perhaps misleadingly to common law lawyers expressed in Italian legal jargon by the words '*territorial competence*', namely the power vested in one Court rather than in another in the territory of the Republic, are numerous and detailed and are not contained in unitary form in the civil and civil procedure codes but are contained in a number of articles; a brief and very general indication as to how a particular court has territorial jurisdiction in preference to another court within the Italian territory can be given on the basis of articles 18, 19, 20 and 23 of the code of civil procedure as follows:

—The general 'Forum' in relation to individuals is that of the place where the defendant resides or is domiciled or, if these are unknown, of the defendant's place of abode. However, if the defendant is not resident or domiciled or if the place of abode is unknown or outside the state, jurisdiction vests upon the Court of the place where the plaintiff resides.

—The general 'Forum' in relation to companies and corporations is that of the place where the defendant company has its 'seat' or the place where the company has an address together with a representative officer with authority to sue and be sued and to accept service of proceedings for and on behalf of the company.

—The alternative 'Forum' in relation to disputes concerning obligations arising out of contracts, quasi contracts and tort is that of the place where the obligation arose or should have been performed.
—The 'Forum' in relation to disputes between company members or co-owners is that of the court of the place where the company has its seat or of the court of the place where the jointly owned property or the majority of the jointly owned properties is.

A1.11 Turning now more generally to the properly defined jurisdiction of the *ordinary* Italian judge this may become an issue only in relation to Italian citizens resident and domiciled abroad or in relation to foreigners (both individuals and corporations). As a general rule Italian citizens may always be sued before the Italian courts provided there is an element which links the dispute to the Italian court, whether that be contractual or tortious, whereas the simple fact that the plaintiff is an Italian citizen is not sufficient (unlike in France, for instance) to establish the Italian court's jurisdiction. In relation to foreigners the most relevant sets of rules are those provided by article 4 of the Italian code of Civil Procedure, article 14 of the Italian Maritime Code, the Brussels Convention 1968 on Civil Jurisdiction and Enforcement of Judgments, and the Brussels Convention 1952 on the Arrest of Sea-Going Vessels. For a more detailed analysis of these sets of regulations reference should be made to paragraphs A4.1 to A4.22 below.

(2) THE JUDICIARY

(a) Training and Background

A2.1 A judicial career is open to university law graduates who must first pass an examination before a panel of examiners (who are themselves judges) for appointment as a judicial auditor (*uditore giudiziario*). This post marks the beginning of the judicial career as an apprentice; after one year of apprenticeship the 'uditore' begins to exercise proper judicial functions and after a total of two years and the passing of a further, but undemanding, examination full judgeship can be achieved.

A2.2 Judges are divided into three main categories: judges of a Tribunal, of a Court of Appeal, and of the Supreme Court (*Corte di Cassazione*). Progress is based upon a mixed system of seniority and evaluation of merit and also, but far less frequently, on performance in oral and written examinations set by a commission of High Court Judges; in all cases a favourable report from the local judicial council or from the president of his Court (Chief Justice) is always at least as relevant as the analysis of the judgments rendered by the particular candidate.

A2.3 The analysis of the judgments rendered by the candidate has caused this system to be under criticism from those who argue that such a system places an unacceptable pressure upon certain judges to render elaborate and doctrinal judgments rather than sensible ones reflecting a careful weighing of evidence.

(b) Experience of Commercial Litigation

A2.4 It follows that none of the Italian judges have experience as advocates or trial lawyers. It must be said however, that experience in advocacy in comparison with barristers in the English courts, or trial lawyers in the American courts, is unlikely to

be acquired in the Italian judicial system for the simple reason that Italian civil litigation is almost entirely conducted by way of written pleadings only.

A2.5 Specialization in the Italian court is present only in so far as the courts located in the major commercial centres are concerned. In these areas specialization is achieved through practice rather than vocation, namely through the assignment by the President of the Tribunal on a repetitive basis of certain categories of disputes to certain sections of the Tribunal, each section comprising of a number of judges which over the years therefore gain specialized experience. Certain courts gain particular experience in certain matters simply because of their location. By way of an illustration only, and by no means to be taken as exhaustive, it can safely be said that among the major centres those which tend to attract disputes relating to enforcement of corporate share sale transactions, copyright and trade-mark, breach of contract and joint trading venture agreements are Milan and Rome due to their geographical location and the number of transactions of that nature which are carried out, whereas in matters relating to ships' arrests, enforcement of foreign arbitration awards, charterparty disputes, or cargo claims and, to a certain degree, insurance (marine) claims the Tribunals located in Genoa, Naples, Trieste, Ravenna, and Livorno have acquired experience because of their location and their traditional links with the shipping trade.

(3) THE LEGAL PROFESSION

(a) Structure

A3.1 The Italian legal profession is not divided into two in the same way as, for instance, the English profession is divided into barristers and solicitors, ie by reason of the function performed. A division linked to the number of years of practice after qualification exists between the '*Dottore Procuratore Legale*' and the '*Avvocato*' since the admission to the 'roll' as a fully qualified *Avvocato* takes place six years after the passing of the professional examinations and the registration as a *Dottore Procuratore*. The main practical difference between the two qualifications is that an *Avvocato* is, of course, more experienced than a *Dottore Procuratore* and may act personally on behalf of clients over the whole national territory whereas a *Dottore Procuratore* may only be officially appointed in contentious matters in the area where he has been admitted to practice.

A3.2 Until not long ago the professional units were almost invariably very small with no more than two or three lawyers, usually members of the same family, working in 'partnership', with perhaps the same number of employed assistants. This state of affairs is now slowly but changing because of a number of factors: a change in mentality, a growing, more demanding and competitive business community, the need in a competitive market to be competitive both within the Italian territory and more importantly internationally because of improving international business relations, and the linked legal market which has therefore been created.

A3.3 If from one point of view there is a growing fear that even large firms, by Italian standards, may find themselves being used as sub-contractors by much larger foreign firms in large international transactions, the problems of growth encountered by many Italian firms are still in place. The problems appear to be partly due to strong

individualism but also to a law governing law firms which dates back to the 1930s, and which does not contemplate the idea of a true partnership. The existing law is only designed to cover professional associations and not partnerships as they are intended in the Anglo-Saxon world and it is therefore left to the individual firms to create structures and regulations which may hold a firm together. The overall picture is fast improving, although not many of the leading Italian law firms can yet count more than a dozen 'partners'.

(b) Specialization

A3.4 Specialization in the Italian legal profession is somewhat new and relatively uncommon. As one would expect specialization very much depends on the kind of clients which a firm or practitioner has and this in turn depends on whether the firm has the expertise to deal with complex matters which require a specialist approach. It also depends on various other factors, one of them being the reputation of that particular firm in a particular field of the law. It is fair to say that, in general terms, large firms tend to attract large clients which, by the law of averages, tend to deal with the more specialized and complicated matters, but this is by no means the rule since there are also excellent lawyers with a solid reputation who are extremely knowledgeable and specialized and who may have varying numbers of employed assistants, who are capable of providing excellent legal services.

A3.5 It is therefore impossible to state categorically that a claim relating to corporate matters is more commonly dealt with by a large firm with a large number of lawyers available because this is not always so. In this respect, it must be also mentioned that university professors play a far more active role in the profession than those, for instance, teaching in the English universities, and those who reach a position of prominence in a University career are usually associated (if they are not practising lawyers on their own account), with other law firms as consultants.

A3.6 In connection with the particular kind of claims listed in Section B, the same reasoning which applies to the specialization of the law firms applies to individuals and therefore the nature of the claim and its location in a way dictates and favours a particular firm or a particular lawyer. The more widespread the kind of litigation contemplated, the less specialization is needed. In an attempt to provide a general, and personal, view of what lawyer or firm is more likely to deal with a particular claim out of those contemplated in Section B the following statement can be made: claims for breach of contract for the sale of goods, claims for title to or damage to goods and, to some extent, claims for money due under insurance contracts, being the more common, can be more than adequately handled by the vast majority of lawyers whether they be in large firms or practising as sole practitioners: Claims to an interest in a bank deposit are one step down the ladder and their handling depends very much on the matter from which the claim derives, namely whether the issue relates to inter-banking agreements, litigation arising out of letters of credit and banks' guarantees, or more simply to a disputed amount in a joint bank account.

A3.7 Claims relating to reinsurance contracts, corporate share sale transactions, copyright and trade-marks require, of course, a rather more specialized approach and experience in those fields is consequently more concentrated. In practical terms, this means that these matters are usually dealt with by lawyers working in large organisations in which the diversification in the various departments of the firm allows deep specialization, or conversely, by lawyers, usually university professors, who have

chosen to practise only in the particularly specialized field concerned as a necessary complement to their university career.

A3.8 Similar comments can be made about shipping claims in relation to charterparties or the arrest of ships with the additional point that, in view of the territorial aspects intimately connected with these kinds of claims, the firms or practitioners which have acquired expertise in shipping matters tend to be those which practise in the major shipping and commercial centres, and among these no particular preference can be drawn between professional 'partnership' and sole practitioners. In view of the international factors associated with these kinds of disputes, and in view of the time pressure often if not always present there is a clear advantage in being represented by a firm with the capacity to understand and be familiar with documents which are invariably written in English and which often contain very specialized terminology.

A3.9 No generalization can be made in relation to proceedings for enforcement of foreign judgments or of foreign or domestic arbitration awards since on the assumption that a foreign plaintiff has a choice of law firms or practitioners of equal standing, a choice may be made on the basis of various factors; the residence or domicile of the defendant and/or the location where the *res* is situated and, of course, the experience of the lawyer concerned in dealing with overseas clients and with documentation in a foreign language.

A3.10 Last, and in relation to claims for rights in a mineral concession, if the claim arises out of the concession itself, then the public administration (whether it be one of the departments of the central government or of the regional governments in those instances where they have powers to issue concessions for the extraction of minerals), is bound to be the counterpart. It is therefore most likely that the dispute will exceed the boundaries of the ordinary civil jurisdiction and be dealt with by the Administrative Tribunals.

(c) International Experience (Overseas Clients, Evidence, Witnesses)

A3.11 The amount of experience gained by a firm in dealing with foreign clients is of course directly related to the type of practice involved. In consequence it is more likely, but by no means to be taken as an invariable rule, that large firms with a large number of foreign clients acquire considerable experience in relation to collecting evidence from abroad for use in Italian proceedings. In this respect, and anticipating what will be said in paragraphs A6.1 to A6.7 below, regard must be had to the rules concerning letters rogatory under the relevant articles in the Italian Code of Civil Procedure, since it is the Italian enquiring judge who transmits the questions to the receiving court of the country where the witness has to be examined and then receives the answers. The questions are articulated under specific chapters and the replies will be considered by the Italian judge according to the Italian rules of procedure, but the manner in which the examination of the witness is carried out can only be that which is allowed in the country where the examination takes place, and this has important consequences which will be examined later.

A3.12 Once again, therefore, familiarity with foreign legal systems and frequent contact with foreign law firms constitutes a distinct advantage mainly enjoyed by large law firms in the main commercial cities or by those practitioners which have frequent contacts with foreign jurisdictions.

(d) Professional Fees

A3.13 The charging rates system in relation to contentious civil matters has its foundation in a contractual agreement between the lawyer and his client coupled with the application of a scale of fees, relating to the court work carried out, which are determined in detail by rules set from time to time by the national Bar association (*Consiglio Nazionale Forense*). The fee scale applies compulsorily only in so far as the minimum fees are concerned and in relation to the costs recoverable from the losing party by the winning party and liquidated by the Judge.

A3.14 The latest up-date in relation to the fee scales dates back to 1985 and contains a detailed description and related fee for each activity carried out before the Court of First Instance, Court of Appeal, Supreme Court and Constitutional Court. There is a difference between the fees payable to the *Dottore Procuratore Legale* and those payable to the *Avvocato* and that the table of fees includes a minimum and maximum figure for each item. As mentioned, the minimum figure is the only one which cannot be overruled by a contrary intention of the parties but the maximum figure is also relevant in relation to the costs payable by the losing party. In non-contentious matters there is no predetermined maximum fee and therefore, depending on the parameters which will be considered later, the maximum fee may reach 1.50 per cent of the value of the dispute in relation to the *Dottore Procuratore Legale* and up to 3 per cent of the value of the dispute in relation to the *Avvocato*.

A3.15 The legal basis of fee-charging is provided by sections of the Civil Code dealing generally with contractual arrangements when the fees have been agreed by the lawyer and his client, or by article 2233 first paragraph of the Civil Code which sets out three criteria to be considered in the absence of a contrary intention of the parties, namely (a) the professional fee scale, (b) the custom and use of the profession and (c) the judge who, in the absence of any other criteria may quantify the remuneration due to the lawyer.

A3.16 The criteria upon which the amount of fees can be assessed are of general application and can be summarized as follows: the nature and value of the dispute, the number and importance of the matters dealt with, the court before which the dispute lies (Judge of First Instance, Court of Appeal, Supreme Court) the difficulty of the legal issues considered, the result achieved, the number of parties represented (whether one or more as co-plaintiffs or co-defendants) and the consequences, whether financial or otherwise, for the client. It must, of course, be borne in mind that these parameters are binding only in relation to the sums liquidated by the judge against a losing party. They do not affect any contractual agreement entered into between the lawyer and his client.

A3.17 The concept of an hourly fee rate is now being applied in many law firms, particularly in those which have a substantial foreign clientele; it is reported by publications concerning Italian law firms that the bracket within which most firms choose their hourly charging rate spans between the equivalent of about US $80.00 per hour to the equivalent of about US $350.00 per hour. Various factors of course influence the actual charging rate in what is a rather wide bracket, and their effect on the fees charged is more a matter of commonsense than of legal arithmetic. It is therefore common ground that if the dispute involves large sums of money, requires a detailed perusal of complex and technical documents (perhaps in a foreign language), requires a very specialized knowledge of the substantive aspects, is dealt with by a number of lawyers dedicated full-time during the relevant period, and if, in addition, a favourable or unfavourable outcome would have serious repercussions, whether financial or