ITALIAN BUSINESS LEGAL GUIDE

FOR IRANIAN ENTREPRENEURS

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INDEX

INTRODUCTION

The expected increasing business relations between Italy and Iran seem at the moment more focused on the import from Italy into Iran of machinery, technology, movable goods, as well as on the participation of Italian companies to public bids, construction projects, plants installation, but it can be reasonably expected that also the sales from Iran to Italy will increase. In both cases, some knowledge on the part of Iranian enterprises of the fundamentals of the Italian law and EU legislation is necessary, to avoid any risks in the case of possible subsequent disputes.

This short guide is the result of my 30 years' experience in assisting Iranian companies, public institutions, banks, and private individuals in transactions or litigation with their Italian counterparts.

The purpose of this guide is to give to Iranian entrepreneurs or lawyers a general overview of the contents of Italian law, not only in respect of any transaction having as its object the Italian market, but also in the opposite case, i.e. in the case of any transaction directed towards Iran with their Italian counterparts.

This guide is based on Italian international private law as a basis to assess both jurisdiction and applicable law, in the case a claim is brought before an Italian court, but also the implication of Italian law that may arise in the case of a request of enforcement in Italy of a judgment obtained in Iran or of an arbitral award issued in Iran or in a third country will be considered.

The provisions concerning other subjects, such as company law, bankruptcy and real estate, have not been handled in this guide, but I hope that in the next future they may become more and more interesting for Iranian entrepreneurs, deciding to invest or to expand their business in Italy.

Milan, April 20, 2016

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1 THE ITALIAN INTERNATIONAL PRIVATE LAW

The Italian international private law is fundamentally contained in the Act 31 May 1995 no. 218 ("Act on the reform of Italian international private law"). The Act provides different rules regarding the identification of the applicable law, the exercise of jurisdiction over foreign defendants, the recognition of foreign judgments in Italy. Certain provisions have been replaced by the subsequent EU legislation, having the same object, and applying (also) to counterparts domiciled outside the European Union.

1.1 International jurisdiction

According to art. 3 of the above Act, Italian jurisdiction over a foreign defendant domiciled outside the European Union exists in accordance with the rules laid down by certain sections of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

According to art. 5(1) of the Brussels Convention, a foreign defendant can be sued before the courts of the country of the place where the obligation that is the object of the claim was, or should have been, executed. In the case of a claim on damages, the above obligation is the obligation the breach of which is the object of the claim.

The above place must be determined pursuant to the law applicable to the contract; such a law shall be assessed in accordance with Italian international private law.

1.2 Applicable law

As regards the determination of the applicable law to a contract, the Act refers to the law applicable pursuant to the rules contained in the Rome Convention of 1980.

The Convention has now been replaced by the EU Regulation no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (so-called: "Rome I").

The general rule is that a contract is governed by the law chosen by the parties. The choice shall be made expressly, or clearly demonstrated by the terms of the contract or the circumstances of the case. Nevertheless, where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of the provisions of the law of that other country which cannot be derogated by the agreement. Therefore, for example, in the case of a contract for the construction of a plant to be erected in Iran, the possible choice of Italian law as substantive law, shall not prejudice the application of any Iranian provisions that are considered part of the Iranian "public order".

From the field of application of the Regulation are excluded *inter alia the* obligations arising out of dealings prior to the conclusion of a contract, arbitration agreements and agreements on the choice

of competent jurisdiction, obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments, to the extent that the obligations under such other negotiable instruments arise out of their negotiable character.

In the absence of a choice of law, the Regulation provides certain rules to identify the applicable law, depending on the type of contract. Specifically:

- a contract for the sale of movable goods shall be governed by the law of the country where the seller has his habitual residence;
- a contract for the provision of services (for example, a commercial agency agreement) shall be governed by the law of the country where the service provider has his habitual residence;
- a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
- a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence.

If a contract does not fall among one of the types listed by the Regulation, or if the elements of the contract include more than one single type of contract (so called: "mixed" contract), the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence, shall apply.

Where the law applicable cannot be determined pursuant to the above rules, the contract shall be governed by the law of the country with which it has the "closest connections" to the contract.

2 NEGOTIATIONS AND FORMATION OF THE CONTRACT

2.1 Formation of the contract: offer and acceptance

Three questions are considered under Italian law for the purpose of determining whether a contract has been duly entered into: i) the moment of the acceptance; ii) the form; iii) the contents of the acceptance.

As regards the time, a contract is concluded when the offeror has been informed of the offeree's acceptance. The acceptance must be communicated to the offeror within the term specified by himself or within the term that, according to the nature of the business or the trade customs, is deemed usually necessary. A late acceptance may be considered valid, provided that the offeror immediately gives notice of his decision to the offeree.

The form is generally not considered a condition for the validity of acceptance, unless a specific form has been required by the offeror, or is a condition for the validity of a specific type of contract.

It should be observed that an acceptance not complying with the offer is deemed to be a counteroffer.

A contract may be sometimes entered into without the need of a formal acceptance, by simply implementing an order. This situation occurs, if the execution without acceptance has been required by the offeror, or if it is justified by the nature of the deal, or by the trade customs. In such a case, a contract is considered to have been concluded at the moment and at the place where the implementation has started. The offeree is required to inform the offeror without delay that implementation of the contract has started, otherwise he will be liable for damages.

2.1.1 Revocation of offer or of acceptance

An offer can be duly withdrawn, as long as the contract has not been concluded: i.e. revocation is possible, pursuant to the rules previously considered, until the moment when the offeror has been informed of the acceptance.

In this respect, it should be noted that it is assumed that the offeror has learnt of the acceptance, when the latter has reached his address, unless he can prove that, without negligence on his part, it was impossible for him to be informed of the acceptance. The same rule applies for determining the moment when an offer, a revocation of an offer or of acceptance, as well as any other declaration sent to a specific person, are deemed to have been received.

Even if an offer has been duly revoked, the offeror shall indemnify the offeree of the costs and losses suffered for having started to implement the contract, provided that the implementation was started in good faith, before having been informed of the revocation of the offer.

Also the acceptance can be duly cancelled, provided that notice of the revocation is received by the offeror before the notice of the acceptance. Specific modalities for the revocation are provided in the case of contracts with consumers, stipulated outside commercial premises.

2.1.2 Irrevocable offer and option

If the offeror unilaterally undertook to maintain his proposal "opened" for a certain period of time ("irrevocable offer"), a possible cancellation of the offer will have no effect. An irrevocable offer remains in force in spite of the possible death or supervened incapacity of the offeror, unless it proves to be inconsistent with the nature of the deal or with other circumstances.

An option consists in an agreement whereby one party remains bound to its proposal, whereas the other party can accept or refuse it. In such a case, the rules regarding "irrevocable offers" shall apply. If no term for the acceptance has been fixed by the parties, the Court can be asked to fix such a term.

An offer concerning a contract providing obligations only on the part of the offeror (e.g.: a bank guarantee at first request) is irrevocable, once it has reached the offeree. The contract is considered to be entered into at that moment, unless the offer has been rejected by the offeree within the term required by the nature of the deal or by trade customs.

2.2 Letters of intent

2.2.1 General remarks

Letters of intent can be defined as documents whereby the parties specify the main points that will be the object of their negotiations, and intend to protect each other in respect of possible unfair behavior of the other party.

The question is whether a letter of intent is to be regarded as binding or not. Under Italian law, such a question should be answered on the basis of the provisions of the civil code governing the formation of contract and the liability of the parties during negotiations.

The problem of the validity and effect under Italian law of letters of intent implies two different questions: i) negotiations and pre-contractual liability; and ii) preliminary agreements.

2.2.2 Negotiations

The general principle is that during negotiations, and during the stipulation of the contract, the parties are required to act in good faith. Specifically, a breach of the aforementioned duty occurs when a party, although the dealings have been already carried out to such an extent that the other party can reasonably rely on the conclusion of the contract, abandons the negotiations without any justified reason.

The obligation of good faith includes the obligation for any party to inform the other of any possible reason of invalidity of the contract, of which the first party was, or should have been, aware. According to the case law, nevertheless, no liability exists, if the invalidity is the consequence of the violation of a specific provision that should have been known to both parties, such as the non-compliance with a particular form required by the law for the validity of the contract. On the contrary, liability exists, if the invalidity is the result of the behavior of one party, which the other party has, without negligence, ignored.

As regards the damages which can be asked in the case of breach of the duty of good faith during negotiations (so-called: "pre-contractual liability"), it should be noted that they are limited to the expenses and losses that are strictly connected with the negotiations (such as: travels, researches, studies, projects, consultants' fees) and to the profit which the party would have achieved, if, instead of devoting its activities to the dealings, it had handled other business.

2.2.3 The Italian case law on letters of intent

Under Italian law, the decisive question is often that of assessing whether a letter of intent is to be regarded as a preliminary agreement or not. This depends on whether the parties intended to enter into an obligation to stipulate a final contract, or just meant to lay down the main points of a possible agreement, which should be verified in the course of the dealings.

For the purpose of qualifying a letter of intent, an Italian court will assess whether the parties already reached an agreement as to the contents of the final contract, that, as previously noted, should have been already specified in the preliminary agreement. This evaluation can be more complicated by the fact that the parties might have agreed upon that the stipulation of the final contract would depend on the fulfillment of certain conditions.

Apart from the interpretation of the intention of the parties and the verification of the existence of the essential elements of the final contract, the fulfillment of any form requirements may be decisive. For instance, in the case of an agreement to incorporate a company, the case law has constantly excluded that a preliminary agreement existed, if the agreement was not made in the same form required for the memorandum of association. In the absence of such a requirement, the agreement could not be regarded as a preliminary agreement, with the consequence that the claimant was entitled to damages because of the violation of the duty of good faith during the dealings, but it could not ask for a judgment producing the same effects as the final contract.

Some judgments have specifically dealt with the validity of a letter of intent. The guidelines for the evaluation, utilized by Italian courts, on preliminary arrangements are the following.

According to certain decisions, preliminary arrangements cannot directly affect the future agreement between the parties, which would arise solely with the stipulation of the final contract. Nevertheless, such arrangements can validly be utilized to construct the contents of a contract, in the case of any discrepancy of interpretation.

In the case of a declarations of intent contained in a document prepared during the dealings, and which has the purpose of recording in writing the development of the negotiations, no binding effect is usually recognized, with the consequence that the parties are entitled to abandon the dealings, except for possible liability under the theory of *"culpa in contrahendo"*.

A more complicated evaluation is required, if a letter of intent which also sets forth specific rules of behavior to be followed in the course of the negotiations (such as: the obligation not to conduct similar dealings with other perspective partners, confidentiality clauses, the duty of supporting certain costs for preliminary studies, etc.). Such ancillary obligations, even though they are embodied in a preliminary arrangement or in a letter of intent, should be regarded as independent obligations, giving rise to liability in case of breach. If the parties have not specifically regulated these obligations, their possible breach might give rise to liability under the theory of *culpa in contrahendo* or under the "unjustified enrichment" doctrine.

A different situation occurs when a preliminary arrangement already includes certain obligations of the final contract, which have already been agreed upon between the parties, whereas the other questions shall be defined in the final contract. Also in such a case, if dealings are interrupted by one party, the breach of the above obligations would give rise only to pre-contractual liability.

Under Italian law, sometimes it is not easy to qualify a letter of intent, because the boundary between mere negotiations and preliminary agreements is rather subtle. If the intention of the parties has not reached the stage of a preliminary agreement, because the essential elements of the final contract have not been specified, the unjustified abandonment of the negotiations can only give rise to pre-contractual liability under the *culpa in contrahendo* theory. Conversely, the protection in the case of breach of a preliminary agreement is stronger, since a judicial order producing the same effects as the final contract can be granted.

In practice, it is extremely important, in the case of negotiations regarding the purchase of the shares of a company, or the incorporation of a joint-venture, to find out whether any requirements about a specific form should be complied with at the moment of stipulating the final contract. This investigation is necessary, if the parties intend to lay down the terms of a preliminary agreement that they have already concluded, and that shall have a binding effect.

Another suggestion is to clearly specify in a letter of intent whether any binding effect must be recognized to the terms contained therein, or whether the parties still maintain their right to abandon the negotiations, at any moment, without any justification.

2.3 Preliminary agreements

A preliminary agreement is a contract whereby the parties engage themselves to stipulate a final contract later. For this reason, the contents of the final contract should be already specified in the preliminary agreement. It should also be noted that a preliminary agreement is void, if it has not been drawn up in the same form required by the law for the final contract.

It is sometimes difficult to say whether the parties have intended to engage themselves to enter into a subsequent contract, or if they have intended to stipulate immediately a final contract, that later on should be drafted in a more appropriate form (e.g., through a public deed prepared by a public notary). For this purpose, the intention of the parties should be properly construed: i.e. whether they meant to delay the scheduled result, or to achieve it immediately.

2.4 Remedies for the breach of a preliminary agreement and remedies for the breach of the duty of good faith during negotiations

The remedies available in case of the breach of a preliminary agreement and those in case of the breach of the duty of good faith during dealings are quite different.

In the first case, if one of the parties refuses to stipulate the final contract, the other party can ask, in addition to damages, that a judgment producing the same effects of the final contract be issued by the competent court: for instance, the compulsory transfer of ownership in respect of the assets which was the object of the preliminary agreement.

On the contrary, in the case of violation of the duty of good faith during negotiations (so called: "*culpa in contrahendo*"), the party not in default will only be entitled to damages, which, however, are not the same as in the case of a breach of contract (and, specifically, of a preliminary agreement).

Specifically, it has been stressed that, in the case of *culpa in contrahendo*, damages may include any immediate and direct consequence deriving from the breach of the duty of good faith during dealings. Damages can also be claimed for the prejudice suffered for not having concluded a contract different from the contract which was the object of the dealings, if the fact of not having stipulated the different contract appears to be an immediate and direct consequence of the behavior of the party that has unduly abandoned the negotiations.

Finally, it should be noted that the statute of limitation applicable to the breach of the aforementioned duty is five years, whereas the general term applicable to breach of contract (including a preliminary agreement) is ten years.

2.5 International jurisdiction and applicable law in case of breach of negotiations

According to art. 12 of the EU Regulation no. 864/2007 of 11 July 2007, on the law applicable to non-contractual obligations (so-called: "Rome II"), 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.

If the applicable law cannot be determined in this way, the applicable law shall be:

- 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
- if 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
- if 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 those previously indicated, the law of that other country.

As regards jurisdiction under the rules of Italian international private law previously examined, it should be noted that, according to art. 5(3) of the Brussels Convention of 1968, in matters relating to tort, delict or quasi-delict, in addition to the general principle of competence of the domicile of the defendant, a claim can be brought also before the courts of the place where the harmful event has occurred.

3 MAIN TYPES OF CONTRACTS

3.1 Contracts of sale

It should be noted that, in the case of a contract of sale of movable goods, if the applicable law is Italian law (either because of the agreement of the parties, or pursuant to the rules of Italian international private law, previously examined), the Vienna Convention of 11 April 1980 on international contracts of movable goods ("CISG") shall apply, because it is considered part of the Italian substantive law. This means that, in such a case, the Convention applies also to a contract entered into with a counterpart domiciled in a non-contracting State (such as Iran).

It should be pointed out that, under the Convention, also contracts for the supply of goods to be manufactured by the seller, are considered sales, unless the party who orders the goods has undertaken to supply a substantial part of the materials necessary for such manufacture or production. On the contrary, the Convention does not apply, if the preponderant part of the obligations of the party who shall furnishes the goods consists in the supply of labor or other services. In such a case, the contract will be regarded as a construction contract, or a contract for the execution of services.

3.1.1 Breaches on the part of the seller (specifically: defects of the goods)

Among the provisions of the Convention, the modalities and remedies concerning the possible defects of the delivered goods may be particularly relevant.

3.1.1.1 Modalities of the examination of the goods

Particular attention should paid to article 38, according to which, the buyer must examine the goods within a short as period as is practicable in the circumstances. If the contract involves carriage of the goods, the examination may be deferred until the moment when the goods have arrived at their final destination.

Regarding the modalities of the examination, it should be pointed out that, according to the case law, the examination of the goods made by an expert unilaterally appointed by the buyer, without the previous agreement of the seller, cannot be regarded as valid evidence of the defects. The courts have observed that, in such a case, the examination was made in violation of the international trade usage, according to which the seller has the right to attend the verification of the goods. This usage must be considered binding pursuant to article 9 of the Convention.

3.1.1.2 Burden of proof

Since the Convention does not specify who has the burden of proving the possible non-conformity of the goods, reference must be made to the law applicable to the contract, and therefore, if Italian law is applicable, to article 1513 of the civil code. According to this article, in case of a disagreement as to the quality or condition of the goods, either the seller or the buyer can request a judicial

inspection pursuant to the code of civil procedure. The judge, following a request of the interested party, can order the deposit or the sequestration of the goods, or its sale on behalf of the party entitled to it, and establish the terms of the sale. The party who has the burden of proof, and who did not ask for the judicial inspection of the goods, shall, in case of a dispute, conclusively prove their identity and conditions.

According to the case law, in such a case, strong evidence must be offered, in the sense that it must be such as to persuade the judge, fully and beyond any doubt, that the claim is justified, in spite of the difficulty that the party, who has the burden of proof, and who did not ask for a judicial survey, may be faced with.

3.1.1.3 Denunciation of the defects

As regards the notice of the defects, the buyer loses the right to rely on a lack of conformity of the goods, if he does not give notice to the seller, specifying the nature of the lack of conformity within a reasonable time after he has discovered it, or ought to have discovered it. The time limit set out by the Convention is two years, running from the date at which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

In case of "non-apparent" defects, the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time, as well as for any lack of conformity which occurs after that moment and which is due to a breach of any of his obligations, including a breach of any guarantee provided for any specific period of time.

The above deadline of two years however does not concern the prescription of the claim. Therefore, since the Convention does not contain any specific provision, the time limitation of the claim is subject (as well as any other issue not specifically considered by the Convention) to the substantive law applicable to the contract (in the case of Italian law, the general limitation period relating to claims based on contract is 10 years).

3.1.1.4 Remedies

As regards the different remedies granted by the Convention, article 49 provides that the buyer may declare the contract avoided, if the failure by the seller to perform any of his obligations under the contract or the Convention amounts to a "fundamental breach". A breach of the contract is fundamental, if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.

Other remedies consist of the reduction of the price, the replacement or the repair of the goods.

Damages for breach consist according to art. 74 of the Convention of a sum equal to the loss, including any loss of profit, suffered by the buyer because of the breach. Such damages may not exceed the loss that the seller foresaw or ought to have foreseen at the time of the conclusion of the

contract. The possibility of claiming loss of profit under Italian or Iranian law will be examined separately.

3.1.2 Breaches on the part of the buyer

If the buyer fails to pay the price, interests will accrue, without prejudice to any additional claim for damages under article 74. However, the Convention does not specify the applicable interest rate; therefore, it must be determined in accordance with the law applicable to the contract.

3.1.3 International jurisdiction and applicable law in case of possible disputes

In the case of a contract of sale of movable goods, if, according to the provisions of Italian international private law previously examined, the applicable law is Italian law, the Vienna Convention of 11 April 1980 on international contracts of movable goods shall apply, because it is considered part of the Italian substantive law. This means that, in such a case, the Convention applies also in respect of a contract entered into with a counterpart domiciled in a non-contracting State.

According to art. 31 of the Convention, unless it is provided by the contract that the seller must deliver the goods at any particular place, if the contract involves carriage of the goods, the obligation of delivery is executed by handing the goods over to the first carrier. Therefore, for example, in the case of a sale of goods from Iran to Italy, an Italian buyer would not be entitled, according to Italian international private law [art. 5(1) of the Brussels Convention of 1968, by virtue of the reference contained in art. 3 of the Act 31 May 1995 no. 218], to sue an Iranian seller in Italy, in case of a claim for alleged defects of the goods.

A similar rule governs the risk of loss: if the contract of sale involves carriage of the goods, and the seller is not bound to hand them over to the buyer at a particular place, the risk will pass to the buyer when the goods are handed over to the first carrier, for transmission to the buyer in accordance with the contract of sale.

On the contrary, in the case of non-payment of the price, an Italian seller would be entitled to sue an Iranian buyer before the competent Italian court, since, according to art. 57 of the Vienna Convention, the price must be paid at the seller's place of business, unless, according to the contract, the buyer is bound to pay the price at any other particular place.

Different rules apply in the case of a contract of sale entered into between parties domiciled in different EU member States: in such a case, according to art. 7 of the EU Regulation no. 1215/2012 of 12 December 2012, that has replaced the Brussels Convention of 1968, all the obligations arising from a contract of sale are considered as if they have, or should have, been executed at the same place of the final destination ("material delivery") of the goods.

3.2 Letters of credit and bank guarantees

3.2.1 General remarks

Letter of credits are the most commonly used instrument of payment in international trade. They are considered "separate transactions" in respect of the contracts to which they refer. Therefore, if a bank has examined with reasonable care the documents required in the letter, and found that they are, on their face, in compliance with the terms and conditions of the documentary credit, the payment shall be executed, in spite of any possible dispute that may arise between the parties of the "main contract".

The autonomy between the "main contract" and the obligation of the bank is even stronger in the case of a bank guarantee, payable upon the "first request" of the beneficiary.

3.2.2 Judicial remedies under Italian law

Nevertheless, in both cases, in spite of the autonomy of the letter of credit, or of the bank guarantee, the account party (i.e. the party of the "main contract", who has asked the bank to issue the letter of credit or the guarantee) can ask the competent court for a temporary order, to prevent the payment of the letter of credit (or of the guarantee), if *prima facie* evidence about the breach of the seller's obligation (i.e. the beneficiary) can be offered.

A temporary order can be issued by the competent court (a single judge), after having heard the parties in a public hearing, or, if a previous hearing can prejudice the execution of the temporary order, without previously hearing the parties ("*inaudita altera parte*" order). In such a case, the hearing for the confirmation of the temporary order shall take place within a short term. Both in the case of a temporary order issued after having previously heard the defendant, and in case of the possible confirmation of an "*inaudita altera parte*" order, the seller can ask that the temporary order be revised by the court, composed of three judges. The request of revision does not suspend the execution of the temporary order, unless the president of the court decides to suspend its enforceability, if the order can cause a severe prejudice.

3.2.3 The exception of fraud regarding the appeal of a guarantee

The typical scheme utilized in international trade is that of a "four sides" relationship, where, in addition to the account party, the guarantor and the beneficiary, also a counter guarantor exists. The counter guarantor (usually an Italian bank) stands between the account party (usually, the buyer of the "main contract") and the bank of first degree. In fact, if the characteristic that makes an autonomous contract of guarantee is commonly identified in the autonomy and independence of the obligation entered into by the guarantor in respects of the so-called "main contract", such a characteristic is reflected also in the different obligations that belong to the aforesaid relationship (i.e. each obligation is independent from the others).

Specifically, as regards bank guarantees, under Italian law, a bank must refuse the payment, if the appeal of the guarantee on the part of the beneficiary appears to *prima facie* fraudulent (so called: *exceptio doli*).

Generally, the bank of "first degree" is acting on behalf of another bank ("counter guarantor"), and does not have any direct relationship with the account party. Therefore, the bank of first degree can be informed of the possible fraud of the beneficiary only by the Italian bank ("counter guarantor"), which shall immediately put at the disposal of the bank of first degree the documents, from which such a bank should directly deduce, without any doubt, the fraud of the beneficiary. Actually, however, such a situation can occur only exceptionally: in most cases, the existence of a dispute between the parties of the main contract cannot release the bank of first degree from paying the guarantee.

3.2.4 International jurisdiction and applicable law in case of possible disputes

3.2.4.1 International jurisdiction

In addition to this, it should be noted that under Italian international private law, Italian jurisdiction over a foreign bank (guarantor of first degree) exists not only in respect of the possible request of a temporary order, because the injunction preventing the counter guarantor to pay the Italian counter guarantee must be executed in Italy, but also in respect of the subsequent proceeding on the merits regarding the payment of the guarantee.

3.2.4.2 Applicable law

As regards the applicable law in the case of a counter guarantee, it should be seriously analyzed, whether the application to the counter guarantee of Italian law would be more advantageous to the Iranian bank than submitting the counter guarantee to Iranian law. That, at least, because of two reasons, that would be examined more specifically in the paragraph regarding damages:

- Italian law allows to claim "loss of profit" (additional damages), whereas Iranian law does not;
- according to the Italian civil code, if the interest rate in the case of a delay of payment has not been agreed upon in the contract (i.e. in text of the counter guarantee), the rate of "late payment interests", from the moment when a claim for the payment of the counter guarantee is brought against the Italian bank before the competent Italian court, would be equal to the interest rate applied by the European Central Bank in its most recent main refinancing operations, increased by 8% per year.

Finally, it should be noted that, if no provision about the applicable law has been included in the text of the counter guarantee, the proper law applicable to the counter guarantee shall be determined in accordance with the rules of the Italian international private law, previously examined. In fact, in a contract with the unilateral obligations, as a counter guarantee is considered to be, the typical

obligation can be only that of the counter guarantor: therefore, in the case of an Italian bank, Italian law, as the law of the country where the party required to execute the characteristic obligation of the contract has its habitual residence.

3.3 Construction contracts or contracts of services

Contracts for the supply of plants, installations, machinery, services, or turnkey contracts, that involve a preponderant part of activity on the part of the contractor are not regarded, under the Vienna Convention, as contracts of sale. In such a case, if the contract, either because of the agreement of the parties or pursuant to the applicable rules of conflicts of international private law, is governed by Italian law, the provisions contained in the Italian civil code shall apply.

3.3.1 Breaches on the part of the contractor (specifically: defects of the work)

The Italian civil code regulates the modalities and the remedies concerning the possible non-conformity, or any defects of the work.

3.3.1.1 Denunciation of the defects

However, according to article 1667 of the civil code, the warranty in favor of the customer does not apply, if he has accepted the work (even without verifying it), and the changes or defects were known to him (or were detectable), provided that such defects were not passed over in silence by the contractor in bad faith.

The customer shall, under penalty of forfeiture, notify the contractor of the non-conformity or of the defects within sixty days from the discovery thereof, unless the contractor has acknowledged, or concealed them.

The time limit of the claim against the contractor is two years, from the date of the delivery of the work.

3.3.1.2 Remedies

The remedies granted to the customer are the following:

- remedies prior to delivery: if the customer, after having made a verification in the course of the work, has ascertained that the performance has not being carried out in compliance with the terms of the contract and the best practices, he can establish a suitable term within which the contractor must conform to such conditions; if such time limit has expired without results, the contract can be terminated without prejudice to the right of the customer to be compensated for damages (article 1662, 2nd paragraph, of the civil code);
- remedies after delivery: according to article 1668 of the civil code, if the customer has notified the contractor with the non-conformity or the defects of the work, he can within the above term of sixty days demand either:

- that the non-conformity or the defects be eliminated at the expenses of the contractor; or
- that the price be reduced proportionately; or
- that the contract be terminated, if the non-conformity or defects in the work are such as to render the work completely inadequate for its purpose; or
- compensation for damages, in case of negligence of the contractor;

– in any event, the customer can ask for the ordinary remedies provided for breach of contract: i.e. ask the court to declare the termination of the contract, in the case of a serious breach on the part of the contractor.

3.3.1.3 The liability of the contractor for the loss, or for the defects, of the work

In the case of buildings or other immovable intended by their nature to last for a long period of time, the contractor is liable, if, within ten years from its completion, the work is totally or partially destroyed by reason of defects of the soil or the building, or if there is an evident danger of destruction of the work, or it reveals serious deficiencies.

Anyway, the customer shall give notice of the destruction or of the defects within one year after their discovery.

The liability of the contractor cannot be previously excluded or limited by any agreement between the parties.

3.3.2 Breaches on the part of the customer

The parties can provide that the payment of the price will be made, rather than in a lump sum or by several instalments at the end of the work, through down payments during the execution of the work, in accordance with its progress.

It is also possible to provide a clause whereby it is agreed that, to guarantee the good performance of the work, the client will withhold a percentage of the down payments, that shall be returned to the contractor after the verification of the work. This clause - that according to the case law, is not a deposit, but a late payment – is intended to ensure that the payments due the contractor are progressively made, and to protect the client in case of any defects of the work.

Regardless the above clause, if the customer fails execute any down payments, the contractor is entitled to suspend the execution of the works, raising an exception of breach of contract (article 1460 of the civil code), and also to ask for the termination of the contract (article 1453 of the civil code), if the default of executing one of the down payments must be considered a serious breach, taking into account the interest of the contractor (article 1455 of the civil code).

3.4 Commercial agency agreements

In the case of commercial agency contracts, if the contract, either because of the agreement of the parties, or pursuant to the applicable rules of conflicts of international private law, is governed by Italian law, the provisions contained in the civil code will apply. The provisions of the Italian civil code relating to commercial agency agreements have implemented the EU Directive no. 653 of 18 December 1986 on commercial agents.

3.4.1 Definition and form of the agreement

A commercial agent is defined as a self-employed intermediary, who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person (the "principal"), or to negotiate and conclude such transactions on behalf of, and in the name of, that principal. A commercial agent can be either an individual, or a partnership, or a company (juridical person).

The contract must be made in writing; the agent is entitled to receive from the principal a copy of it.

3.4.2 Commissions

Article 1748 of the civil code provides that the agent is entitled to receive a commission for any contract concluded by him during the agency agreement, if such contracts have been the result of his activity.

3.4.3 Duration and termination of the agreement

An agency contract entered into for a fixed-period, but which continues to be performed by both parties after that period has expired, shall be deemed to be converted into a contract for indefinite period.

If the contract is concluded for an indefinite period, either party may terminate it, by giving notice to the other party within the period laid down in the contract.

According to art. 1750 of the civil code, the term of notice shall be one month during the first year of implementation of the contract, two months during the second, and so on, until a maximum term of six months, during the sixth and any subsequent years.

The parties may agree a longer period of notice, but the period to be complied with by the principal cannot be shorter than the one to be observed by the agent.

3.4.4 Commissions due to the agent upon the termination of the agreement

Unless otherwise agreed upon, commissions are due also for any transactions concluded directly by the principal with any third party, which the agent had previously acquired as a client for business

of the same kind, or with any third party, which was included in the territory or in the group of clients reserved to the agent.

The agent is entitled to a commission for any transactions concluded after the termination of the agency agreement, if the principal or the agent has received the proposal before the termination of the agency agreement, or if such transactions are concluded within a reasonable term after the termination of the agreement, and the conclusion of said transactions is mainly the result of the activities performed by the agent. In such a case, the commission shall be paid only to the previous agent, unless specific circumstances justify that the commission be shared between the old and the new agent.

Unless otherwise agreed upon, the agent is entitled to commission at the moment when the principal has or should have executed his obligation on the basis of the contract concluded with the client.

The agent is entitled to a commission, at the latest, at the moment when, and in so far, the client has executed or should have executed his obligation, if the principal had executed his obligation.

If the principal and the client agree not to implement the contract with the client wholly or in part, the agent is entitled, for the part of the contract which has not been implemented, to a commission reduced in accordance with the trade usages or, in the absence, to be determined by the Judge on equitable way.

3.4.5 Indemnity upon termination of the agreement

Pursuant to article 1751 of the civil code, the principal shall pay to the agent an indemnity upon the termination of the contract, if the following conditions are fulfilled:

- the agent has procured new customers to the principal, or has remarkably developed the business with the existing customers, and the principal still receives substantial advantages from the business with such customers; and
- the payment of such indemnity is equitable, taking into account all the circumstances, specifically the commissions that the agent is going to lose and that derive from the contracts with such customers.

According to paragraph 7 of the aforementioned article, the amount of the indemnity cannot exceed a sum equivalent to an annual indemnity, computed on the basis of the annual average of the remunerations received by the agent during the last five years, or, if the contract lasted less than five years, on the basis of the average of the relevant period.

It should be pointed out that twelve months is the maximum amount that can be awarded to the agent; the law does not lay down any rules whereby the judge must calculate the actual amount of the indemnity. The criterion mostly utilized by Italian courts is based on a ratio between the clients that have remained with the previous principle and those that have followed the agent.

It is also important to note that, according to paragraph 8 of the above article, the payment of the indemnity does not deprive, in any event, the agent of the right to ask for possible damages, in the case of unlawful termination of the contract on the part of the principal.

3.4.6 Non competition agreement

An agreement restricting the activities of the agent after the termination of the contract must be concluded in writing, must relate to the specific geographical area, the group of customers, previously entrusted to the commercial agent, and to the kind of goods or services for which the contract was concluded.

The restriction cannot exceed two years after termination of the contract.

The acceptance of a non-competition restriction requires that, upon the termination of the agency contract, an indemnity will be paid to the agent; the amount of the indemnity shall be determined by the parties, or, in the absence of an agreement, by the court, in equitable way.

3.5 Distributorship agreements

3.5.1 Definition

Distributorship agreements are not specifically regulated by the Italian civil code; therefore, they are defined by the case law as "atypical" contracts, characterized by the fact that the distributor is a commercial entrepreneur, who is acting in his own name and on his own risk, to promote steadily the sale of the products manufactured by someone else within a specific territory, subject to the influence and control of the manufacturer. They are considered as "framework" agreements, providing the obligation of the distributor to promote the resale of the products. The products are bought from the manufacturer through single purchase agreements, whose conditions have been previously agreed upon in the "framework" agreement.

The contract type regulated by the civil code that is considered to have the closest similarities to a distributorship agreement is the "supply" agreement (art. 1559 of the civil code), namely an agreement by which a party undertakes to execute periodic or continuous supplies of goods, in favor of another party, against the payment of a price.

3.5.2 Minimum quantities and other obligations

A distributorship agreement usually provides the obligation for the distributor to purchase a minimum quantity of products per year, as well the obligation to keep a certain quantity of products and spare parts in stock, and to offer technical assistance and guarantee service. In addition to this, the distributor may be required to send periodical reports to the manufacturer on the market's

conditions and the sales developments, or to carry out advertising or other promotional activities, sometimes in accordance with the manufacturer's standards.

The provision of an exclusive purchase obligation on the part of the distributor and the obligation not to distribute any competing products are often included in the contract. As a counter obligation, the exclusive distribution right within the territory in favor of the distributor can be agreed upon.

3.5.3 Trademark's utilization

According to the Italian code of industrial property (art. 20), the distributor can add his own trademark to the products, but cannot suppress the manufacturer's trademark.

The most delicate question concerns the prohibition of further continuing to utilize the manufacturer's trademark at the end of the distributorship agreement. Contracts often provide that, at the end of the contract, the distributor shall return to the manufacturer any products on stock, against the payment of a certain price. Specific provisions should also be included as regards the possibility for the distributor to execute any orders already received at the moment of the termination of the contract.

It is clear in fact that at the end of the contact two opposite interests may exist:

- the interest of the manufacturer that the distributor does not continue to utilize its own trademark, and to offer the products in the relevant territory, and to replace the previous distributor with a new one, or to sell the products within the territory directly, from one side; and
- the interest of the distributor to replace the manufacturer's products with equivalent products, in order not to lose his market share, on the other side.

3.5.4 Duration and terms for termination of the contract

Because of the similarity to the contract of supply, the same rules provided by the civil code are considered applicable also to a distributorship agreement. Specifically, if a contract of supply has been entered into for indefinite time, each party can terminate the contract within the term agreed upon, or within the term provided by the trade usages, or, in the absence, within a term that must be considered fair according to the nature of the supply.

3.5.5 Compensation upon termination of the contract

As a general rule, under Italian law, in the absence of a specific contractual provision, compensation to the distributor for possible loss of business upon the termination of the agreement is not granted. Specifically, it has been denied that the provision regarding the right to an indemnity at the end of a commercial agency agreement can be applied extensively to a distributorship agreement.

Nevertheless, the violation of the general principle of "good faith" regarding the implementation of a contract can be invoked by the distributor, if the termination of the agreement must be considered unfair under the circumstances; in such a case, the distributor can ask to be indemnified of the investments that he has made, and that was not able to exploit because of the unfair termination of the agreement. For this purpose, it is necessary to analyze whether the term of notice given to the distributor has caused the loss of the investments already made.

3.5.6 International jurisdiction and applicable law in case of possible disputes

As a general principle, under Italian international private law, previously examined, the applicable law to a distributorship agreement is, in the absence of any choice in the contract, the law of the country where the distributor has his habitual residence; therefore, in the case of an Iranian distributor, Iranian law.

In the case of a distributorship agreement, that, according to the provisions of Italian international private law previously examined, is governed by Italian law, the Vienna Convention of 11 April 1980 on international contracts of movable goods shall apply.

Therefore, unless a different provision on jurisdiction was included in the contract, according to the rules of Italian international private law, in connection with art. 57 of the Convention, an Italian manufacturer will be entitled to sue an Iranian distributor in Italy, for not having paid the price of the goods purchased by the latter. On the other hand, according to same rules of conflicts, jurisdiction will be solely in Iran, if the claim relates to the alleged breach of any obligations of the distributor, to be executed in Iran. On the contrary, jurisdiction will be, according to Italian international private law, solely Italy, if the claim relates to any defects of the goods delivered by the manufacturer, as examined under paragraph concerning international sale of movable goods.

As regards the determination of the applicable law, in the absence of a choice made by the parties, the criteria laid down by the EU Regulation no. 593/2008, previously examined, shall apply: i.e. the contract will be submitted to the law of the country where the distributor has his habitual residence.

3.6 Transfer of technology (licensing agreements)

3.6.1 General overview

Transfer of technology is one of the most important forms of business presence in a foreign country. In fact, instead of simply selling its products abroad through an agency or a distribution agreement a manufacturer may decide to sell his technology, or to exploit it in a foreign country by granting a license to a company in that country (the "licensee"), to manufacture his products there against the payment of a royalty. Sometimes the licensee is a joint venture between the producer and a foreign company: in this case, the control of the manufacturer over the licensee's activity is certainly stronger than in the case the licensee is a foreign fully independent entity.

Transferring or licensing technology often involves difficult questions, such as antitrust problems, taxation of royalties, and protection of industrial inventions or industrial processes. This is especially the case where the licensed technology is not covered by a patent (i.e. "know-how"): this is why know-how licensing agreements usually take great care to provide secrecy clauses. The purpose of such clauses is to avoid any unlawful disclosure or utilization of the know-how on the part of the licensee during or after the implementation of the contract.

For the purpose of this guide, the analysis of the applicable provisions of Italian law will be focused on the typical case of a licensing agreement between an Italian licensor and an Iranian licensee for the purpose of exploiting in Iran non patented technology and sell the products manufactured under such a technology in Iran or in other third countries (subject to any restriction provided in the agreement).

3.6.2 Definition of "know-how" and "know-how licensing agreement"

The expression "know-how" is generally applied, in business practice, to a number of areas, such as technical or commercial information or manufacturing processes, which are the result of experience or research and are recognized as being of economic value. In general, the term "know-how" may refer to both commercial and technical know-how, whereas, in strict sense, such a term refers to technical information which does not possess the requirements for the grant of a patent or which is not patented, in spite of such requirements being satisfied. The term "know-how licensing agreement" is applied to contracts where technical or commercial confidential information is transferred from the licensor to the licensee in order to enable the licensee to utilize such information.

According to art. 1 of the EU Regulation no. 772/2004 of 27 April 2004 concerning "technology transfer agreements", "know-how" means:

"a package of non-patented practical information, resulting from experience and testing, which is:

- *substantial, that is to say, significant and useful for the production of the contract products; and*
- *identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfills the criteria of secrecy and substantiality".*

According to art. 98 of the Italian Code of Industrial Property ("protection of secret information"), "know-how" is defined as:

"business information and technical or industrial experiences, including commercial information, that are subject to the legitimate control of the owner, provided that such information:

- *is secret, that is to say, is not generally known or easily accessible to the experts and the professionals of a specific industry, on the whole, or in the specific arrangement and combination of its elements;*
- *has an economic value, in so far it is secret;*

- *is subject, on the part of the persons exercising a legitimate control over it, to such measures that must be reasonably considered adequate, to keep it secret*".

The protection includes also data concerning experiments, or other secret (confidential) data, if their development has involved considerable efforts, or if the authorization of putting on the market a specific chemical, pharmaceutical or agriculture product (involving the utilization of new chemical substances), depends from the availability of such data.

3.6.3 Contractual warranties and restrictions

Licensing agreements usually provide specific warranties on the part of the licensor about the originality and the ownership of the know-how, the right of the licensor to lawfully licensing it, and the absence of any claim of third parties that may affect the above requirements.

In turn, the licensee is usually requested to keep - not only during the time of implementation of the contract, but also after its termination - the utmost secrecy about all data, information and technical processes which he has received or learnt by reason of the contract, and therefore to take all the reasonable measures, also in respect of his employees, to prevent any unlawful disclosure.

3.6.4 The protection of know-how

The transfer implies that the know-how is neither available nor has been disclosed to any third parties other than the licensee. Nevertheless, if during the implementation of the contract the know-how is disclosed to third parties, or has become part of the public domain (because the level of general knowledge in a particular technical field has developed in such a way that the same results are available to any competitor), the maintenance of the secret is no longer justified. It should be noted that, in the case of unlawful disclosure of the know-how, the contractual protection grants to the licensor the right to claim damages from the licensee, whereas the first necessity in such a case is to prevent the unlawful utilization of the know-how.

The protection of know-how, independently from the protection provided by the above clauses, is provided, under Italian law, in so far as the provisions relating to unfair competition and the protection of manufacturing secrets are applicable.

In addition to this, art. 99 of the above Code ("Protection") provides that, apart from, the rules concerning unfair competition, the legitimate owner of the information and business experiences mentioned in art. 98 can forbid any third party, except under his own consent, from acquiring, disclosing or unlawfully utilizing such information or experiences, apart from the case that they have been achieved independently by such a third party.

The above provision may have serious consequences as to the possibility of the licensee to legitimate sell the products manufactured through the technology that is the object of the license, in case of a possible dispute between the licensor and any third party contesting the legitimacy of the

ownership of the technology on the part of the licensor. Therefore, as already pointed out, the licensing agreement should provide adequate warranties about the ownership and the right of granting the license on the part of the licensor, as well as the absence of any third party's claim.

3.6.5 Improvements

Another critical issue in a licensing agreement relates to the communication and ownership of any improvements achieved by either the licensor or the licensee.

Usually, the licensor is oblige to communicate to the licensee any improvements of the technology developed during the term of the license.

Sometimes, a reciprocal obligation is provided in the agreement. In such case, it is important to specify in the contract which improvements developed by the licensee while exploiting the technology will be the exclusive property of the licensee, and which improvements will be considered as a direct development of the original know-how, that must be communicated to the licensor.

4 DAMAGES

4.1 General remarks

Damages for breach contract under Italian law are governed by art. 1223 of the civil code, and include both losses and loss of profits, provided that they are an immediate and direct consequence of the breach.

If the amount of damages cannot be proved exactly, the corresponding amount can be fixed by the court in equitable way.

Under Iranian law, on the contrary, according to art. 515, note 2, of the Iranian code of civil procedure, loss of profit cannot be claimed.

Because of this provision, it should be considered that, if a contract that must be implemented in Iran, is submitted to Italian law (for example a contract for the delivery of a plant, or relating to oil extraction), the possibility of asking loss of profit in the case of a possible breach is arguable, because it could be regarded as against the Iranian "public order", if the above provision cannot be derogated. In fact, according to the art. 3 of the EU Regulation no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations ("Rome I"), "*where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of the other country which cannot be derogated from by agreement*".

4.2 Breach of monetary obligations

As regards the breach of monetary obligations, article 1224 of the Italian civil code provides that legal interests are due from the day of the default, even if they have not been previously agreed upon, and even if the creditor does not give any evidence of the actual damages suffered.

If, before the default, interests have been agreed upon at a higher rate than the Italian legal rate, "late payment" interests shall be due at the same rate.

Anyway, if the interest rate has not been agreed upon, the rate of late payment interests is equal to that provided by the Italian special law on the delay of payment in commercial transactions (Act of 9 October 2002 no. 231), starting from the moment of the filing of the claim (art. 1284, paragraph 4, of the Italian civil code). In such a case, the applicable interest rate shall be equal to the interest rate applied by the European Central Bank to its most recent main refinancing operations, plus 8% per year.

The creditor who proves to have suffered additional damages is entitled to an additional compensation. This is not due, if the rate of "late payment" interests has been agreed upon.

5 DISPUTES RESOLUTION

5.1 General remarks

In case of a dispute, an Iranian or an Italian party will have the possibility of filing a claim before the competent judicial court specified in the contract, if any. Otherwise, in the absence of an agreement on jurisdiction (either exclusive or not), the jurisdiction of the Italian or of the Iranian courts upon a foreign defendant will be determined by the rules laid down by their respective international private law.

But, for example, if under Iranian international private law, Iranian courts may have jurisdiction over an Italian defendant, it will be necessary to previously verify if the Iranian judgment could later on be enforced in Italy. The same question applies vice versa, i.e. if, under Italian international private law, Italian courts have jurisdiction over an Iranian defendant. To obtain a judgment from a domestic court, which cannot be enforced in the other country, would be a loss of time and costs.

An alternative is arbitration. But, also in such a case, the arbitral award shall then be recognized in the country of the defendant.

For the purpose of this guide, only the modalities for the recognition in Italy of an Iranian judgment, or of a foreign arbitral award (either issued in Iran or in a third country) will be considered.

5.2 Recognition of foreign arbitral awards

Both Italy and Iran have ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention", adopted on 10 June 1958. In addition to this, Italy has ratified the European Convention on International Commercial Arbitration, done at Geneva, on April 21, 1961.

The modalities for the recognition and enforcement of a foreign arbitral award in Italy are laid down by the code of civil procedure.

The request must be submitted to the President of the Court of Appeal, in the district of which the defendant is domiciled. For this purpose, it is necessary to join to the above request the award and the arbitration clause (or the contract in which said clause is embodied). Both documents must be exhibited either in original, or through a certified copy.

Practically, for the purpose of obtaining the recognition and the enforcement of a foreign award, the following documents are necessary:

- the original or a certified copy of the award;
- the original or a certified copy of the contract, in which the arbitration clause is embodied;
- a power of attorney, certified by a public notary and duly legalized by the Italian Consulate.

As regards any certified copy of the award or of the arbitration agreement, such a copy must be authenticated by a public notary or by any other competent authority; the Italian Consulate should then legalize the public notary's seal, unless the award has been issued in a country which is a party of the Hague Convention of 5 October 1961. In such a case, the "Apostille" shall be affixed on the award or on the arbitration agreement.

The proceeding is rather quick. The President, after having verified the formal regularity of the award, declares that the award is enforceable, unless:

- the dispute could not, according to Italian law, be submitted to arbitration; or
- the content of the award is against the Italian public order.

Against the decree of the President, which declares that the award is enforceable, the defendant can, within 30 days from the notification of the decree, file an opposition against the decree before the Court of Appeal. In such a case, an ordinary proceeding will follow. Likewise, an opposition against the refusal of recognition can be filed.

The Court of Appeal can refuse the recognition or the enforcement of the award, if the opponent can prove that:

- the parties were unable to stipulate the arbitration clause, or the clause was not valid pursuant to the law specified by the parties or, in the absence of a choice of law, by the law of the country where the award has been issued; or
- the party against which the recognition of the award has been requested, was not informed of the appointment of the arbitrators, or of the proceeding, or was unable to submit its defenses; or
- the award has pronounced on a dispute which was not covered by the arbitration clause, or the award has pronounced beyond the limits laid down in the clause; nevertheless, the parts of the award regarding questions covered by the clause can be recognized and declared enforceable, if they can be separated from the questions which were not included in the clause; or
- the appointment of the board or the arbitration proceeding did not comply with the provisions laid down by the parties or, in the absence of such provisions, with the law of the place where the proceeding took place; or
- the award has not become binding, or has been declared void, or has been suspended by any competent authority of the country where it had been pronounced, or by any competent authority of the country in accordance with the law of which it had been pronounced.

In the last case, if the annulment or the suspension of the award has been requested before the foreign competent jurisdiction, the Court of Appeal can stay the proceeding for the recognition or the enforcement of the award. If the proceeding has been stayed, the Court can, upon request of the party which has required the enforcement, order that an appropriate guarantee be given by the other party.

In addition to the aforementioned cases, the Court can refuse the recognition or the enforcement in the same cases under which the President of the Court can reject the request for the recognition of the award, previously examined.

In the case of an opposition, the temporary enforceability of the award can be requested to the Court of Appeal, because the same provisions regarding the proceeding of opposition against an injunction of payment, which will be examined in the following, are considered applicable.

It should be noted that, in any event, the provisions laid down by international conventions shall prevail on the rules previously examined.

5.3 Recognition of foreign judgements

The conditions and the modalities for the recognition of a foreign judgement, not included in the field of application of the EU Regulation no. 1215/2012 of 12 December 2012, or of the Lugano Convention of 30 October 2007, are laid down by the Act of May 31, 1995 no. 218 (articles 64 and 67), if a bilateral convention on the reciprocal recognition of foreign judgments (as it is the case between Italy and the I.R.I.) does not exist.

Foreign judgements are automatically recognized in Italy, provided that the following requirements are met:

a) the court that issued the foreign judgement had jurisdiction over the claim, in accordance the principles of Italian international private law, previously examined);

b) the claim concerning the foreign proceedings was properly served on the defendant and his right of defense was not violated;

c) the parties entered a formal appearance, or a default judgment has been issued pursuant to the applicable rules of civil procedure;

d) the foreign judgement has become "*res judicata*" in accordance with the law of the foreign country;

e) the foreign judgement is not contrary to any "*res judicata*" judgement rendered by an Italian court;

f) no proceeding, having the same object, is pending between the same parties before an Italian court, provided that such a proceeding has been started before the foreign proceeding;

g) the foreign judgement is not contrary to the Italian "public order".

Specifically, as regards the requirement indicated in letter b), special attention should be paid to the term granted by the Iranian Judge in the order of the appearance of the defendant before the court, and the modalities for the execution of the service of the claim. In fact, according to the Iranian code

of civil procedure, in case of a foreign defendant, the minimum term between the date of the service of the above decree and the date of the hearing is 60 days. This term would be considered sufficient under Italian law. Nevertheless, to avoid any risks, it would be advisable to ask the court to grant a term corresponding to that provided by the Italian legal system in the case of a foreign defendant, i.e. 150 days between the date of the notification of the claim and the date of the first hearing.

The provision of the Iranian procedural law, according to which the service of a claim against a foreign defendant must be executed through the Iranian diplomatic representative complies with the requirement of "due process". Nevertheless, it would be advisable that the notification of the decree and of the claim is made though the Iranian Embassy in Rome that will send the judicial act to the Italian Ministry of Foreign Affairs. The Ministry will then ask the competent Court of Appeal to execute the service through the court's bailiff.

A further issue is the necessity of a certified translation into Italian of both the claim and the order of appearance. Even though the case law does not lay down any specific rules, a certified translation (in two copies) of the above acts, is strongly recommended. In fact, in the absence of a translation, the Italian Ministry of Foreign Affairs will refuse to execute the service. Finally, all the judicial acts to be notified shall be certified as corresponding to the original by the competent Iranian court, and legalized by the Italian Embassy in Teheran.

If a party refuses to recognize a foreign judgment, or whenever it is necessary to enforce it, the interested party can bring a claim before the competent Court of Appeal, asking for the recognition and the declaration of enforceability of the judgment. Against the decision of the Court of Appeal, an appeal to the Supreme Court can be filed. The request for the recognition must be made to the Court of Appeal of the place where the claimant intends to execute the foreign judgment.

The proceeding can usually last from one to three years, or more, depending on the calendar of the competent court.

The judgment must not be "time barred" according to Iranian law. Under Italian law, the time limitation of an executory title is ten years, running from the moment at which it has become *res judicata*.

6 LITIGATION OR ARBITRATION IN ITALY

6.1 General remarks

Serious difficulties may arise to enforce an Iranian judgment in Italy.

They consist specifically in the difficulty of obtaining a copy of all the acts of the proceedings, including the records of the hearings, or in the difficulty of obtaining an official translation made at a professional standard, acceptable to an Italian court.

Sometimes the defendant has not been indicated in the claim, or in the judgment, with its full and correct firm's name. In other cases, the notification of the claim to the Italian defendant was made without observing the minimum term required by Iranian law, or it was not specified in details which acts had been notified, or the service was made at a branch instead of at the company's registered office.

For this reason, it is strongly advisable, if the contractual power of the Iranian party is strong, not to include in the contract a clause providing the exclusive jurisdiction of the Iranian courts for any possible claim, but a so called "asymmetric" clause, whereby, in spite of the provision of exclusive jurisdiction of the Iranian courts, the Iranian party (only) will be entitled to bring a claim before any other competent Italian court.

In such a way, in case of a claim having as object the payment of a sum of money, the beneficiary will be in the position of suing the Italian party in Italy, without having to wait the time necessary to obtain a *res judicata* judgment in Iran, and then the subsequent time and risks to enforce such a judgment in Italy.

The same observations are applicable also to arbitration.

An arbitral award issued in Italy can be executed in Italy more quickly, once the interested party has obtained a decree of enforceability from the tribunal in the district of which the arbitration was held. For this purpose, the tribunal will verify the fulfillment the formal requirements of the award.

Different institutions (for example, the Swiss Chamber of Commerce in Milan, or other Chambers of Commerce) have set up international arbitration centers in Italy.

6.2 Injunction of payment

As regards litigation in Italy, the possible request of an injunction of payment against a debtor domiciled in Italy could be particularly advantageous in the case of breach of a monetary obligation (such as the non-payment of the price of a contract, or of a bank guarantee).

The injunction proceeding can be utilized both by foreign creditors to collect their credits in Italy, and by Italian creditors against foreign debtors.

A foreign creditor can obtain from the competent Italian Court an injunction, ordering the payment of a credit (for example, outstanding invoices, or a bank guarantee) on the basis of "written" evidence.

Specifically, in the case of a contract of sale of movable goods, in addition to the copies of the relevant invoices, the following documents should be exhibited:

- a copy of the relevant bills of lading, duly stamped and signed by the debtor, certifying the receipt of the goods; or
- a letter of the debtor acknowledging his debt.

In the absence of the two aforementioned documents, a copy of the customs declaration, relating to the clearance of the goods, is usually accepted by Italian courts.

Should not even the customs declaration be available, an excerpt of the foreign company's accounting books, duly certified by a public notary and attesting the existence of the credit, can be exhibited. The public notary should also certify that the company's books are kept in compliance with the applicable accounting provisions of the foreign country. Nevertheless, such excerpts are not always accepted by Italian courts. This requirement appears in any event extremely difficult in the case of a sale from Iran to Italy, considering the specific language in which accounting books are kept in Iran.

Therefore, attention should be paid to keep all the documentary evidence concerning the delivery of the goods, as previously indicated.

The request of injunction is filed electronically with the competent court, which should issue the injunction within 30 days from the filing of the petition. The decree must then be served on the debtor. The debtor can within the following 40 days either pay or lay an opposition against the injunction. The above term applies, if the debtor is domiciled in Italy.

Should the debtor file an opposition against the injunction, then an ordinary proceeding of first instance would follow. In such a case, if the opposition is not based on written evidence, the Judge can at the first hearing grant the temporary enforcement of the injunction.

Should the defendant not lay an opposition against the injunction, the injunction would become "res judicata".

Once the declaration of enforceability has been affixed on the injunction, the execution of the debtor's assets can start. The first step would be to serve the debtor with a writ of payment, giving him a term of 10 days to execute payment. Should the payment not be made within such a term, then a seizure of the assets through the Court's bailiff can be requested.

In certain cases, it is also possible to obtain an immediately temporary enforceable injunction:

- if the credit is based on a draft, or a check, or a deed made before a public notary or another authorized public officer; or
- if the danger of a serious prejudice for the creditor exists; or
- if the claimant can exhibit any documents signed by the debtor, proving the credit.