Refractions of Italian Law: An Indiana Perpective

*by David Williams Russell**

I. Introduction

It is indeed a privilege to have been requested on behalf of the International Law Section of the Indiana State Bar Association to submit these remarks to the Italian law symposium edition of the *Indiana International & Comparative Law Review*. It is obvious from even a cursory review of the current legal publications that far more attention has been paid in this country to the comprehensive restructurings of the bar in the United Kingdom and to the bureaucratic machinations in Belgium with respect to the Maastricht Treaty, than to current issues in Italian law. Therefore, a focus upon Italy is very timely. As the reader will observe by reading this Italian law symposium issue, the current legal situation in Italy holds up to us a kind of prismatic mirror through which we may see and be seen—yet in the process both reflect and refract similarities and differences between the American and Italian legal systems.

II. Italian Businesses are Increasingly Prominent in the World Markets

This Italian law symposium is not only timely, but is most relevant because, from the perspective of an Indiana business lawyer, I can attest that Italian businesses are active and proficient traders in international marketplaces, including our own. In our own practice over the years, for example, our firm has had the good fortune to represent a number of American companies distributing medical equipment in Italy and participating in joint ventures to produce in Italy such goods as agricultural and food products and sports equipment for distribution both in Europe and in the United States. In addition, we also have had the opportunity to represent a number of Italian companies man-

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ufacturing products as diverse as packaging materials, automotive products, and heating equipment, both in Italy and in the United States, for distribution here. We have assisted Italians in buying manufacturing companies here, in putting together joint ventures in Italy amongst themselves to distribute goods here, and, this past year, were involved in an arduous and intense international arbitration proceeding involving two Italian companies disputing their respective Italian distribution rights. Most recently, to compound the ever-increasing internationalization of our Indiana business practice, we have been assisting an Italian-owned United States joint venture corporation to establish a Mexican distribution network for its Italian-made goods. In the course of such representation, we have developed healthy respect for Italian business people and for American business people having the good sense to trade with Italians—who, after all, opened the North American continent for transcontinental trade.

III. THE ITALIAN LAW SYMPOSIUM ARTICLES REFLECT AND REFRACT UNITED STATES LEGAL PROBLEMS

From this vantage point, it was truly a delight to have the opportunity to review preliminary drafts of certain of the legal articles submitted by the Italian contributors to this symposium. It was not just that these articles were perceptive and penetrating, although they were, and not just that they were exceptional and pertinent—although they were these things as well. No, the major impact of these articles came with the realization that these commentators on another legal system in a country on another continent were dealing with the *very same problems* facing us in Indiana. Not just the same *types* of problems, in many ways the very *same* problems, albeit in a foreign context.

For example, Judge Garavelli presents a fascinating analysis of how the American legal system, the seminal influence upon the international development of systems for legal regulation of psychoactive drugs, has been filtered, interpreted and implemented in a variety of different contexts in Italy and throughout Europe. Guido Bolaffi discusses the need in Italy, as a country with an extensive unprotected coastal perimeter, to integrate Italy's national economic, industrial and employment policies with a comprehensive national immigration policy. Professor Guarnieri comments upon the problems created for defendants' rights as a bureaucratically trained and administered judiciary has become increasingly politicized and aligned with the prosecution and concomitantly distanced from the professional bar. Professor La Pergola presents a particularly fascinating analysis of how in the com-

mercial sphere the law of the European Economic Community ("EEC") has quietly supplanted the Italian Civil Code in most trade-related areas. This has happened, La Pergola points out, not by clear invocation of the supremacy of EEC law by the Italian courts, but by simple supplantation of Italian law by EEC law accompanied by the withdrawal of the Italian judiciary from the practice of invoking the Italian Civil Code in the commercial sphere. This makes Italian courts just another arm of the EEC as to most commercial matters, he observes.

IV. AN INDIANA PERSPECTIVE

In my subsequent remarks, I would like to begin by reflecting a bit about the impact in Italy of the supplantation of its Civil Code by the developing commercial law of the EEC. Then I would like to refract this somewhat by commenting upon a similar infusion of the growing and changing international "law merchant" which is occurring in Indiana and in other states of the United States. From these observations, I would then propose aspects of a couple of areas of law of particular interest to international trade lawyers, namely distribution law and corporation law, which appear to have devolved from different philosophical and theoretical viewpoints in Italy as opposed to the United States. Such areas would appear to present fruitful possibilities for future collaboration, analysis and possible harmonization by legal scholars here and in Italy.

V. SOME COMMENTARY CONCERNING THE POTENTIAL IMPACT OF EEC COMMERCIAL LAW UPON ITALIAN CIVIL CODE LAW

From La Pergola's observation that EEC commercial law has in the main supplanted the Italian commercial law contained in the Italian Civil Code, I would like to add that, from the perspective of common law jurisdictions, such as those in the United States, this process of supplantation would appear to have great likelihood of effecting very substantive changes upon the Italian legal system. This is likely because Italy is what is sometimes termed a "code law" country, as opposed to a "common law" country.

Speaking very generally, in code law countries, legislatures propound and codify laws and regulations in considerable detail. As controversies or disputes arise under these codes, the cases are decided by judges with reference to the code as applied to the facts. Generally, except in cases including questions of constitutional breadth, code country judges are not bound to follow prior decisions on comparable facts and issues, although they may do so. In common law terms, the practical

effect of this tends to be to limit the applicability of each case before a court to its particular facts. Thus, in code law countries, as opposed to common law countries, there is less tendency for the meaning of the code to evolve or "creep" by means of binding judicial interpretations, and a greater tendency for the code to continue to mean what it says—or at least what each separate judge in each separate case thinks it says.

By contrast, in a common law country, such as the United Kingdom or the United States, judges' decisions tend to have more precedential value as *stare decisis, et non quieta movere,* and later judges may be more likely to defer to precedents in subsequent decisions. This can, and often does, lead to the creation of a substantial body of so-called "common law" or judge-made law which may have very little, if any, basis in statute.

As La Pergola has observed, Italian courts have largely withdrawn from the application of Italian code law to most commercial disputes and controversies, and have instead applied EEC commercial law as embodied in the Treaty of Rome and Regulations and Directives promulgated thereunder and under the Maastricht Treaty. Thus, in effect, the Italian courts sit as EEC courts in commercial matters. EEC Regulations, Draft Group Exemptions and Directives tend to be broad and complex, requiring court interpretation and development for full elucidation. Furthermore, decisions regarding EEC issues, such as antitrust policy for example, tend to be reported and to have precedential value as *stare decisis*. Consequently, it appears likely that one result of European unification upon Italian law may well be to move Italy along the spectrum away from being a civil code law country and towards being more like a common law country, at least as regards the "law merchant."

VI. THE INTERNATIONAL "LAW MERCHANT" MODIFIES UNITED STATES LAW AND WILL CONTINUE TO DO SO

As many legal scholars have remarked, whereas much of the law of property in the United States has evolved from principles of English common law, much of the commercial law of the United States has been derived from the "law merchant" as developed in European trade fairs since the middle ages. In this regard, the commercial law of a state of the United States, such as Indiana, does not differ as markedly as one might expect from the commercial law of a European country like Italy. Both bodies of law are essentially branches of a common tree. In Indiana, since the 1960s, we have codified much of our commercial law and "law merchant" in the Uniform Commercial Code,

which both imported foreign commercial law concepts and harmonized various state law developments to a very substantial degree.

Nonetheless, Indiana's commercial law has continued to evolve and develop as Indiana businesses engage in ever more international transactions and has been substantively impacted by the United States' adoption (by treaty) of the 1980 United Nations Convention on Contracts for the International Sales of Goods ("U.N. Convention"). Just as La Pergola noted that EEC law had become the law of Italy as regards the "law merchant," the U.N. Convention—unless contractually excluded—has become the law of Indiana and arbitrarily applies to every transnational contract in goods to which Indiana law applies.

As in the case of Italy, there is every reason to believe, as an international body of decisions construing the U.N. Convention develops, that this body of law, decided by courts outside Indiana, will become part of the international common law of Indiana as regards contracts for the sale of goods, just as EEC decisions now automatically become the law of Italy. Consequently, we in Indiana have much to learn from the European and Italian experience with the harmonization of international laws.

VII. Differences In European and American Legal Perspectives as to Distribution Arrangements: Intriguing Possibilities for Analysis and Harmonization

If one were seeking an area of law with potentially the greatest impact upon international trade, one would be hard pressed to find an area more important than that of distribution arrangements. This is because international distribution arrangements embody so many areas of law within them. Distribution agreements involve sales of goods, and thus the laws of purchase; sale; warranty and limitations of warranty; remedy; and products liability and insurance thereagainst. To the extent that sales are financed, distribution contracts involve international financing and banking law, including such things as letters of credit, documentary drafts, security and pledge arrangements and the like. Distribution contracts are a form of license, so they may involve licensing and intellectual property law, including the laws of trade secrets, trademarks, copyrights and patent rights. Because they are transnational, distribution contracts may involve questions of the choice of law and forum, conflicts of law, dispute resolution mechanisms such as arbitration and mediation, political risk insurance questions, and the like. Locally applicable principles of agency, termination indemnities, employment law questions, tax withholdings from royalty and product payments, the enforceability of non-competition and con-

fidentiality covenants, and foreign exchange controls and the convertibility and repatriability of payments may be involved.

Yet looming above, overarching and dominating, and to a degree integrating all of the aspects of international distribution contracts are international antitrust concerns, and, in particular, questions involving supplier, distributor, customer and territorial restrictions upon both suppliers and distributors party to a distributorship contract. The profound differences between the American and European views of such restraints from an antitrust standpoint can probably best be illustrated by a discussion of the various possible interpretations of the word "exclusive" in an international distributorship antitrust context. As shall be indicated, the word "exclusive" is decidedly ambiguous even in an entirely American, or in an entirely European context. Yet Americans and Europeans tend to interpret the word "exclusive" from an antitrust standpoint in profoundly different ways—with the typical European interpretation being substantively less exclusive than is the typical American interpretation of the word.

A. *In the United States, Suppliers Have Substantial Freedom to Place Customer and Territorial Restraints Upon Both Themselves and Their Distributors*

In this country, where customer, supplier and territorial restrictions in distribution arrangements are horizontal—between two companies on the same level of distribution, for example, two suppliers or two distributors—courts applying antitrust laws tend to look pejoratively at both sides of the bargain. In other words, *both* the first distributor's agreement not to sell in the second distributor's territory *and* the second distributor's agreement not to sell in the first distributor's territory are judged harshly, and in fact deemed *per se illegal*; that is, antitrust injury to competition is *presumed.*

This is not always the outcome in the United States, however, where the restrictive agreement is vertical—entered into between a supplier and a distributor at different levels of distribution. In vertical distribution arrangements, the restrictions a supplier puts on its distributor historically have been viewed harshly. This is true in the case of territorial restrictions pursuant to *United States v. Arnold Schwinn & Co.*[1]

1. 388 U.S. 365 (1967) (which held that absolute territorial restraints which prevented a dealer from selling outside an exclusive assigned territory were *per se* illegal under the Sherman Antitrust Act, 15 U.S.C. § 1 (1992 Supp. IV).

However, the restrictions the distributor puts on its supplier by agreement, such as the supplier's agreement to sell "exclusively" to its dealers—to sell to no other dealer but the chosen dealer—is essentially viewed as innocuous and permissible. The supplier's right to foreclose itself from dealing with other dealers, the exercise of which would be *per se* illegal in a horizontal arrangement, is usually presumed absolutely legal and unobjectionable in the United States.

Nor did this change when *Schwinn* was overruled in *Continental T.V., Inc. v. GTE Sylvania Inc.*[2] In *Sylvania*, the distributor had been limited to distributing Sylvania brand television sets from a single location, but, in fact had ignored this restriction and had trans-shipped its *Sylvania* sets for sale from another location. After Sylvania enforced this vertical (supplier to dealer) restriction of the distributor contract by terminating the dealer, the dealer sued, claiming that Sylvania's enforcement of the contract's express restrictions was unfair under the antitrust laws.

The *Sylvania* Court noted that such vertical restrictions—and the court viewed all vertical non-price restrictions equivalently—indeed restricted the competitive freedom of one or more distributors of goods identified by one trademark. Nonetheless, the *Sylvania* Court overruled *Schwinn* and held that such restrictions were not to be struck down under the antitrust laws so long as such restrictions tended to benefit the ultimate consumer by enhancing the competition between such trademarked products and similar products bearing different trademarks.

As shall be examined *infra*, the European rule applicable in Italy subjects *both* the supplier's restrictions on its dealers *and* the dealer's restrictions upon the supplier to strict scrutiny. The result is that an "exclusive" dealing agreement in Italy, as a matter of law is far less exclusive than a comparable exclusive dealing arrangement here. The word "exclusive" simply has a different legal meaning in Italy than it does in the United States.

B. *In Italy, Absolute Supplier, Customer and Territorial Restraints Are Not Permissible in Distribution Arrangements*

Just as the United States has antitrust laws, so does Europe. In Italian courts in commercial cases, sitting as EEC tribunals, the applicable regulations are called the "Treaty of Rome." Distribution agreements for an EEC company potentially violate Article 85(1) of the Treaty of Rome, unless they comply with strict guidelines. If they

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2. 433 U.S. 36 (1977).

do not so comply, such agreements may be nullified pursuant to Article 85(2) of the Treaty of Rome.

Article 85(1) of the Treaty of Rome provides as follows:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market and in particular those which:
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This provision is of a scope comparable to that of Section 1 of the Sherman Act,[3] construed as to vertical distribution arrangements in *Schwinn* and *Sylvania*. It potentially forbids almost any limitations upon business conduct agreed to by two or more parties.[4]

Agreements, or because of the "doctrine of severability," at least provisions of agreements, violating Article 85(1), may be found null and void pursuant to Article 85(2) of the Treaty of Rome. Although civil fines under Article 15(5)(a) of Regulation 17/62 of the Treaty of Rome are unlikely to be imposed because of a distribution violation, there is a real potential for a supplier to lose rights to trade secrets and even the rights to be paid for delivered goods, since key provisions, or even the whole distribution agreement, may be held unenforceable.

3. 15 U.S.C. § 1 (1992 Supp. IV).

4. Bear in mind, however, that arrangements to distribute goods in European Common Market countries such as Italy may be required to comport with certain of the individual laws of such countries as well as with EEC antitrust laws broadly applicable in such countries.

What should an Indiana supplier do before entering into a standard distribution arrangement with an Italian distributor? There are two basic alternatives: (1) to obtain a specific exemption by means of a notification procedure available under the Treaty of Rome, or (2) to make sure the agreement contains no objectionable provisions and/or is exempt pursuant to a group exemption not requiring notification.

1. *Notification*

If the supplier is reasonably certain, based upon antitrust analysis, that the arrangement will violate European antitrust law, the supplier should notify the agreement to the EEC, thereby requesting an exemption from EEC antitrust laws. Pursuant to interpretations of Article 85(3) of the Treaty of Rome, notifying even one of a number of standard distribution agreements to the EEC will stay the possibility of the imposition of any fines during the period when the exemption is being considered by the EEC's "Commission of the European Communities" ("EEC Commission"). This notification period may take up to five years at present. Validation by exemption of but one of such standard agreements has been held by case law to validate all of such agreements.

The exemption by notification procedure in the EEC therefore constitutes a kind of "rule of reason" approach to antitrust law exemption similar to that developed under the Sherman Act as exemplified by *Sylvania*; but it is one which is so institutionalized, bureaucratic and slow as to be of little practical use to fast-moving businessmen. Although there is being developed a quicker procedure to obtain "comfort letters" from the EEC Commission during the lengthy exemption procedures following notification, it makes more economic sense to include in distribution agreements only provisions which have been held unobjectionable under Article 85(1) of the Treaty of Rome and/or those which enable the distribution arrangement to fall within specific group exemptions available under Article 85(1).

2. *Unobjectionable Provisions*

The following general types of clauses have been held acceptable despite Article 85(1). Unless used in combination to achieve a proscribed result, such as price fixing or unpermitted market foreclosure of competitors, agreements containing only such clauses need not be notified to the EEC.

a. *Dealer Competence*

Reasonably necessary requirements for technical competence, professional training or a full-time staff are permissible.

b. *Suitable Premises*

Requirements for suitably equipped and appearing premises to be used exclusively for the subject goods during normal business hours are permissible.

c. *Marketing*

Suppliers may require use of prescribed advertising, display of goods, marketing inventory in good condition, use of the suppliers' trademarks, supply of goods in original packaging and cooperation in marketing efforts.

d. *Adequate Inventory*

Cases have held it reasonable for a supplier to require that a distributor stock a three months supply of inventory of the supplier's goods.

e. *Servicing of Goods*

It has been held reasonable to require dealers to service goods for six months after sale unless the goods are defective, altered or misused.

f. *Exports*

Exports from the EEC may be prohibited unless such restrictions are contrary to treaty.[5]

g. *Sales Information*

Suppliers may demand that dealers provide information regarding customers, pricing and discounts granted, if such demand is not ancillary to a price fixing conspiracy.

h. *Term*

Distribution agreements may be for a fixed term which may be renewed, but which cannot explicitly be made automatically renewable.

i. *General Terms*

Provisions for retention of title until goods are paid for, consignment sales, arbitration and choice of both law and forum are usually acceptable.

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5. However, restrictions by an American supplier against a dealer exporting to the United States could potentially violate the United States antitrust laws.

j. *Intellectual Property*

Requirements for non-exclusive grantbacks of improvement licenses, for sharing of information regarding improvements, for confidentiality of know-how, and for quality control generally are permissible.

3. *Group Exemption Regulation 1983/83*

In addition to the general terms set forth above, distribution arrangements containing certain provisions for exclusivity need not be notified to the EEC Commission, provided such provisions fall within one of the "group exemptions" available under Article 85(1) of the Treaty of Rome. The most useful, Regulation 1983/83, which exempts from notification certain arrangements for the distribution of goods, replaced the former group exemption, Regulation 67/67.[6]

In addition to the unobjectionable provisions outlined above, which are broadly applicable to all EEC distribution arrangements, the *only* additional restrictions permitted under the Regulation 1983/83 group exemption are the following and, as we shall examine *infra*, these are not as far-reaching as their plain language would suggest: (1) the supplier may make an arrangement to supply certain goods to no more than one distributor per territory, which territory may be the whole EEC; (2) the supplier may reserve the right to alter the territory in a non-punitive way; (3) the supplier may agree not to supply anyone but the distributor, including end users, in the territory; (4) the distributor may agree not to manufacture or distribute competing goods and not to buy the subject goods from anyone but the supplier; i.e., not from other distributors; (5) the distributor may agree not to have offices, supply or repair depots for goods outside the territory and not to solicit orders from customers outside the territory; and (6) the distributor may agree to purchase full lines and minimum volumes of the "exclusive" goods.

It is important to note that, despite apparent language to the contrary in Regulation 1983/83, there are very real limits to the types of "exclusivity" permitted under Regulation 1983/83. For example, the supplier may not agree to refuse direct orders from customers in the territory for delivery outside the territory. Neither may the supplier prohibit the distributor from accepting unsolicited orders from customers outside the territory. A supplier may reserve "house accounts" to itself, but only if these accounts are end users and not other distributors.

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6. Regulation 1983/83, 2 Common Mkt. Rep. (CCH) ¶ 2730.

It is these limitations upon the concept of permissible "exclusivity" under the Treaty of Rome, which we shall now explore in greater depth, because the author believes that this analysis demonstrates that what are called "exclusive dealing arrangements" in Italy and the rest of Europe are not understood as such in the United States. Some hints as to this can be found in the language of Regulation 1983/83 itself. For example, Regulation 1983/83 is entitled "On the Application of Article 85(3) of the Treaty to Categories of Exclusive Distribution Agreements."[7] But paragraph (11) of the preambles to Regulation 1983/83 goes on to state as follows:

> (11) Whereas consumers will be assured of a fair share of the benefits resulting from exclusive distribution only if parallel imports remain possible; *whereas agreements relating to goods which the user can obtain only from the exclusive distributor should therefore be excluded from the exemption by category; whereas the parties cannot be allowed to abuse industrial property rights or other rights in order to create absolute territorial protection*; . . . .[8]

Article 3 of Regulation 1983/83, entitled "Restrictive Agreements Prohibited," goes on to *prohibit* exclusive distribution agreements whereunder

> (c) users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory; . . . .

It is when one explores the actual "exclusive dealing" cases in Europe that it really becomes clear how limited "exclusivity" in distribution arrangements really is in Italy and other EEC countries. There is ample additional and consistent precedent in Europe for the proposition that no one can exercise an absolute product distribution monopoly which will prohibit or prevent a supplier, or persons buying from the supplier, from selling the same goods in competition with the supplier's "exclusive" distributor.

In *Case 22/71, Béguelin Import Co. v. G.L. Import Export S.A.*, for example, the Japanese supplier had "exclusively" licensed a French subsidiary of its Belgian distributor to distribute its unique, trademarked cigarette lighters in France.[9] The same lighters began to be distributed

7. Regulation 1983/83, 2 Common Mkt. Rep. (CCH) ¶ 2730.

8. Emphasis added.

9. [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8149, 3 [1971-1973] E.E.C. Comp. L. Rep. 757 (November 25, 1971).

in France by another French company. The French distributor sued to enforce its "exclusive" rights against its French rival and its foreign supplier. The French distributor lost, the court holding that the Treaty of Rome's "exclusive" distributorship regulation, Regulation 67/67 (the predecessor of Regulation 1983/83), was inapplicable to exempt "exclusive" distribution agreements which forced *all* French purchasers to buy the unique lighter from only *one* designated French distributor. The tribunal consequently nullified the "exclusive" distributor agreement pursuant to Article 85(2) of the Treaty of Rome.[10]

In *Joined Cases 56 & 58/64, Establishments Consten SARL and Grundig-Berkaufs-GmbH v. Commission*, a French plaintiff had obtained an "exclusive" distributorship for all of France for all "Grundig" brand radio receivers, recorders, dictaphones and television sets.[11] The "exclusive" French distributor then sued another French wholesaler for buying the same "Grundig" brand goods for resale in France, alleging unfair competition and trademark infringement. The French company lost on the grounds that "exclusive" distribution agreements which foreclose all other distributors from the market are illegal in Europe. The French distributor was therefore

> required to refrain from any measure likely to obstruct or impede the acquisition by third parties, in the exercise of their free choice, from wholesalers or retailers established in the European Economic Community, of the products set out in the contract, with a view to their resale in the contract territory.[12]

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10. *Accord* Commission Decision of 21 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.812 Theal/Watts), 1977 O.J. (L 39) 19, 3 [1971-1973] E.E.C. Comp. L. Rep. 129 (February 10, 1977); Case 28/77, Tepea BV v. Commission, 1978 E.C.R. 1391, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8467, 6 [1978-1979] E.E.C. Comp. L. Rep. 831 (June 20, 1978), ("exclusive" Dutch distributor of trademarked record player cleaning products was unsuccessful in preventing other Dutch wholesalers from ordering the "exclusive" products for resale *and* from using the "exclusive" trademarks and actually fined for attempting to enforce its rights in concert with its supplier in such a way as to deny Dutch purchasers other sources of supply for the trademarked products in question).

11. [Transfer Binder 1964-1971] Common Mkt. Rep. (CCH) ¶ 8046, 1 [1964-1971] E.E.C. Comp. L. Rep. 547 (July 13, 1966).

12. *Consten*, *supra* note 11, at 552; *See also* Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG, 1971 E.C.R. 487, [Transfer Binder 1971-1973] Common Mkt. Rpt. (CCH) ¶ 8106 (German holder of "exclusive" rights to the thing itself—copyrighted phonograph records—held not entitled to prevent wildcat distributors from purchasing and reselling the proprietary items in Germany, since enforcement of such rights would tend unlawfully to partition the EEC).

However, when private label goods of the same type are available, it is permissible in Europe to suppress intra-brand competition, as in *Sylvania*, by means of "exclusive dealing" arrangements.[13] In *Case 96/75, EMI Records Ltd. v. CBS Schallplatten GmbH.*, "exclusive" French holders of "Columbia" record distribution and trademark rights, in fact, *were* permitted to prevent the United States supplier from selling these unique copyrighted records to competing French wholesalers for resale in France.[14] The court's reasoning? The United States manufacturer needed only to obliterate the protected trademarks and to privately label these same unique, copyrighted records in order to be allowed to sell these same unique copyrighted records to French wholesalers for resale in France. French purchasers were not therefore denied the right to purchase the things themselves, the unique, copyrighted records, from either the "exclusive" French distributor, or from other French wholesalers sourcing the same unique copyrighted records from the same United States source under private label. In other words, in Europe, even "exclusive" distribution contracts for unique trademarked goods are not permitted to prevent suppliers from making private or alternative label sales of these same unique goods in the "exclusive" European territories under different marks.

Some other European limitations upon "exclusivity" in distribution arrangements are perhaps worth mentioning. Regulation 1983/83 may not be used with respect to distribution arrangements between two competitors or potential competitors if the gross sales of each are very substantial, and, in fact, cross agreements for "exclusive" distribution between competing suppliers of any size are prohibited. As suggested above, the "exclusivity" granted cannot further a monopoly making the supplier the sole source of supply of the "exclusive" goods in the "exclusive" territory. The supplier cannot agree to police, punish or terminate other distributors in other territories for invading the "exclusive" territory.

As previously indicated, suppliers should use caution in enforcing intellectual property rights to promote "exclusivity," although, as suggested by the *EMI Records* cases, suppliers and, possibly, distributors, may be able to use trademark rights to exclude trademarked goods

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13. *See, e.g.*, Case 51/75, EMI Records Ltd. v. CBS U.K. Ltd., 1976 E.C.R. 811, [Transfer Binder 1976] Common Mkt. Rep. (CCH) ¶ 8350 (June 15, 1976); Case 86/75, EMI Records Ltd. v. CBS Grammofon A/S, 1976 E.C.R. 871, [Transfer Binder 1976] Common Mkt. Rep. (CCH) ¶ 8351 (June 15, 1976).

14. 1976 E.C.R. 913 [Transfer Binder 1976], Common Mkt. Rep. (CCH) ¶ 8352 (June 15, 1976).

from outside the EEC. If the supplier owns over 50% of the distributor, the Regulation 1983/83 exemption will be unavailable. However, because there is no "intra-company conspiracy" doctrine in the EEC, "exclusive" distribution through a wholly-owned subsidiary does not violate Article 85(1).

As suggested above, it would appear that significant differences exist between the permissible range of "exclusivity" in European distributorship arrangements as opposed to those in the United States. The study of the possible harmonization of these concepts by legal scholars in the United States and Italy could do much to eliminate some of the legal uncertainties between Europe and the United States of trading through distributors.

VIII. Differences in Approach Between Italian and United States Corporation Laws Suggest Interesting Opportunities for Economic and Legal Analysis

It is beyond the scope of this article to do an in depth analysis and comparison of the legal attributes of limited liability companies in Italy and in the United States. However, it is intriguing that, in Italy, limited liability appears to be a privilege purchased in effect by the enforcement of relatively strict minimum capital guidelines. By contrast, in the United States there has been a "race to the bottom" amongst our various state incorporation statutes with the result that, in most states, a promise to put up $1,000 and minimal adherence to corporate law formalities affords corporate shareholders limited liability beyond their $1,000 pledge, which they need not necessarily even fulfill.

True, in the United States in order to sell stock to the public, corporations must make public disclosures of their finances and, before providing financing, lenders may insist on representations and warranties of corporate soundness, as well as upon shareholder guaranties as a precondition to the extension of credit. But these kinds of safeguards are designed to protect potential lenders or shareholders. They offer no real protections or assurances to the public that the limited liability company is in fact a solid, solvent entity. Furthermore, absent fraud, American corporate directors are liable only for breaches of duties of loyalty (self dealing, theft of corporate opportunity and the like) and care (virtually total stupidity). Furthermore, the new limited liability company statutes would appear to offer the general public no more assurances of the solvency of these new limited liability companies than exists with respect to corporations.

Contrast this system (albeit oversimplified by the writer) in the American corporations with the situation in Italy. In Italy, there are

essentially two types of limited liabilities companies—small and large. There are other types of legal entities under Italian law, but only two with the attribute of limited liability for all owners. The large Italian corporation or *societa per anzioni*, or S.p.A., requires a minimum investment and maintenance capital of at least 200 million lira, or over $100,000. The small Italian corporation, or *società à responsabilità limitata*, or S.r.l., must have and maintain a minimum capitalization of at least 20 million lira, or over $10,000.[15]

What is interesting about Italian limited liability companies is that they must *maintain* their capital. Every year they must file financial reports in a prescribed, precise format[16] with the shareholders and also in an official Italian Business Register, together with a report of the directors. If these annual statutorily-mandated reports reveal that the Italian corporation has lost over one-third of its capital, Article 2446 of the Italian Civil Code mandates that the shareholders meet to consider the situation, and to reduce the capital of the corporation, which cannot be reduced below the statutory minimum. Article 2447 of the Italian Civil Code further provides that if the capital goes below the statutory minimum, the corporation's capital must be increased, or else the corporation must be liquidated, or the limited liability feature of the corporation must be eliminated and the corporation must be reformed as another type of legal entity not having the attribute of limited liability.

It would be most interesting to evaluate the question whether these stringent standards requiring shareholders and directors of Italian limited liability companies to maintain minimum capital have the effect of enhancing trade, since unsecured creditors from these requests have some assurances from these minimum capitalization requirements that they are dealing with a legally solvent company. Conversely, it would be interesting to note whether capital formation in Italy is hampered by the statutory exposure for investors in risky ventures. Probably the concomitant effect of the Italian Bankruptcy Law, Royal Decree of March 16, 1942, Number 267, which can provide penal sanctions from six months to two years imprisonment for "simple bankruptcy" and from three to ten years imprisonment for "fraudulent bankruptcy," also should be evaluated in this regard.

Given the wave of corporate failures and bankruptcies in the United States over the past decade, however, it might well be appropriate for

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15. *See generally* Italian Company Law, Italian Civil Code, Book V, Articles 2325 to 2548.

16. This format now has been modified by the Fourth EEC Directive.

American and Italian legal scholars to investigate the possible effects in this country of more stringent solvency and minimum capital requirements for United States limited liability companies.

IX. CONCLUSION

This Italian law symposium is a timely and salutary addition to our jurisprudence, affording us both a refraction of and a reflection upon our own legal system. Indiana businesses and lawyers are increasingly working with Italian businesses and lawyers in world markets and need better to understand the compatibilities, incompatibilities and cross-fertilizations which are resulting. Furthermore, ambiguities as regards the permissible ranges of restrictions in distribution arrangements and a different, more restrictive Italian approach to requiring the solvency of limited liability corporations afford possible avenues for further study and possible harmonization by Indiana and Italian legal scholars.