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**The International Comparative Legal Guide to:****Commodities and Trade Law 2006****A practical insight to cross-border Commodities and Trade Laws****Published by Global Legal Group, in association with Richards Butler,  
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# Italy

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### 1 Formation of Contract of Sale

**1.1 What are the formalities for the formation of a contract of sale under the laws of your country? Can a contract be made by exchange of emails/faxes? Is a signed or sealed contract needed? Can a contract made orally be enforced?**

Under Italian law a contract of sale requires no formality and can be made in writing or orally.

A contract of sale can also be concluded by exchange of emails/faxes and a signed or sealed contract is therefore not required. However, in case of a dispute, a written contract would be better evidence of the conclusion and of the terms of the contract.

A contract made orally can be enforced, provided that evidence is submitted to prove that the contract has been concluded.

**1.2 Are there any limitations on the capacity of a party to enter into a contract of sale as seller or buyer? Are there any special limitations for signing a contract? Is the position different if the contract incorporates an arbitration agreement?**

The capacity of a person to enter into a contract of sale as seller or buyer is governed by the provisions of the Civil Code relating to the capacity to act; under art. 2 of the Civil Code the capacity to contract and to transfer and acquire property is obtained by a person when they reach the majority age, which is fixed at the termination of the eighteen year.

Under Italian law, provided the person is able to act under art. 2 of the Civil Code, there are no limitations on the capacity to sign a contract of sale.

The capacity of a company to be a party to a contract of sale depends on the power of the person signing the contract to represent the company. Under Italian law there is a presumption that the directors have the power to represent the company, unless specified differently in the memorandum of association.

The incorporation of an arbitration agreement in the contract of sale does not affect the above position.

**1.3 Are there any sources that a party is advised to check to ensure that a contract of sale is authorised by the company?**

In order to verify whether the person who is to sign the contract has the power to represent the company it is possible to check the Companies Registry which is public under art. 2188 of the Civil Code. Also the memorandum of association of the company can be checked in order to verify whether the sale is an activity which is within the scope of the object clause contained in the company memorandum of association.

**1.4 How far are the principles of “freedom of contract” applicable? Should the parties to a contract of sale check restrictions under local law? Should they do so even if the sale contract is expressly subject to another legal system?**

Under Italian law the “freedom of contract” principle applies to the determination of the rights and duties of the parties. Mandatory rules apply to issues such as capacity, misrepresentation, illegality, and time-bar. There are limits to freedom of contract in respect of certain kinds of goods (e.g. gold, art objects, weapons). Mandatory rules of laws other than the law governing the contract may apply in certain circumstances as provided by art. 7 of the 1980 Rome Convention.

### 2 Classification of Terms

**2.1 How are the sale contract terms classified (i.e. important/less important terms) and what is the consequence of such classification?**

Under Italian law there is no distinction similar to the one under English law between conditions and warranties. Art. 1455 of the Civil Code states that a contract cannot be terminated because of a breach by the other party when such breach is of little importance.

### 3 Validity of a Contract of Sale

#### 3.1 Can misrepresentation affect the validity of a contract of sale?

Under Italian law the concept of misrepresentation includes the concepts of mistake and fraud (art. 1427 of the Civil Code). Misrepresentation by mistake can affect the validity of a contract of sale when it is fundamental and recognisable by the other contracting party.

According to art. 1429 of the Civil Code misrepresentation by mistake is fundamental:

- a) when it concerns the nature and object of the contract;
- b) when it concerns the identity of the object of the performance or a quality of said object which, according to common understanding or under the circumstances, should be considered determinative of consent;
- c) when it concerns the identity or personal qualities of the other contracting party, so long as the one or the others were determinative of consent; or
- d) when it was one of law and was the only or the principal reason for entering into the contract.

According to art. 1431 of the Civil Code misrepresentation by mistake is considered recognisable when, with respect to the content, the circumstances of the contract or the quality of the contracting parties, it would have been detected by normal due diligence.

Misrepresentation by fraud makes the contract invalid when it induces the other party to stipulate a contract which he would not otherwise have stipulated.

#### 3.2 Can illegality affect the validity of a contract of sale in your country?

The illegality of a contract of sale automatically implies that the contract is void and null ab origine.

The partial illegality of the contract or the illegality of single clauses causes the nullity of the entire contract, if it appears that the contracting parties would not have entered into it without that part of its content which is affected by illegality.

The illegality of single clauses does not cause the nullity of the contract when, by operation of law, mandatory rules are substituted for the void clauses.

#### 3.3 What is the effect of bankruptcy or insolvency of a party on the validity of a contract of sale? Does a liquidator or other duly appointed insolvency officer have the power to set aside the contract?

In case of bankruptcy the trustee has the option of whether to keep the contract and perform it or have it set aside. The other party can ask the Judge to give a deadline to the trustee to exercise such option.

### 4 Passing of Property and Risk

#### 4.1 What are the factors that determine whether and when title in goods passes from the seller to the buyer?

In principle under Italian law the title in goods automatically passes from the seller to the buyer at the conclusion of the contract of sale. However there is a distinction between the sale of determined goods, when the title in goods actually passes to the buyer at the conclusion of the contract, and the sale of unspecified goods when the title in goods passes to the buyer only once the goods are identified by virtue of identification. In the case of things which must be carried from one place to another, identification also takes place by delivery to the carrier or to the forwarding agent.

#### 4.2 Will the courts in your country apply local law or the law of the contract of sale to determine the issue as to which party has property over goods? Does the answer change if third parties (i.e. not parties to the contract of sale) are involved?

In order to determine the issue as to which party has property over goods, Italian courts would apply the *lex rei sitae*, i.e. the law of the country where the goods are.

The answer does not change if third parties are involved.

#### 4.3 What are the factors that determine whether and when risk in respect of goods passes from the seller to the buyer? What (if any) is the relationship between the passing of risk of loss/damage in the goods and the passing of property?

As a general principle, the risk passes with the property and therefore in the case of goods to be carried, upon delivery, to the carrier (see question 4.1 above). It is arguable however that this general rule can be varied by contract.

#### 4.4 In what circumstances will the courts in your country give effect to a provision in the contract of sale that reserves or purports to reserve title or other rights over goods once the seller has parted with possession of the goods?

The agreement reserving title must be in writing and, in order to be enforceable vis-a-vis third parties, it must have a certified date.

#### 4.5 Is a provision that reserves title over the goods sufficient for legal title to the goods to remain vested in the seller notwithstanding the passing of risk on shipment?

Despite the seller reserving title, risk would pass on delivery (i.e. on shipment).

#### 4.6 In contracts for the sale of goods that form part of an identified bulk, can property be passed before the goods are separated from the bulk?

Under the general rule mentioned in question 4.3 the answer would be no. However, as mentioned in question 4.5 above,

it is arguable that this can be varied by contract.

## 5 Performance of the Contract of Sale

### 5.1 What is the place of delivery of the goods in the absence of any agreement, express or implied, between the parties?

In the absence of any agreement, express or implied, between the parties as to the place of delivery, under art. 1510 of the Civil Code the delivery of the goods has to be made at the place where the goods were at the time of the sale, if the parties knew of the place, or at the place where the seller has his domicile or his principal place of business.

If the goods are to be carried from one place to the other, the seller discharges his obligations to deliver the goods by handing the goods over to the carrier, or to the forwarding agent.

### 5.2 What is the time of delivery of the goods in the absence of any agreement, express or implied, between the parties?

Usually the contract of sale expressly provides a time of delivery or shipment; if the contract does not provide any time of delivery, the goods have to be delivered within a reasonable time.

### 5.3 What is the place of payment of the price for the goods where no place of payment is specified in the contract?

Where no place of payment is specified in the contract, the payment has to be made in the place where delivery takes place. If the price is not to be paid on delivery, payment is made at the domicile of the seller.

### 5.4 If no time of payment is specified in the contract of sale, what is the time at which payment is to be made?

If no time of payment is specified in the contract, payment is to be made at the time of delivery.

### 5.5 In determining the duties of the parties in C&F, FOB, CPT and similar contracts, will the "INCOTERMS" publication by ICC be followed in determining which party does what?

The "INCOTERMS" will be followed if the parties to a contract of sale expressly make the contract subject to the "INCOTERMS". It is arguable that "INCOTERMS" would be followed, as a general custom of the trade, even if not expressly referred to.

## 6 Frustration of the Contract of Sale / Force Majeure

### 6.1 Is there a doctrine of force majeure or a similar doctrine under local law? In what circumstances may a contract of sale be frustrated or be subject to force majeure?

Please see the answer to question 6.2 below.

### 6.2 What are the consequences of frustration or force majeure on a contract of sale?

As a general principle, an obligation is extinguished when its performance becomes impossible for a cause not imputable to the debtor.

In the case of commodities, legal impossibility would apply only on rather limited circumstances such as an embargo or a natural disaster and would generally only be temporary. Temporary impossibility will become definitive and bring the contract to an end when the other party no longer has any interest in the performance of the contract.

The parties can, by a force majeure clause, indicate the circumstances which would lead to impossibility and their effect on the contract.

## 7 Remedies of the Parties

### 7.1 What are the remedies of the buyer against the seller in respect of goods delivered in breach of a contractual term as to (a) quality (b) condition (c) quantity or (d) description?

The buyer, depending on the nature and seriousness of the breach, can either obtain a reduction of price or terminate the contract. In both cases he is entitled to compensation for damages.

### 7.2 What remedies does the buyer have against the seller for non-delivery of the goods?

The buyer can terminate the contract and, if he has already paid, obtain the restitution of price. In addition, he is entitled to compensation for damages.

### 7.3 Does the buyer have any remedies against the seller for delay in delivery of the goods?

In case of delay in delivery, the buyer is entitled to claim damages. If delay exceeds any reasonable term or exceeds a deadline which is stipulated as essential (i.e. a warranty) the buyer is also entitled to terminate the contract.

### 7.4 What are the main remedies of an unpaid seller against the buyer? Does the unpaid seller have any rights over the goods themselves?

If the seller fails to pay the price and/or to take delivery of the goods the seller can terminate the contract and have the goods sold by auction. If the goods have already been delivered to the buyer, the seller can within 15 days take

back possession of the goods. In all cases the seller is also entitled to damages.

## 8 Assessment of Damages

**8.1 Are there any general rules which are used to decide what types of losses caused by a breach of contract may be recovered by the innocent party by way of damages?**

As mentioned in questions 7.1, 7.2 and 7.3, in case of a breach, the buyer is entitled to damages due to a breach concerning quality, condition, quantity or description, damages due to delay and damages due to non-performance. As mentioned in question 7.3 the seller is entitled to damages for non-performance.

Such damages include actual losses (in case of non-performance the difference between the contractual price and the price of substitute goods or the difference between the contractual price and the price of a substitute sale) plus loss of profit. Only direct and foreseeable damages can be recovered.

**8.2 What is the relevant date for the assessment of damages?**

The relevant date for the assessment of damages arising from a breach of contract is the date of the breach.

**8.3 Is the innocent party under any duty to mitigate its losses consequent on a breach of the contract of sale? If so, what is the extent of that duty?**

Under art. 1227 of the Civil Code the innocent party is not entitled to damages which he could have avoided by the exercise of due diligence. Furthermore if the negligence of the innocent party contributed to cause the damage, compensation is proportionally reduced.

## 9 Instalment Contracts

**9.1 Can a breach of one or more instalments entitle the innocent party to terminate the balance of the contract of sale?**

If payment of the price is to be made in instalments, failure by the buyer to pay one instalment entitles the seller to terminate the contract only if its amount exceeds one eighth of the total price.

In case of delivery of the goods in instalments, the right of the buyer to terminate the contract in case of failure by the seller to perform delivery of one instalment would depend on the general rules of the termination of contracts, i.e. when such breach can not be considered of “little importance” as per art. 1455 of the Civil Code (see question 2.1 above) or when termination is expressly stipulated as a consequence of failure to deliver one instalment.

**9.2 Can the innocent party legitimately demand some guarantee of future correct performance?**

Under art. 1461 of the Civil Code an innocent party can suspend performance of the contracts when the financial conditions of the other party are such as to put at risk performance by such other party, unless an adequate guarantee is provided.

## 10 Assignment

**10.1 Can a contract of sale be assigned by one party without the permission of the other? If so, is notice required?**

Under Italian law, each party can assign his rights under a contract of sale to third parties provided the other party consents thereto.

The assignment becomes effective from the time when it is either notified to the other party or acknowledged by such other party.

As a rule, the assignor is released from liability under the contract from the time the assignment becomes effective but the other party can declare that he will keep the assignor jointly liable with the assignee.

## 11 Sources of Law Relating to Sale of Goods

**11.1 What is the main source of the law relating to the sale of goods?**

The main source of law relating to the sale of goods is the provisions of the Civil Code on the contract of sale.

**11.2 Is the Vienna Convention on Contracts for International Sale of Goods applicable in your country?**

Yes, Italy ratified the Vienna Convention on Contracts for International Sale of Goods by law n. 765 on 11/12/1985.

**11.3 Are clauses exempting or excluding liability of a party to a contract of sale effective?**

Under Italian law clauses exempting or excluding liability of a party are valid unless liability is excluded in respect of fraud or gross negligence.

## 12 Conflict of Laws

**12.1 What are the rules relating to the law application to the contract of sale in your legal system?**

Conflicts of law in relation to the sale of goods are governed by the 1955 Hague Convention.

**12.2 If the parties to an international contract of sale have not expressly chosen the law which will govern the contract, what factors will determine which law is applied?**

As a general rule, but with some exceptions, the law of the place where the seller has its principal place of business will be applied in the absence of an express or clearly implied choice of law by the parties.

**12.3 Are any limitations imposed on the freedom of the parties to choose the law governing a contract of sale?**

Generally speaking there are no limitations on the freedom of the parties to choose the applicable law but certain mandatory provisions of the *lex fori* can apply irrespective of the choice of law by the parties. Furthermore the choice of law by the parties can be made invalid by reasons of public policy.

### 13 Warehousing and Storage

**13.1 What is the legal effect, if any, of a warehouse receipt or a warrant under the laws of your country? Are they documents of title?**

Under Italian law a warehouse receipt and a warrant are documents of title which are transferable by endorsement.

The warehouse receipts for the stored goods are issued by the warehouse upon request of the depositor. To each warehouse receipt is attached the pledge certificate and the holder of a warehouse receipt together with the pledge certificate is entitled to the delivery of the goods.

**13.2 If not, how is title over goods held in storage transferred and proven?**

See question 13.1 above.

**13.3 Is it necessary to register an interest in goods in order to protect such interest against third party claims or interests? Are there any steps that you advise the owner of bulk goods to take in order to safeguard its title over goods whilst in storage?**

Interests in goods (other than houses, ships and aircrafts which are registered properties) are not subject to registration. Safeguard of title can be achieved by obtaining a warehouse receipt as mentioned above and can be reinforced by keeping goods stored separately in order to avoid them being co-mingled with other goods.

**13.4 Are there any other interests over moveable goods that the laws of your country will recognise? For example, a pledge or a charge?**

A pledge can be constituted over movable goods provided that i) they are clearly identified and separated from the bulk; ii) there is a written agreement with certified date to that effect; and/or iii) the pledged goods are in the possession of the creditor or the document of title

(warehouse receipt - see question 13.1 above) is endorsed to the creditor. Certain claims such as those of the carrier or of the warehouse are assisted by a lien on the goods and the carrier/warehouse is entitled to exercise retention of such goods.

**13.5 If so, how are such interests created? Is it necessary to protect them by registration?**

See question 13.4 above.

**13.6 In relation to all of the questions at paragraphs 13.1 to 13.5 what if anything is the effect upon title or other security interests of co-mingling the relevant goods with other goods?**

Pledged goods must be identified and separated from the bulk (see question 13.3 above).

## 14 Enforcement of Awards

**14.1 Are Awards of arbitration in respect of contracts for the sale of goods recognised under the laws of your country?**

The Awards of arbitration in respect of a contract of sale are recognised under Italian law and the enforcement of foreign awards in Italy is governed by the provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, which was ratified by law 62/1968, and by law 25/1994.

**14.2 If so, what is the process for enforcement and approximate time scale?**

The application for the enforcement of a foreign award must be filed to the Court of Appeal of the place where enforcement is sought, i.e. generally the place where the defendant has his principal place of business or where the defendants' assets are located. The Court of Appeal considers the application "ex parte" and issues a decree. If the decree upholds the application, it is served upon the defendant who can file an opposition within 30 days; if the application is rejected it is up to plaintiffs to file an opposition. If the opposition is filed, ordinary proceedings will follow before the Court of Appeal.

The plaintiff must submit with his application (i) the original or certified copy of the contract including the arbitration clause; and (ii) the original or certified copy of the award.

Enforcement of the award can be denied only if the Court finds that the arbitrators decided on a matter which under Italian law could not be referred to arbitration or that the award is contrary to the public policy. Enforcement is also denied if the defendant proves that (i) the arbitration clause had not been validly stipulated; (ii) the defendant had not been properly notified of proceedings; (iii) the arbitrators exceeded their powers issuing a decision on a matter which was not covered by the arbitration agreement; (iv) the arbitral proceedings did not comply with the arbitration agreement or with the applicable law; or (v) the award is not binding or has been set aside or suspended.

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Studio Legale Mordiglia, with offices in Genova, Milan and Ravenna, was established in 1950; the firm, specialised in maritime law since its early days, has become more and more international widening the scope of its specialisation to commercial, corporate and financial law.

Studio Legale Mordiglia has been correspondent for many years of the most important law firms in the UK, USA and Europe specialised in shipping and international trade. In 2002 Studio Legale Mordiglia formed a cooperation agreement with a law firm of great traditions, Studio De Andrè, which mainly operates in the areas of commercial and corporate law.