NYSBA AUTUMN 2008 | VOL. 21 | NO. 2

International Law Practicum

A publication of the International Law and Practice Section
of the New York State Bar Association

Practicing the Law of the World from New York

NYSBA

A Primer on Italian Commercial Agency Law

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I. Introduction

Agency is one of the most time-honored ways to promote business. In Italy, the use of commercial agents may be traced back at least to the medieval Genoese and Venetian maritime republics, whose extensive networks of foreign agents assisted these republics in expanding beyond their boundaries as small city-states to dominate commerce and trade throughout the Mediterranean.[1] Over the years, the practice of using an independent intermediary to negotiate the sale or purchase of goods on behalf (and at times in the name) of a principal who would pay such intermediary proportionally to the success of his or her activities has become one of the most common ways to promote new business, open markets to foreign players, and generally drive sales growth.

The agency relationship involves mutual investments of labor (and perhaps capital) by both agent and principal, which in turn create a mix of obligations, duties, and expectations for the parties. The agent invests his or her time and labor to promote the products of the principal and develop a network of customers and brand goodwill within his or her territory, thus relying on the quality of the principal's products and services in order to earn his or her commission, which commission incentivizes the agent to enlarge the principal's client portfolio and sales volume. The principal relies on the efforts of the agent to drive sales of the products, pays the agent commissions, and grants the agent other benefits, such as exclusivity within a defined territory. As the owner and controller of the product, however, the principal retains an advantage over the agent, in that the principal may attempt at any time to sell directly to customers, thus trading on the brand goodwill and client network the agent has developed without having to pay the agent a commission.

Recognizing this power imbalance, most European countries began to regulate agency relationships in the late 19th and early 20th centuries with the partial intention of introducing greater clarity and predictability in the marketplace while protecting agents from unfair dismissal.[2] With the drive towards an integrated European market in the 1980s came a desire to unify the inconsistent patchwork of agency laws across the Member States of the European Economic Community (as it then was known) ("EEC"). Hence, in 1986 the EEC, proclaiming that "the differences in national laws" were "detrimental both to the protection available to commercial agents . . . and to the security of commercial transactions," adopted Directive 86/653/EEC "*on the coordination of the laws of the Member States relating to self-employed commercial agents*" (the "Agency Directive").[3]

II. The European Agency Directive

The decision to use a directive rather than a regulation was intended to allow the Member States to determine the best way to implement the objectives of the Agency Directive, while still ensuring a common framework for all national agency laws. Rather than tinkering with the provisions of the Agency Directive, Italy chose, for the most part, to amend its laws in strict conformity with the text adopted by the EEC. The key provisions of the Agency Directive, and thus of most of Italian agency law, are described below.

A. Application

The Agency Directive broadly defines an agent as a "self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal,' or to negotiate and conclude such transactions on behalf of and in the name of that principal" and specifically excludes from the definition company officers (and partners in a partnership) who have the power to enter into commitments binding the entity with which they work, as well as receivers, managers, liquidators, or trustees acting in respect of a bankruptcy. The activities of unpaid commercial agents, or agents who operate on commodity exchanges or in the commodity markets, also fall outside the Agency Directive.

B. Binding Principles

The overriding goal of the Agency Directive is to provide certain basic levels of protection for commercial agents while at the same time harmonizing the agency laws of the Member States. Importantly, the Agency Directive is comprised of both binding principles and non-compulsory guidelines that are intended to act as default rules in the event that the parties to an agency relationship have not otherwise addressed the issues by contract. It is critical to an understanding of Italian—and European—agency law to appreciate that the Agency Directive's binding principles cannot be altered by contract unless the contract provides for more favorable treatment for the agent. These binding principles are discussed below.

1. Parties' Duties

The Agency Directive prescribes certain core duties of agents and principals. According to paragraph 2 of Article 3, an agent is required to do the following:

– "look after his principal's interests and act dutifully and in good faith";

– "make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of";

– "communicate to his principal all the necessary[4] information available to him"; and

– "comply with reasonable instructions given by his principal."

Paragraph 1 of Article 3 provides that a principal must "act dutifully and in good faith" in all relations with his or her commercial agent. In addition, paragraph 2 of Article 4 provides that a principal do the following:

– "provide his commercial agent with the necessary documentation relating to the goods concerned";

– "obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected"; and

– "inform the commercial agent within a reasonable period of his acceptance, refusal, and of any nonexecution of a commercial transaction which the commercial agent has procured for the principal."

Both the principal and the agent have the right to request a signed written agreement setting out the terms of the agency relationship. In addition, Member States may require that any agency contract be evidenced in writing.

2. Remuneration

An agent's remuneration is treated extensively in the Agency Directive. Both binding and guideline provisions are used. (The nonbinding provisions are identified as such below.) Under Article 7, an agent is entitled to commissions on commercial transactions concluded during the period covered by the agency contract where:

– "the transaction has been concluded as a result of his action"; or

– "the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind"; or

– he has "an exclusive right to" or has "been entrusted with" a "specific geographical area or group of customers," and a transaction is concluded with a customer from that group or area (regardless of whether the agent was personally involved in securing the transaction).

The parties are free to determine the level of commissions or other remuneration to be paid to the agent; however, in the absence of express terms as to payment, the Agency Directive's guidelines stipulate that the agent must receive a level of remuneration consistent with what other agents are "customarily allowed in the place where he carries on his activities" or, where the local custom cannot be established, "reasonable remuneration taking into account all the aspects of the transaction."

Agent commissions become due and payable when the principal or the third party has executed his or her part of the transaction or when the principal should have executed his or her part of the transaction under the terms of the contract. Once due, the commission must be paid no later than the last day of the month following the quarter in which the payment became due. The principal must also provide the agent with a written accounting showing the amount of the commission due and the calculation of such amount. An agent has the right to demand access to the principal's books and records in order to verify the amount.

Importantly, the agent's right to the commission is extinguished (and, if already paid to the agent, must be refunded) only where it is established that the contract between the third party and the principal will not be executed and the principal is not to blame.

3. Termination

Under the Agency Directive, termination of an agent entails significant consequences, the most important of which is the payment of an indemnity to the agent. Instead of the common law's complicated weighing analysis of good faith or reasonableness in terminating an agent, the Agency Directive explicitly recognizes the value that an agent may bring to a principal by developing the latter's customer network, brand recognition, goodwill, and the like, and paragraph 2 of Article 17 stipulates that an agent shall be entitled to an indemnity upon termination (including where the relationship is terminated by the agent's death) if and to the extent that:

– "he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers"; and

– "the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers."

Determining the amount of indemnity owed can be a matter of negotiation between the parties, although Article 17(2)(b) of the Agency Directive states that the indemnity "may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years." If the relationship is less than five years old, the indemnity is calculated on the average remuneration for the life of the agency. The agent also retains his or her right to sue the principal for damages, with paragraph 3

of Article 17 of the Agency Directive specifically noting that damages "shall be deemed to occur particularly" if the termination:

- deprives the agent of a commission he should have earned while "providing the principal with substantial benefits linked to the commercial agent's activities"; or
- where the timing of the termination does not allow the agent to "amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice."

Article 18 of the Agency Directive also specifies the following limited circumstances in which an indemnity will not be payable upon termination:

- where the principal terminated the agency contract due to a fault of the agent that would justify immediate termination of the agency contract under national law; or
- where the agent voluntarily terminates the agency contract, unless such termination is justified based on the conduct of the principal or on the grounds that the agent cannot reasonably continue his activities because of age, infirmity, or illness; or
- where the agent assigns his or her rights and duties under the agency contract to another person, with the agreement of the principal.

Moreover, paragraph 5 of Article 17 provides that the agent loses any entitlement to the indemnity if the agent, within one year following termination of the contract, has not notified the principal that he or she intends to claim his or her indemnity.

Finally, it should be noted that, in addition to an indemnity, the agent may be entitled to additional commissions following termination under Article 8 if "the order of the third party reached the principal or the commercial agent before the agency contract [was] terminated" or if the principal enters into a transaction that is "mainly attributable to the commercial agent's efforts during the period covered by the agency contract and . . . entered into within a reasonable period after that contract terminated."

III. Agency Law in Italy

In 1991, the Italian Legislature implemented the Agency Directive with Legislative Decree 303/91, which amended the Italian Civil Code to effectively mirror the language of the Agency Directive.[5] The analysis provided in Section II above therefore also fairly describes Italian agency law. Italian jurisprudence and practice, however, have provided some additional layers of analysis concerning termination (particularly as regards the payment of indemnities and use of noncompetition clauses) and agent registration.

A. Termination Indemnities

The implementation of the Agency Directive touched off a series of cases in which the Italian and European courts were asked to examine the relationship between the Agency Directive and preexisting Italian legislation dealing with posttermination indemnities and other payments in respect of commercial agents' social security. Italian law requires that all principals (regardless of whether they maintain an office in Italy) with agents active in Italy must register and open a social security account with the ENASARCO Foundation,[6] a quasi-governmental agency that is responsible for providing retirement plans to commercial agents. The collective agreements previously drafted by the leading association of principals and agents had also entrusted ENASARCO with the task of collecting further contributions from principals in respect of termination indemnities. The funds were to be held and accrued in an accumulation fund and released to the agent after termination of the agency as a form of indemnity. A debate arose as to whether such collective agreements, using different indemnity criteria, could exist alongside the indemnity provisions of the Agency Directive, as adopted in the Civil Code in 1991.[7]

The issue was eventually resolved by the European Court of Justice ("ECJ"), which held that the criteria set forth in the Agency Directive can be modified pursuant to an agreement between the parties, or pursuant to a collective agreement, if the modification provides for more favorable treatment of the agent.[8] The ECJ considered this issue at some length and ruled that the favorability analysis must be undertaken by the parties *ex ante* and that the treatment set forth by the collective agreement must be more favorable in each and every aspect of the agency relationship (i.e., not simply more favorable on balance than under the Agency Directive).

Several subsequent Italian cases did not follow the ECJ's approach, favoring instead a more conservative interpretation of the conflict of laws. The Corte di Cassazione ("CC") stated on numerous occasions that in termination cases the favorability analysis should be conducted based on an *ex post* analysis of all of the facts of the particular agency relationship.[9] Following a debate in the Italian legal community about the inconsistency of the CC's decision with that of the ECJ, the CC adopted the ECJ's *ex ante* approach in later cases.[10] Thus, the current state of the Italian law requires that any contractual deviation from the indemnity provisions in the Agency Directive must, on an *ex ante* analysis, be more favorable to the agent in each instance in which the contract deviates from the Agency Directive. It is highly likely that, by analogy, this rule applies to any deviation from the other mandatory terms of the Agency Directive.

It is also important to note, however, that the CC has ruled that the agency provisions of the Italian Civil Code shall be applied only to bona fide agents and not to brokers or so-called "deal-hunters" (*procacciatori d'affari*).[11]

The court specified that an agent is different from a broker in that the relationship between an agent and a principal is characterized by continuity, that is, it is based on stability and is not episodic. In an agency relationship, the agent commits to promote on a continuous basis the business of the principal and to follow the principal's instructions, whereas the broker procures contracts for the principal on an ad-hoc basis, solely on his or her own initiative and without any commitment to the principal. Given the significant responsibilities that a true agency relationship imposes under Italian law, particularly for principals, it is essential that the true nature of any potential agency relationship be clearly stated in writing to avoid disputes and potential litigation over the characterization of a relationship as an agency or a brokerage.

B. Noncompetition Clauses

It is common for principals to include in agency contracts a noncompetition clause by which the agent is prohibited from competing in the same market and territory following termination of the agency relationship. Given his or her knowledge of the principal's product characteristics, pricing, and other terms of trade, and especially the principal's client portfolio, a terminated agent could be an extremely valuable resource for any of the principal's competitors. Thus, while European Community ("EC") law vigorously promotes competition as a tool for breaking down national barriers and integrating the common market, EC and Italian agency law also recognizes the need to preserve some right of noncompetition if the institution of agency is to remain effective. Barring such recognition, it is possible that vendors would abandon the agency model to avoid the loss of customers and/or business secrets following an agent's termination.

In Italy, the compromise between these competing interests has led to the following treatment of noncompetition clauses: an agreement limiting an agent's competition after termination of the agency shall be valid only if

- it is concluded in writing;
- it relates only to the geographic area, or the group of customers and the geographic area, previously entrusted to the agent, and to the kind of goods formerly covered by the agency contract; and
- the term of the agreement does not exceed two years following the termination of the agency contract.[12]

If an agent enters into a valid noncompetition agreement, he or she is entitled to be paid an indemnity that is to be calculated with reference to the length of the agreement, the nature of the former agency relationship, and the indemnity given for the termination of the agency contract.[13]

C. Agent Registration

Unlike most other countries, Italy has adopted the professional regulation of agents.[14] According to Italian law, all agents who promote, on a continuous basis and within a defined territory, the conclusion of contracts for one or more principals must be inscribed in a Register kept by the local Chamber of Commerce. Failure to adhere to this requirement may trigger administrative fines against the agent and also against any principal dealing with an unregistered agent.[15]

Perhaps more significantly, failure to register had once been considered to void an agency contract concluded with an unregistered agent,[16] leaving unregistered agents with few legal protections. The compatibility of this view with the Agency Directive was referred for a preliminary ruling to the ECJ in the *Bellone* case.[17] The court reiterated that the Agency Directive was designed to protect commercial agents, and it noted that, although the notion of a register of agents had been proposed by the Economic and Social Committee during the preparation of the Agency Directive, the final text did not address the issue (but referred only to the ability of Member States to require that the contract be in writing). As a consequence, the ECJ concluded that Member States could not impose any condition on the validity of agency contracts other than that they be evidenced in writing.

In the subsequent *Caprini* case,[18] the ECJ was asked to answer, by preliminary ruling, whether the registration requirement itself violated the Agency Directive. The court held that national legislation requiring agent registration would be permissible so long as the consequences of nonregistration did not adversely affect the protection that the Agency Directive confers upon agents in their relations with their principals. The Italian registration requirement thus still stands, although reforms are expected in this sector, since the requirement has become toothless in the aftermath of *Caprini*.

IV. Conclusion

The law of commercial agency in Italy and throughout the European Union is highly regulated, especially when compared with the corresponding position in common-law jurisdictions. A sound understanding of the law of agency is essential for both agents and principals, particularly as it may entail substantial payments and indemnities for the latter. While it is clear that the Agency Directive is substantially "the law of the land" in Italy on nearly all matters of commercial agency, it is equally clear that the Italian courts have consistently taken an independent approach to judicial interpretation of the Agency Directive. An understanding of Italian agency law thus begins, but does not end, with the text of the Agency Directive, and developments in Italian agency law and practice should thus bear careful watching by those with an interest in this market.

Endnotes

1. *See* L. Goldschmidt, STORIA UNIVERSALE DEL DIRITTO COMMERCIALE, 206 (1913), which notes that provisions governing agency commissions on sales were included in the Genoese *Chartae* of 1153 and that detailed regulations on the subject were later adopted in the Genoese City Charter of 1588-89.
2. For example, Germany introduced a regulation for commercial agents in 1897, and other countries soon followed, e.g., Sweden (1914), Norway (1916), Denmark (1917), Austria (1921). Italy drafted an agency bill in 1920 that was the spur for a 1935 collective agreement; legislative provisions were introduced in Italy with the Civil Code of 1942.
3. 1986 O.J. [L 382] 17 (EEC).
4. The somewhat awkward terminology "all the necessary information" is also used in the French- and Italian-language texts of the Agency Directive. Presumably this was intended as a reference to market information that comes into the possession of the agent and that is reasonably necessary to the carrying on of the principal's business.
5. Legislative Decree 10 Sept. 1991 n. 303 implemented Directive 86/653/CEE concerning the coordination of the laws of the Member States related to self-employed commercial agents, modified articles 1742, 1748, 1750, 1751, and added article 1751*bis* to the Italian civil code.
6. For more information about ENASARCO, including filing requirements available in English, see http://www.enasarco.it.
7. The issue was particularly controversial, as the 1992 collective agreement, despite having been signed after the adoption of the Agency Directive in the Italian Civil Code, did not take into consideration the criteria set forth by the Agency Directive for determining an indemnity.
8. Case C-465/04, *Honyvem Informazioni Commerciali S.r.l. v. De Zotti*, 2006 E.C.R.
9. *See*, *e.g.*, *Mencaraglia v. Kenwood Electronics Italia S.p.A.*, Cass. Civ. Labour sez. 29 July 2002 n. 11189; *N.M. v. Cantine Leonardo da Vinci*, Cass. Civ. Labour sez. 3 Oct. 2006 n. 21309; *Simeto Docks S.r.l. v. Com. Catania*, Cass. Civ. sez. V 17 May 2005 n. 10308.
10. *See*, *e.g.*, *Francesia Riccardo v. Filtrauto Italia S.r.l.*, Cass. Civ. sez. II, 9 Oct. 2007 n. 21088; Honyvem - Informazioni Commerciali S.r.l. v. D.Z.M, Cass. Civ. Labour sez. 24 July 2007 n. 16347.
11. *Oblett v. 3elle Scarl*, Cass. Civ. Labour sez. 24 June 2005 n. 13629.
12. *See* art. 1751*bis* of the Civil Code.
13. *See* art. 1751 of the Civil Code.
14. Law 3 May 1985, n.204.
15. According to Article 9 of Law 3 May 1985 n.204, these fines may range in amount from €516.45 to €2,065.82.
16. *See Fallimento Soc. Tanit v. Fallimento Soc. Selpa*, Cass., sez. un., 12 Nov. 1983, n.6729, RV431441; *Buongiovanni v. Soc. Conc. Subalp.*, Cass., sez un., 12 Nov. 1983, n.6730, RV 431442; and *Cuomo v. Soc. Camste. Int.*, Cass., sez un., 3 Apr. 1989, n.1613, RV462399 (all cases determined under the 1968 predecessor law to L. 204/95).
17. Case C-215/97, *Bellone v. Yokohama S.p.A.*, 1998 E.C.R. I-2191.
18. Case C-485/01, *Caprini v. Conservatore Camera di Commercio*, 2003 E.C.R.