COUNTRY REPORT
ITALY

Commercial Agency

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1. LEGAL SOURCES.

What are the rules governing commercial agency agreements (if any) in your country?

Rules of law. The main rules on commercial agency contracts are provided in Articles 1742-1753 of the civil code of 1942. These Articles have been amended in 1991[1] and in 1999[2] in order to implement the EC Directive 653/86. Further amendments have been made in the years 1999[3] and 2000[4].

Some of these provisions are mandatory, but they can always be derogated in favour of the agent.

Enrolment on a special register. Law No. 204, of 3 May 1985 regulates the profession of commercial agent and used to require all agents who performed

[1] Decree n. 303 of 10 September 1991.
[2] Decree n. 65 of 15 February 1999.
[3] Law of 21 December 1999, n 526, which has added a new paragraph to Article 1746 c.c., substantially prohibiting del credere: see hereafter, § 10.
[4] Article 23 of the law of 29 December 2000, n. 422, which has added some new paragraphs to Article 1751-bis c.c. regarding compensation for post-contractual non competition obligations.

their activity in Italy to be inscribed on a special register. In 2010 such register has been abolished. Therefore, from May 2012 (date in which those provisions become effective), Italian commercial agents, instead of being authorized to the inscription to such register, shall simply present to the competent Chamber of Commerce a declaration of beginning of activity ("dichiarazione di inizio di attività"), also confirming that they comply with the requirement prescribed by law (listed under Article 5 of Law 204/1985), and they will be entitled to start performing their activity after 30 days.

Special procedural rules (i.e. the special procedure for labour disputes, called «processo del lavoro») are applicable to agents whose activity is mainly personal (agents-individuals with a limited organisation).

Collective agreements. A peculiar characteristic of the Italian system is the presence of collective agreements (Accordi Economici Collettivi, AEC) concluded between the organisations of principals and agents.

There are at present four different collective agreements, applicable in relation to the category to which the principal belongs: one for contracts with principals who are industrial undertakings (AEC Industria of 30 July 2014), one for contracts with principals who are commercial undertakings (AEC Commercio of 16 February 2009, amended on 10 March 2010 and on 29 March 2017); one for contracts with principals who are artisans (AEC Artigianato of 10 December 2014) and one for contracts with small undertakings belonging to Confapi (AEC Confapi of 17 September 2014).

The collective agreements apply in principle only where both parties belong to the associations which signed them[5]. They also apply if incorporated by reference in the contract. This means that the collective agreements will not apply to contracts between a foreign principal and an Italian agent (or between a foreign agent and an Italian principal), unless expressly incorporated by reference.

The collective agreements include important provisions on several matters, like for instance: unilateral modifications of the contract by the principal; compensation for post-contractual non competition obligation; calculation of the goodwill indemnity, etc.

In this report we will sometimes also mention some provisions of the collective agreements, although they will normally not be applicable to international contracts, in order to give an overview of the prevailing practice, which may be useful for a better understanding of the position of Italian agents.

General rules on contracts (Articles 1321 ss. of the civil code) also apply.

Social security. Italian agents have a social security organization (Fondazione ENASARCO) which has been privatized in 1996. Pursuant to the basic regulation of ENASARCO (in force since January 1, 2013) only Italian principals, or foreign principals having a seat or establishment in Italy had the obligation to enrol their agents on the social security fund of ENASARCO (Fondo di previdenza ENASARCO).

[5] But they may also apply to parties not belonging to the relevant associations, if they have been *de facto* applied by the parties.

2. CONCEPT OF COMMERCIAL AGENT.

2.1 Distinctive criteria with respect to other intermediaries.

Does the law of your country on agency contracts also apply to occasional intermediaries?

Which are the most important criteria (provided by the law of your country, or by jurisprudence) distinguishing commercial agents from occasional intermediaries?

Italian courts have developed a notion of occasional intermediary (the so called «procacciatore d'affari») who is not an agent and does not benefit from the rules of law protecting commercial agents.

The main difference between a procacciatore d'affari and a commercial agent is that the first has no obligation to carry out a promotional activity: he occasionally promotes business, but he is not obliged to do so. The agent, on the contrary, has a continuous obligation to promote business.

In fact, the distinction is not always easy. If an intermediary negotiates contracts with some continuity he may be considered as an agent by the courts, even if the contract says that he has no obligation to be active for the principal (Italian Courts of course evaluate the specific circumstances of each case). Consequently, contracts of this type should be carefully drafted, after having thoroughly examined the actual relationship between the parties.

2.2 Self-employed agents.

According to the law of your country, in what cases may a commercial agent be considered as an employee, subject to labour law?

Which are the most important criteria distinguishing the self-employed agent from the employee (e.g. fixed timetables, request for detailed information about clients..)?

An agent will be qualified as employee only in rather extreme cases where he has almost no freedom to organise his activity. Situations which may contribute to qualify an agent as an employee are the following: the agent's obligation to follow a daily itinerary of customers to be visited, imposed by the principal; daily reports on his activity; absence of own office; car and other means paid by the principal; fixed remuneration. In principle none of these elements alone is sufficient for the existence of a labour relationship (as confirmed by the European Court of Justice in its decision of November 21, 2018 - case C-452/17, Zako v. Sanidel - pursuant to which, the performance of the agent's activities from the principal's business premises does not prevent him from being classified as a 'commercial agent' within the meaning of that provision, provided that such activities are performed in an independent manner, which is for the referring court to ascertain); however, if more of them are present the agent may be qualified as employee. In such a case the rules of labour law will apply and the social security obligations will be those of the employees.

It should be noted that independent agents nevertheless benefit from certain protections that are typical of employees, without being considered as employees. So, the special procedure for labour disputes is applicable to agents who are nat-

ural persons (individuals) without an important organisation; moreover, social security contributions must be paid by principals (see above, § 1).

If the IDI standard model is used, is there risk (or certainty) that the agent will be qualified as an employee?

In principle, an agent undertaking the obligations set out in the IDI model contract will not be considered as an employee by Italian courts, unless there are further elements showing subordination (like the fact that the agent is actually bound to follow a daily itinerary, to respect strict instructions as to the way of performing his activity, etc.).

2.3 Authority to conclude contracts on behalf of the principal.

Has a commercial agent appointed under the law of your country the power to conclude contracts on behalf of his principal or is a specific agreement (or contract clause) needed to that effect?

Authority to act on the principal's behalf. Under Italian law the authority to represent the principal is an option: Article 1752 c.c. provides that the rules on agency also apply in case the principal has given the agent the authority to represent him in the conclusion of contracts. This means that, if no such authority has been given, the agent cannot conclude contracts on behalf of the principal.

Insurance agents are frequently provided with the authority to conclude contracts; such circumstance has brought Italian Courts to envisage a liability of the principal for illicit conducts committed by his agent[6].

If the agent concludes a contract on behalf of the principal without having the authority to do so, is there a risk that, under your legislation, the principal would be bound by such agreement? Does he have to expressly notify the third party within a certain delay?

The authority to conclude contracts can also be granted orally or can result from the facts (for example if the principal always performs contracts made by the agent on his behalf without being authorised to do so). However, there is no presumption that such authority exists; on the contrary, the party claiming that the agent had the authority to engage the principal must prove it and, since it is normal that no such authority is granted, the proof will be difficult[7].

In other words, in normal situations there is almost no risk that a third party may pretend that the contract was concluded by the agent on behalf of the principal, if this has not been clearly agreed between principal and agent.

In any case, it may be advisable to expressly state that the agent has no authority to conclude contracts on behalf of the principal (see Article 2.5 of the IDI balanced and agent-friendly model contracts as well as Article 2.4 of the IDI principal-friendly model).

Is the agent entitled, under the law of your country, to receive on behalf of

[6] On the basis of Article 2049 of the Italian civil code, which envisages a liability of employers/principals for torts committed by their employees/assistants during the performance of their activity. Cass. 10-2-2010, n. 3095, *Commercial Union Italia S.p.A.* v. *C.F. and B.O.;* Cass. 24-01-2007, n. 1516, *Fondiaria SAI S.p.A.* v. *S.B.,* in www.leggiditalia.it. See also Trib. Nocera Inferiore, 24-9-2013, concerning a financial promoter/agent.

[7] See Trib. Bologna, 16-3-2010, pursuant to which the collection of products made by the agent from the customer (with the promise to return the price paid), without being authorized by the principal to do so, was considered not effective by the Court, which condemned the customer to pay the relevant price.

the principal claims from purchasers in respect of defects in the products sold to them?

According to Article 1745 of the Italian civil code all claims concerning the performance of the sales contracts promoted by the agent, as well as complaints related to the non-fulfilment of such contracts can be validly made to the agent. Therefore, any complaints made to the agent by a purchaser concerning defects of the products are considered as if they had been made to the principal.

In this context Article 8.3 of the IDI balanced and principal-friendly model contracts, which requires the agent to immediately inform the principal, may be a useful clause. In addition, the contract could also provide that the agent must give this information in writing, so that there will be no space for discussion about the actual performance of such obligation.

According to your legislation what happens if the agent does not timely inform the principal of a claim by the customer (e.g. will the agent be deemed responsible for possible damages caused by the delay)?

According to the general rules on contractual responsibility the agent is in principle responsible for damages caused by his breach of contract. However, it may be difficult to prove that he did not timely give such information (unless there is an obligation to give it in writing).

2.4 Agents who also act as resellers.

Is it admissible to foresee, within a commercial agency contract, that the agent may also act as a reseller, where such activity is accessory with respect to the promotion of contracts for the principal?

Under Italian law, the exercise by the agent of an activity as buyer-reseller of the principal's products is not as such inconsistent with the agency agreement, provided that such activity remains accessory and does not prevail on the agency activity.

Case law on this matter is rather rare. In one case (6-3-87/2382) the Court of Cassation has ruled that an agency agreement (qualified and construed as an agency contract, but where the agent's prevailing activity was in fact to buy and resell the principal's products), could not be considered as an agency contract and that the activity as intermediary was to be qualified as that of a «procacciatore d'affari» (occasional intermediary) instead of agency.

Where the activity as reseller is not merely accessory, parties should evaluate the possibility of having two separate contracts or, if the resale activity is prevailing, to opt for a distribution contract with a clause permitting the distributor to occasionally promote business as an intermediary.

Where the activity as reseller is accessory, there should be no particular problems.***How is the accessory activity as reseller to be considered within the agency agreement (e.g. should also such activity be considered when calculating the goodwill indemnity).***

There seem to be no precedents in case law on this matter. It is difficult to say whether a court would consider the business made as reseller for the calculation of the indemnity. Considering the traditional view of our courts to consider the activity as reseller as something totally different from the activity as agent/intermediary, a negative answer seems more likely.

Would Article 2.6 of the IDI principal-friendly model contract, as well as Article 2.7 of the IDI balanced model contract be consistent with your law?

Articles 2.6 of the IDI principal-friendly model contract and 2.7 of the IDI balanced model contract are consistent with Italian law.

More in general, as far as accessory activities performed by the agent are concerned (e.g. supervision of other agents), the European Court of Justice recently dealt with this issue in its decision of November 21, 2018 (case C-452/17, Zako v. Sanidel) and decided that:

> "Article 1(2) of Directive 86/653 must be interpreted as meaning that the fact that a person not only performs activities consisting in the negotiation of the sale or purchase of goods for another person, or the negotiation and conclusion of those transactions on behalf of and in the name of that other person, but also performs, for the same person, activities of another kind, without those other activities being subsidiary to the first kind of activities, does not preclude that person from being classified as a 'commercial agent' within the meaning of that provision, provided that that fact does not prevent the former activities from being performed in an independent manner, which it is for the referring court to ascertain".

Therefore, under such conditions (i.e. if the independency of the agent is preserved) he/she will be considered a commercial agent even if performing different activities for the principal and irrespective of the fact that such additional activities are subsidiary to the typical agent's activities, or not. However, the ECJ does not give indications on how such further activities would be considered e.g. for the purpose of calculating the goodwill indemnity, aspect that will remain to national Courts to evaluate. In this respect, a recent decision of the Italian Supreme Court has excluded the right to goodwill indemnity to an agent on its activity as supervisor of other agents (see Cass. Sez. Lav. 15/10/2018, n. 25740).

2.5 Sub-agents

Is the commercial agent free to appoint sub-agents at his discretion, or does he have an obligation to inform (or request the consent of) the principal?

There are in principle no limitations to the agent's freedom to appoint subagents. The agent is free to organise his business as he prefers, provided he does not breach the obligation to protect the principal's interests.

Are contractual clauses which limit the agent's freedom to engage sub-agents (such us clauses requiring the agent not to appoint sub-agents and to perform his activity personally, or clauses requiring previous approval by the principal: e.g. Article 7.1 of the balanced and principal-friendly models) valid?

Clauses of this type are admissible. There is no case law on this issue.

Would a sub-agent have any rights in respect of the principal of the agent? If the answer is yes, would clauses like Article 7.2 of the balanced and principal-friendly models effectively exclude any responsibility of the principal towards the sub-agents (agents of his agent)?

Unless the principal enters into a direct relationship with the subagent, the subagent has no contractual relation, and thus no contractual rights towards the prin-

cipal. Clause 7.2 is effective (provided, of course, the principal avoids direct dealings with the subagents).

2.6 Requirements concerning the performance of the agent's activity.

Is there any condition required by the laws of your country for being allowed to perform the agency activity (e.g. citizenship, registration etc.)?

Italian citizenship used to be a requirement for performing the agency activity, but has now been abolished.

Article 5 of Law 204/1985 requires the agent:

- not to have been disqualified or incapacitated, sentenced for crimes against the public administration, the administration of justice, public faith, public economy, industry and commerce, or for the crime of murder, theft, robbery, extortion, fraud, embezzlement, receiving stolen property and for any other intentional crime for which the law prescribes a penalty of imprisonment of not less than the minimum, to two years and a maximum duration of five years unless they have been rehabilitated.

The other conditions previously required by Article 5 of Law 204/1985 have been abolished by D.lgs. 59/2010.

3. FORMALITIES REGARDING THE CONTRACT AND ITS MODIFICATIONS.

3.1 Formalities required by law.

Is any formality (written form, notarisation, registration, etc.) required for the validity of an agency contract in your country?

If so, what are the consequences of the non observance of the above formalities?

Written form. The Italian civil code (Article 1742 § 2, as modified in 1991 and 1999[8]) provides that the agency contract must be proved in writing: the written form is not required for the validity of the contract, but it is necessary in order to prove its existence as well as its contents and subsequent modifications[9].

According to some case-law such evidence can be provided through any possible document, as well as through other types of evidence, such as the confession or the oath; however, some recent decisions of the Supreme Court excluded the validity of documents not directly related to the conclusion of the contract (e.g. list of customers, commission report etc.) as a sufficient evidence of the conclusion of the contract (Cass. 13822/2015; Cass. 1657/2017). Once the written evidence is provided, witness is allowed, in order to ascertain if the contents of the contract correspond to the real willing of the parties and/or to interpret it[10].

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[8] The Italian Supreme Court has therefore confirmed in a recent judgment (Cass. No. 6021 of 28/2/2019) that a contract concluded before the year 1991 is not subject to the condition of the written form and can therefore be proved through witnesses).

[9] As an exception to this general principle, evidence through witnesses is permitted only if there is a *prima facie* evidence in writing; or if it is impossible for the contractual party to provide the written evidence or, finally, if it has lost the document which contained the written evidence, without being responsible for that.

[10] See Cass. 28-01-2013, n. 1824, *Mc Gregor Fashion Ag* v. *Di Terlizzi;* see also Trib. Nocera Inferiore, 27 January 2012, *L.A.* v. *Yoga s.r.l.;* Trib. Monza 03-01-2013*, Sk. s.a.s. di Ma.Pi. & C*. v. *Pe.Ca. S.p.A.,* referred to a case of provisions allegedly agreed upon orally between the parties, in contra-

Consequently, great attention should be taken, particularly with respect to subsequent modifications which must be made in writing.

The requirement of the written form *ad probationem* is difficult to reconcile with the rule contained in the same Article 1742 § 2 (that implemented Article 13, § 2 of the EC Directive), which grants each party the right to obtain from the other party, upon request, a signed written document setting out the terms of the agency contract including any terms subsequently agreed. In fact, it appears strange that the party trying to enforce in court its right to obtain a written contract should be prevented from proving through witnesses what the actual contents of the agency contract are.

If written form is required by the law of your country, does it also apply to subsequent modifications agreed by the parties? For instance, what happens if the parties, during the life of the contract, orally agree to increase (or to decrease) the amount of the commission?

In principle, the party wishing to take advantage of the modification will be unable to prove such modification before a court. So, the agent cannot prove through witnesses that he agreed on an increase of commission for a certain business, nor can the principal prove that he agreed upon a reduced commission. Italian case-law has not taken a univocal approach in this respect.

Specific acceptance of onerous conditions contained in non-negotiated contracts. Article 1341, second paragraph, of the Italian civil code states that when the contract has been prepared by one party and its contents have not been actually negotiated, possible "onerous clauses" («clausole vessatorie») are invalid, unless specifically approved in writing. According to Italian case law specific approval may be given through a second signature under a list indicating the "onerous" clauses contained in the contract.

It should be reminded that these principles apply only to standard contracts drafted by one of the parties which are not negotiated[11]; in addition, some of the typical provisions contained in agency contracts (e.g. the exclusivity clause, the "clausola risolutiva espressa") have been declared by Italian Courts as not "onerous" for the purpose of the application of Article 1341, second paragraph, cod. civ. (see, for instance, Cass. 2-5-2006, n. 10092; Cass. 11-11-2016, n. 23065).

3.2 Contractual requirement of written form for modifications.

If the contract requires the use of writing for possible future amendments, what are the consequences of non compliance?

If the agency contract requires the written form for subsequent modifications, oral modifications of the contract will be in principle considered as not valid. There are exceptions to this principle, in the sense that courts have recognized the existence of a tacit acceptance when the behaviour of the other party clearly implies acceptance of the proposed modification (see for instance Cass. 14-01-04, n. 406), but they should not apply after the written form requirement has been introduced in 1999 (see above, § 3.1).

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diction with the contents of the contract.

[11] See, for instance, Trib. Firenze, 6 December 2012, n. 4144, that confirmed the non applicability of this rule to an agency contract. See also App. Bologna 14-05-2010, which stated that the exclusivity clause as well as the right to immediately terminate the contract in case of serious breach ("clausola risolutiva espressa") are not onerous clauses for the purpose of applying Article 1341 of the Italian civil code.

Would Article 23.3, second sentence, of the IDI model contracts (which has been taken from the Vienna convention on international sale) be effective under your law?

As to the principle contained in Article 23.3, second sentence, of the IDI model contracts, according to which a party may be precluded by its conduct to take advantage of the clause which requires the written form if the other party has relied on such conduct, such clause should be valid considering that the parties should be free to derogate the principle of the written form by less stringent rules.

3.3 Clauses authorizing unilateral contract modifications

Are clauses which give one party the right to unilaterally modify some essential elements of the agency contract, such as Article 5.4 of the principal-friendly IDI model, valid and effective under the law of your country?

The validity of this type of clauses is doubtful. According to recent case law, clauses which give one party the right to modify essential elements of the contract are ineffective or can be considered valid only provided that the right to modify is exercised within certain limits and according to good faith[12]. It is therefore recommended that clauses which give one party the right to unilaterally modify certain contractual issues (such as territory, customer range, commission, minimum turnover) make reference to objective criteria.

In addition to this it should be said that **collective agreements** recognise, within certain limits and under certain conditions, the principal's right to unilaterally reduce[13] some basic aspects of the contract (territory, customers, products, commission). If such modifications affect no more than 5% of the commission due to the agent during the previous year (e.g. cancellation of a part of the territory where the agent made less than 5% of his commission) the agent must accept the modification; if it affects more than 15% (pursuant to the collective agreement of the industrial sector of July 30, 2014) or 20% (pursuant to the collective agreement of the commercial sector), a specific term of notice shall be respected and the agent has the right to consider the modification proposal as a termination notice (which means that if he does not accept, the contract is deemed terminated by the principal); between 5% and 15%-20% it is discussed whether the agent's refusal amounts to termination by the agent and in any case a specific term of notice must be respected.

3.4 Form requirements and applicable law

How is the law governing the form of the agency contract to be determined under the law of your country?

Under the Rome convention of 1980 (still applicable between Italy and Denmark) form requirements are evaluated with respect to the most flexible law of those implied. In particular, Article 9 of the Convention says:

> **1.** A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

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12 See, for instance, Trib. Bari, 03-02-2016; Trib. Bologna 11-04-2012.

13 The Supreme Court stated that such rule does not apply to an extension of the territory, which remains subject to the application of the general principle according to which an agreement between the parties is required (Cass. 5-6-2009, n. 13076).

> **2.** A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

So, if the contract is made *inter absentes*, the *lex causae* and the law of the countries where the parties are domiciled will be considered; if the contract is made *inter presentes*, the law of the place of conclusion and the *lex causae* will be considered. This means that in most cases (except when the contract is concluded in Italy and submitted to Italian law) more flexible rules as to form contained in other laws will prevail over Articles 1742 and 1341 c.c.

Regulation Rome I (applicable to contracts concluded after December 17, 2009 between Italy and the other countries of the EU except Denmark, as well as between Italy and countries outside the EU) regulates the first circumstance (i.e. parties concluding the contract in the same country) as the previous Article 9.1 of the Rome Convention.

Making reference to the second circumstance, Article 11.2 contains a similar provision to Article 9 of the Rome Convention mentioned above:

> "A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time."

3.5 Information about the parties

Is it required by law (or simply customary in your country) to include in the contract additional specifications (such as registration number, social security number)?

Italian law does not require to include in the contract additional specifications regarding the parties. However, it is customary in domestic contracts to specify the social security number of the agent.

4. AGENT'S OBLIGATION NOT TO COMPETE.

4.1 Non competition during the term of the contract.

If there is no contractual provision prohibiting the agent to sell competitive goods, does it mean that the agent is free to act for competitors of the principal?

According to Article 1743 c.c. the agent cannot act, in the same area and for the same type of business, for competitors of the principal. This implies that even in the absence of a contractual provision prohibiting the agent to sell competitive products, the law prevents him from doing so.

However, the above rule is not mandatory. The parties are free to derogate from such provision permitting the agent to act for competitors.

Is it possible to contractually extend the agent's non competition obligation to the promotion of non competing goods of competing manufacturers?

Is it possible to contractually extend the agent's non competition obligation to the promotion of competing goods outside the contractual territory (i.e.

an obligation not to represent competitors of the principal outside the territory)?

It is possible to extend the non-competition obligation beyond its normal boundaries (e.g. by covering non competing goods of competing manufacturers or a competitive activity carried out outside the territory).

Consequently, Article 6.3 of the IDI balanced as well as of the principal-friendly model contracts is consistent with Italian law.

4.2 Agent engaged for one principal only.

Is it possible to agree with the agent that he will distribute only the products of the principal (and consequently concentrate his activity exclusively on the distribution of the principal's products)?

Italian law admits the possibility of appointing an «agente monomandatario» i.e. an agent who undertakes to work exclusively for one manufacturer.

If this is the case, will special rules or principles protecting the agent be applicable?

The only legal rule concerning the «agente monomandatario» is Article 1751-bis, paragraph 3, c.c. where it is said that one of the elements to take into account for calculating the agent's indemnity for his post-contractual non-competition obligation is the existence of the agent's obligation to work exclusively for one principal.

The collective agreements have several rules which grant such agents a more favourable treatment in comparison with the agents who are free to work for several (non competing) manufacturers.

4.3 Post-contractual non-competition obligation.

Is it possible to agree with the agent an undertaking not to compete in the period after contract termination? If so, is this obligation subject to specific conditions (i.e. time limit, special compensation for the agent etc.)?

It is possible to agree with the agent a post-contractual non-competition obligation. However, in compliance with the EC Directive, the relevant clause shall be valid only to the extent that it is concluded in writing and it relates to the same geographical area, customers and goods of the agency contract.

The duration of the obligation cannot exceed a period of two years after termination of the contract and, for agents who perform their activity individually, or as partnership or as corporation with a sole partner, or – whenever provided by collective agreements – as corporation between commercial agents, it must be remunerated by paying a specific remuneration. If the amount of the remuneration or the method for its calculation has not been agreed between the parties, the amount will be determined by the courts taking into account: (1) the average of the commissions received during the contract, (2) the reasons of termination of the contract, (3) the extension of the geographical area assigned to the agent, (4) the circumstance of being an agent «monomandatario».

Since the courts have a wide discretionary power for determining the amount, it is highly recommended to expressly state in the contract the criteria for calculating the remuneration.

The collective agreements indicate specific calculation criteria, based on the av-

erage of the goodwill indemnity and related to the duration of the contract. So, for example the collective agreement for industrial undertakings (AEC Industria) provides the following criteria:

Total amount of the remuneration		
Duration of the contract	Agent acting only for one principal	Agent acting for more than one principal
over 10 years	12 months commission	10 months commission
between 5 and 10	10 months commission	8 months commission
Up to 5 years	8 months commission	6 months commission

A clause fixing the remuneration for the post-contractual non-competition obligation should also make clear that the principal may at any moment waive his right to request the agent to observe the clause and that in this case no remuneration shall be due[14].

The provision concerning the remuneration was introduced in the civil code in the year 2000 and entered into force on June 1, 2001. Pursuant to Italian case law such provision does not apply to contracts entered into before 1/6/2001. This interpretation was confirmed by the Supreme Court in two recent decisions[15], in which the Court of Cassation also stated that the parties remain free to contractually derogate to such principle, since the relevant provision is not mandatory.

Should the contract also provide for a liquidated damages clause to be applied in case the agent breaches his post-contractual non-competition obligation, principals shall be aware of the fact that Italian courts are entitled to reduce the amount provided in the contract, in case they deem it excessive or in case of partial or not important breach by the agent (see Trib. Verona, 29-1-2007; Cass. 13-9-2005, n. 18128, Trib. Milano n. 5943 of 19/6/2019).

Is Article 6.4 of the IDI principal-friendly model contract valid under your law?

Article 6.4 of the IDI principal-friendly model contract is not in compliance with Italian law.

A possible example of clause, which should replace Article 6.4 of the IDI principal-friendly model contract, can be the following:

> The non competition obligation set forth in Article 6.1 shall last for a further period of two years after termination of this contract, having regard to the same geographical area, customers and products covered by this agency contract.
>
> The Principal will pay the agent, for the observance of the above obligation, a remuneration equal to .... months of commission, calculated on the average of the last year of duration of the contract. The remuneration will not be due if the Principal decides not to exercise his right and will be proportionally reduced if the Principal decides to reduce the duration of the post-contractual non-competition obligation.

[14] See Trib. Milano 2-10-2013: in the absence of such a contractual clause, the agent did not accept the principal's waive and confirmed its intention to respect the post contractual non compete obligation; the Court accepted the agent's claim and condemned the principal to pay the relevant remuneration to the agent.

[15] Cass. 11-06-2015, No. 12127 and Cass. 31-05-2017, No. 13796, also followed by other decisions of lower Courts (e.g. App. Brescia 19/7/2019).

In case of breach of the above obligation by the Agent, the latter will pay to the Principal a penalty of one month of commission, calculated on the average of the last three years of duration of the contract for each business proposed or concluded in breach of the above obligation.

Are post contractual undertakings not to compete frequently used in your country?

They used to be rather exceptional, also because principals tended to be sceptical about the actual possibility to enforce them. However, more recently such clauses have become less exceptional.

5. EXCLUSIVITY.

5.1 Rights of the agent in the absence of contractual rules.

If there is no written contract or if the contract does not state anything about the agent's exclusivity, does it mean that the principal is free to appoint other agents or distributors and to sell the products without having recourse to the agent (and without paying him a commission)?

According to Article 1743 c.c., the principal may not appoint more than one agent in the same geographical area for the same branch of activity. This means that, unless otherwise agreed by the parties, the agent is to be considered as exclusive, i.e. the principal must refrain from appointing other agents or distributors in the same territory. He may (as we will see hereafter: § 5.2) make direct sales to customers of the agent's territory, but must pay the commission on such sales.

The above rule is not mandatory and can be derogated by the parties.

If nothing has been stated (expressly or impliedly) to the contrary, the principal cannot appoint other agents or intermediaries for the agent's territory.

5.2 What is covered by exclusivity.

When the agent is exclusive, does it mean that the principal must not sell to customers in the territory? Does it also imply that the principal may not sell to customers outside the territory who may resell into the agent's territory? Is the principal still free to sell in the agent's territory if he pays the normal commission?

Article 1743 c.c. expressly states that the principal cannot appoint other intermediaries than the agent in the same geographical area for the same branch of activity, but does not say anything about possible direct sales by the principal himself. At the same time Article 1748, second paragraph, c.c. states that, «in the absence of contractual rules on the contrary, the agent has right to commission on sales that the principal concludes with customers previously acquired by the agent for business of the same range or with customers pertaining to the territory or group of clients reserved to the agent».

It would therefore seem that the principal is free to make direct sales in the agent's territory, provided he pays him the commission on such sales.

There is however some discussion about the extent of the principal's right to make direct sales: some courts have considered that non occasional direct sales in the agent's territory would be contrary to law, other courts have stated that the

principal is free to make as many direct sales as he likes, provided he pays the relevant commission to the agent.

In any case, since the parties are free to determine contractually the extent of the agent's exclusivity (and even to exclude any such right) it is recommended to regulate these matters through express contractual clauses.

As regards sales to customers outside the territory who resell in the territory, the major problem which may arise is to establish if the agent is entitled to commission on such sales. The old text of Article 1748/2 (in force until 1999) stated that commission was due on direct sales «to be performed» in the agent's territory, which provision left some space for including sales to third parties of which the principal knew that they would sell into the agent's territory. Under the new text of Article 1748/2 (revised in 1999) which makes reference to business concluded by the principal with third parties «belonging to the territory or group of customers reserved to the agent», it should be clear that no commission is due on indirect sales, i.e. on sales to third parties who resell in the territory.

Is Article 11.2 of the IDI balanced and principal-friendly model contract valid under your law?

Clauses 11.2 of the IDI balanced and principal-friendly model contracts are to be considered in compliance with Italian law.

Are there any rules (or case law principles) concerning principal's direct sales to clients in the territory, through the principal's internet web-site? Would Article 11.3 of the IDI agent-friendly model contract, as well as Article 11.4 of the IDI balanced and principal-friendly models, be valid under your law?

Under Italian law there are no provisions concerning principal's direct sales to clients of the territory, made through the principal's internet web-site. Article 11.3 of the IDI agent-friendly model contract, as well as Articles 11.4 of the IDI balanced and principal-friendly models should therefore be consistent with Italian law.

5.3 Sole agent/Exclusive agent.

Does your law (or case law) distinguish between a "sole" agent and an "exclusive" agent? If so, what are the differences?

Under Italian law there is no distinction between sole and exclusive agent, i.e. the notion of «sole» agent is unknown.

5.4 Contractual limitations to the agent's exclusivity.

Is it possible to exclude specific products or clients from the exclusivity?

All provisions concerning exclusivity are non-mandatory rules. Therefore, the parties are free to limit the exclusivity, by excluding specific products or customers from it.

Is it Article 11.3 of the IDI balanced and principal-friendly model contracts in compliance with your legislation?

All solutions chosen in Articles 11.3 of the IDI balanced and principal-friendly model contracts are consistent with Italian law.

6. SALES OUTSIDE THE TERRITORY.

Does the legislation of your country allow the principal to forbid to the agent to promote sales outside the territory?

Under Italian law, the principal can prohibit the agent to promote sales outside his contractual territory. And, even if he does not do so, the agent would in principle not be entitled to commission on sales to customers not falling within the scope of the contract.

It should however be considered that under EC antitrust law such prohibition would not be valid in the exceptional cases where an agent is not considered to be a "real" agent, under the definition provided by the European Commission in its Guidelines on Vertical Restraints[16] (see report on EU antitrust law).

If the agent promotes business with customers outside the territory, will he be entitled to commission under the agency contract?

In principle the agent is not entitled to commission if he promotes sales to customers outside the territory, to the extent such business is to be considered as being outside the scope of the agency contract. However, some doubt may arise considering the very general wording of Article 1748, first paragraph, c.c., which states that «For all business concluded during the contract, the agent has right to commission when the deal has been made as consequence of his intervention». Consequently, a provision expressly stating that commission is due only on sales to customers of the territory (like Article 12.1 of the model contract) is in any case to be recommended.

Of course, this does not exclude that where the principal accepts orders regarding sales outside the territory, this may be construed as a tacit derogation from Article 12.1 (but the conclusion may be different if the agent has simply transmitted information about a possible deal and thereafter requests commission).

Is Article 12.2 of the IDI model contracts in compliance with your legislation? What if the parties do not regulate this situation under the contract?

Parties are in principle free to choose whatever contractual solution for apportioning commission between different agents. So, for instance, the solution proposed in Article 12.2 with regard to the case where the agent, when dealing with customers of his own territory, promotes business which actually gives rise to sales outside the territory, is certainly valid under Italian law.

If the parties do not regulate the matter, the solution will depend upon the wording of the clause regarding the right to commission. If such clause says that commission is due only on business with customers established in the contractual territory, no commission will in principle be due (but, if the principal accepts the business, the agent could argue that the clause has been derogated by mutual agreement). Otherwise, it is likely that the agent is entitled to commission, particularly if the principal accepts the business.

What if the party do not regulate the situation in the contract?

Are there specific provisions (or case law) concerning the performance of the agent's activity through an Internet web-site?

At present there are no legislative provisions nor case-law regarding the performance of the agent's activity through an Internet web-site. Article 4.4 of the IDI model contracts is consistent with Italian law. Should the sale be made through

[16] Commission's guidelines on vertical restrictions of 2010.

the web-site to customers established outside the contractual territory, the above mentioned principles concerning sales outside the territory shall apply.

7. ACCEPTANCE AND NON-EXECUTION OF BUSINESS BY THE PRINCIPAL

7.1 Acceptance of orders.

Is the principal free to decide if he wishes to accept or refuse business transmitted to him by the agent?

According to Italian law, the principal is free to accept or refuse orders transmitted to him by the agent. However, there is case-law affirming that a prejudicial and systematic refusal to accept orders by the principal must be considered contrary to good faith and gives right to compensation for damages and may justify an earlier termination of the contract by the agent.

If the principal does not inform the agent within a reasonable period about his decision as to whether he accepts or refuses an order transmitted by the agent, can the business be considered as accepted (at least for the purpose of the agent's right to commission)?

The Italian civil code specifically establishes that the principal must inform the agent, within a reasonable period of time, about his decision to accept or to refuse an order transmitted by the agent. This provision is mandatory and cannot be derogated by the parties. Consequently, by not informing the agent within a reasonable time, the principal could be responsible for breach of contract and subsequent damages.

The collective agreements provide that in case the principal does not inform the agent within 30 days (pursuant to the collective agreement of the industrial sector of July 30, 2014) or 60 days (pursuant to the collective agreement of the commercial sector of 2009/2017), from receipt of his refusal, the relevant order is to be considered as accepted, for the only purpose of the agent's right to commission. The parties can contractually derogate to these rules in their contract. In any case, it is very unlikely that collective agreements apply to international contracts: see above § 1.

Would Article 2.2 of the IDI model contracts be effective under your law?

Article 2.2 states the principle that the principal is free to accept or refuse the orders transmitted by the agent. This rule conforms to Italian law, in the sense that the principal has the discretion to decide if he wants to accept each individual order, without needing to give reasons for his refusal. On the contrary, a repeated and unjustified refusal by the principal of the proposals transmitted by the agent could be considered against good faith. This aspect is dealt with in Article 2.4 of the balanced and agent-friendly model contract.

7.2 Non-execution of orders accepted by the principal.

If the principal does not perform a contract concluded on the basis of an order transmitted by the agent, is the agent nevertheless entitled to commission?

Is the agent entitled to commission only if and insofar as the non-performance is due to reasons for which the principal is not responsible?

In principle the agent is entitled to commission in case of non execution of orders accepted by the principal, unless such non-execution is due to reasons for which the principal is not responsible.

In the latter case, what are reasons for which the principal is not responsible? E.g. accepting the return of goods for commercial reasons or when there is a risk that the customer will not pay? Non-performance by the principal in cases where he is entitled to do so by the contract with the customer?

Italian courts tend to consider as «reasons for which the principal is not responsible» not only circumstances beyond the parties' control (e.g. force majeure), but all behaviours not implying negligence or fraud on the side of the principal.

E.g. it is likely that accepting return of goods for commercial reasons or when there is risk that the customer will not pay would be deemed by the courts as a principal's behaviour not implying negligence or fraud. Less clear is the case where the principal cancels the sales contract by using an option given to him in such contract (a solution frequently used in the clothing industry, where the supplier reserves the right to cancel contracts for items for which he has not got enough orders).

The European Court of Justice recently interpreted the relevant provision of the EC Directive (Article 11), with reference to an insurance contract concluded by two Slovakian parties[17] (hereafter the "ERGO" judgement), pursuant to which the agent was entitled to an advance payment on commissions, which were then definitively acquired only if the insurance contract was not terminated before three or five years. Possible non-payment of premiums by the customer, would have resulted in the ceasing of the entitlement to commission, if it occurred during the first few months of the insurance contract, or a proportional reduction of the amount of the commission, if it occurred after the first three months of the execution of that contract. Some customers ceased to pay the premiums, saying that they had lost confidence in the company, because it had treated them inappropriately. The principal asked the agent to be partially refunded in accordance with the contractual provisions and the applicable Slovakian rules, but the agent refused, arguing that ERGO was responsible for the non-payment by the customer.

The Slovakian Court seized by the parties, referred to the ECJ three questions of interpretation of Article 11 of the EC Directive 86/653/EEC, which were answered as follows:

> "The first indent of Article 11(1) of Council Directive 86/653/EEC (..) must be interpreted as meaning that it covers not only cases of complete non-execution of the contract concluded between the principal and the third party, but also cases of partial non-execution of that contract, such as non-compliance with the volume of transactions or the duration envisaged by that contract.
>
> Article 11(2) and (3) of Directive 86/653 must be interpreted as meaning that the clause of a contract for commercial agency pursuant to which the agent is required to refund, on a pro-rata basis, a part of his commission in the event of partial non-execution of the contract concluded between the principal and the third party does not constitute a 'derogation to the detriment of the commercial agent', for the purposes of that Article 11(3), if the part of the commission subject to the refund obligation is proportionate to the extent to which that contract has not been executed and on condition that that non-execution is not due to a reason for which the principal is to blame.
>
> (..) the concept of 'a reason for which the principal is to blame' does not relate only to the legal reasons which led directly to the termination of the contract concluded between the principal and

[17] Judgement of the Court of Justice of May 17, 2017, Case C-48/16, *ERGO Poist'ovňa a.s.* v. *Alžbeta Barlíková.*

the third party, but covers all the legal and factual circumstances for which the principal is to blame, which are the cause of the non-execution of that contract.

It is of course for national Courts to evaluate such "factual circumstances", in each specific case.

Would Article 14.2 of the IDI principal-friendly model contract be effective under your law?

As regards Article 14.2 of the principal-friendly IDI model contract, the full effectiveness of such clause will depend upon the attitude of the courts. Principals using this clause should be aware that the exclusion of the agent's commission also in cases where the decision not to carry out the sales contract is a choice of the principal, although not constituting a breach towards the customer, is doubtful.

8. RIGHT TO COMMISSION.

8.1 Amount of commission

Are there any rules in your domestic law limiting the parties' freedom to agree upon the rate of commission?

Under Italian law the parties are free to agree upon the rate of commission.

If the parties do not agree on the rate of commission will the contract be void, or will the rate be fixed by the courts?

In the rather unlikely case that the parties would forget to agree upon the commission, the contract could be considered as void, because of the absence of an essential element. However, it is not excluded that the contract could be considered as valid and the commission rate be fixed by the courts.

8.2 Business on which commission is due.

Assuming that the agent has in any case a right to commission on sales promoted by him within the scope of the agency contract, does the agent have a right to commission on successive sales to customers previously acquired by him for the principal?

Under Article 1748, second paragraph, c.c. the agent is entitled to commission on successive business concluded directly by the principal with a third party previously acquired as a customer by the agent. This provision mainly regards non-exclusive agents and aims at protecting them from the risk that the principal, once he gets in contact with the customer, decides to directly sell to him without paying the commission to the agent. However, since in Italy almost all agents are exclusive and get the commission on all business with customers of their territory, there is almost no need for such provision (which has been added in 1999 in order to implement the EC directive).

It would be interesting to know if this provision is mandatory, but there is at present no case law on the subject.

Does the agent have a right to commission on direct sales made by the principal in the territory?

If the agent is non-exclusive (which is a rather uncommon situation, which requires a derogation from the legal rule) he will have no right to commission on

sales not promoted by himself (unless made to customers previously acquired by the agent).

Where the agent is exclusive (which is the normal case), commission is due on any business with customers of the territory (or group of customers) assigned to the agent (i.e. even if the sale is made without his intervention - Article 1748, second paragraph, c.c.).

If the answer is yes, are the above rules mandatory, or do they apply only if the parties have not agreed otherwise?

The provisions of law which say in which cases commission is due and in which cases not are generally considered not to have mandatory character, which means that parties can contractually arrange things as they prefer, e.g. by excluding any commission on direct sales, by reserving certain customers to the principal, by providing reduced commissions in certain cases, etc.

8.3 Partial payment by the customer.

If the customer does not pay the full amount and the partial payment is not conforming to the contract between the principal and the customer, is the agent entitled to

- ***no commission at all, or***
- ***partial commission in proportion to the payment received?***

If the customer does not pay the full amount and the partial payment is conforming to the contract between the principal and the customer (e.g. because payment by instalments has been foreseen), the agent is entitled to a part of the commission in proportion with the payment received.

If partial payment is not justified (e.g. the customer pays only 90%, and retains 10% without being entitled to do so), it would seem that the principal can refuse payment of the entire commission (but this would of course not apply if the right to commission already arises when the principal performs - see § 8.5 - i.e. before he can know if and to what extent the customer will pay).

The collective agreements make an exception to that principle by stating that in case the unpaid part of the price is less than 15%, the agent is in any case entitled to commission on the part of the price which has been paid.

Also the ECJ, in the ERGO judgement mentioned in the previous paragraph 7.2[18], follows such approach (although not explicitly referring to the case of non justified partial payment), when it states that "the part of the commission subject to the refund obligation shall be proportionate to the extent to which that contract has not been executed."

Would Article 12.5 of the balanced and principal-friendly IDI models be in compliance with your legislation?

Yes, it is in compliance with Italian law.

8.4 Business concluded or carried out after contract termination.

Does the agent have right to commission on business:

[18] Judgement of the Court of Justice of May 17, 2017, Case C-48/16, *ERGO Poist'ovňa a.s.* v. *Alžbeta Barlíková.*

- ***transmitted by the agent or received by the principal before contract termination, but concluded and/or carried out after contract termination, or***
- ***concluded before contract termination, but carried out after such date or***
- ***concluded and carried out after contract termination?***

If so, on what conditions?

Article 1748/3 makes a distinction between two different situations arising after contract termination:

- orders transmitted by the agent or received by the principal before contract termination, but concluded and/or carried out after contract termination;
- orders transmitted or received after contract termination.

In the first case the agent is always entitled to commission; in the second case, only if the contract conclusion is mainly attributable to the agent's efforts and provided the sales contract is entered into within a reasonable period after termination of the agency contract.

The collective agreement of July 30, 2014 (AEC Industria) states, with respect to the second situation, that the commission shall be due only if the contract is concluded not later than six months after termination and provided the agent has informed the principal in detail about such pending business at the time of termination of the agency contract.

Would Articles 20.1 and 20.2 of the IDI principal-friendly model contract be fully effective under your law?

Although such provisions may be considered slightly less favourable to the agent than the legal rule, because they fix a precise term within which the contract with the third party must be concluded, it is likely that Articles 20.1 and 20.2 of the IDI principal-friendly model may nevertheless be considered valid: in fact, it is not sure whether the legal rule is mandatory and, moreover, the contractual provision is in line with the collective agreements entered into between the representatives of the principals and the agents.

8.5 Moment when the right to commission arises.

According to the law of your country, does the right to commission arise:

- ***when the contract between the principal and the customer is concluded,***
- ***when the principal performs the transaction with the customer,***
- ***when the customer performs the contract, or***
- ***other?***

If the law fixes the moment when the right to commission arises, can this rule be derogated contractually and to what extent?

In the absence of contractual rules on the contrary, the agent's right to commission arises when the principal fulfils his performance or when he would have to perform pursuant to the sale contract signed with the customer (Article 1748, fourth paragraph, c.c.). Thus, unless the parties make a derogation to this rule

(as they normally do), the right to commission arises when the principal performs the sales contract, normally by delivering the goods.

The parties are free to contractually postpone this term, but not later than the moment in which the buyer fulfils or would have to perform his obligation. It is common practice to make use of this option and to provide in the contract that the right to commission only arises when the customer pays the goods.

9. METHOD OF CALCULATING COMMISSION AND PAYMENT.

Are the clauses contained in Article 13 of the IDI model consistent with your domestic law?

Are cash discounts deductible under your legislation?

Pursuant to Italian law the parties are free to choose any method of calculation of the commission. Only «cash discounts» recognised to the customer for earlier payment («sconti di valuta»), cannot be deducted from the amount on which the commission is calculated.

It is common practice to deduct from the basic amount on which commission is calculated possible returned goods («resi», «annullamenti»). It is doubtful whether this practice is admissible, at least when it amounts to a non-execution of a contract entered into between the principal and the customer (see above, § 7.2). Case law on this subject is confused (also because courts not always distinguish between non acceptance of orders and non execution of accepted orders).

Since cash discounts are not deductible under Italian law, Article 13 of the IDI model contract should be amended, by excluding the deduction of cash discounts, as follows:

> **13.1 (Amount on which commission is to be calculated).** Commission shall be calculated on the net amount of the invoices, i.e. on the effective sales price (any discount **other than cash discounts** being deducted) clear of any additional charges (such as packing, transportation, insurance) and clear of all tariffs or taxes (including value added tax) of any kind, provided that such additional charges, tariffs and taxes are separately stated in the invoice.

10. OBLIGATIONS REGARDING THE SUPPLY OF INFORMATION TO THE OTHER PARTY

Article 8 of the IDI agent-friendly model provides a general obligation of the agent's part to inform the principal about his activity and market conditions, at the latter's request of the latter. Pursuant the law of your country, has the agent more burdensome and/or more specific obligations to inform the principal? In case the answer is yes, are such provisions mandatory?

According to Article 1746/1 of the civil code, the agent must inform the principal about the market conditions in his territory and give him any information which is useful for evaluating the suitability of each individual business. This provision cannot be derogated contractually.

It can consequently be said that the agent's obligations are actually wider than those foreseen in Article 8.1 of the IDI agent-friendly model. However, since the information about the solvency of customers is anyhow implicitly covered by Article 9.1, it is unlikely that actual problems may arise.

On the other side, Article 16 of the IDI principal-friendly model does not contain (as do the other models) any obligation on the principal's part to inform the agent. Pursuant to the law of your country, has the principal more burdensome and/or more specific obligations to inform the agent?

If the answer is yes, are such provisions mandatory?

By virtue of Article 1749/1 of the civil code the principal must give the agent the information which is necessary for performing the contract and inform the agent if business will be substantially lower than what the agent may expect. He furthermore must inform the agent about the acceptance, refusal or non-execution of orders. These provisions are mandatory.

The rule according to which the principal must inform the agent if business will be substantially lower than what the agent may expect (Article 1749(1) c.c.) has been introduced in 1991 in order to implement the EC directive. In one of the first judgments regarding such rule the Supreme Court (Cass. 23-04-02, n. 5920) has affirmed that the principal need not to give the information in question if the agent already knows about the situation which provokes the reduction of business (in the specific case price increases about which the agent already complained).

11. DEL CREDERE CLAUSE.

Does the law or jurisprudence of your country allow del credere clauses?

If so, is this obligation subject to specific conditions (e.g. only for specific contracts or customers or only up to a certain amount or with special compensation for the agent)?

Before 1999 del credere was exclusively governed by collective agreements, which stated the principle that del credere could be contractually agreed on all business promoted by the agent but only up to a maximum amount of 15% (20% in the older collective agreements, which were applicable also to parties not members of the contracting trade associations) of the loss suffered and no more than three times the commission.

Particularly in regions where it is difficult to recover payments, del credere proved to be a very effective means for stimulating the agent's sense of responsibility when choosing customers.

In 1999 the civil code has been amended, by making the del credere obligation practically useless. Article 1746, third paragraph, c.c. now prohibits any agreement which puts at the charge of the agent any liability, total or partial, for non performance by the third party. Only exceptionally, parties may agree on del credere provided:

- the del credere obligation is agreed on a case by case basis (not for all future businesses, as it was before); and
- the amount warranted by the agent does not exceed the commission granted to the agent for that business; and
- the agent obtains a special remuneration.

This means that del credere clauses which conform to the new rule are practically useless: it makes no sense for the principal to agree case by case - i.e. when the customer's financial position is doubtful - a del credere obligation equal to the agent's commission, which would only cover a small part of the loss.

In any case, del credere clauses are still admissible, if they are included in contracts stipulated before 1999, within the limits prescribed by the applicable collective agree-

ments. The Supreme Court in a recent decision[19] has even allowed a del credere clause exceeding the limit provided by the collective agreement, looking at the specific circumstances of the case (the clause was agreed upon on the initiative of the agent, and for a specific customer, to whom the principal did not want to sell).

Is this type of clause frequently used in your country?

Del credere obligation was frequently used by undertakings before 1999. Now it has been deleted from almost all contracts and is no more used. An alternative means which is sometimes used is to foresee an obligation of the agent to warrant that he will not exceed a certain level of insolvencies (or late payments) linked to certain consequences (contract termination, loss of bonuses, reduction of commission for the future) if the above level is exceeded. Such clause is frequently connected with the clause on minimum turnover.

An example of alternative clause of this type is the following:

> The Agent undertakes (by using the utmost diligence in selecting the customers and in subsequently managing the relationship with them) to cause that the customers' insolvencies and delayed payments do not exceed the solvency and punctuality thresholds set out in Annex .....,
>
> It is expressly agreed that the breach of the above obligation is to be considered as a reason for contract termination pursuant to Article 1456 of the Italian civil code. Consequently, if during a certain year one of the thresholds indicated in Annex ... is exceeded, the Principal will have the right to terminate this Contract without respecting a period of notice and without indemnity. It is moreover agreed that the agent will loose the right to bonuses or similar benefits if the above thresholds have been exceeded in the relevant time period.

Would Article 9.3 as well as Annex E of the IDI balanced and principal-friendly models be fully effective under your law?

The solutions of the IDI model are clearly inconsistent with Italian law. Only del credere according to the new rules - which is however of almost no interest for the principal - can be used.

We enclose here a del credere clause which complies with Italian law:

> The parties may agree with respect to a specific deal that the agent will warrant del credere for an amount not exceeding his rate of commission on such business. In such case the remuneration for undertaking the del credere obligation will amount to 5% of the commission due on such transaction. The agent will be entitled to such remuneration at the time when the commission on such business is due.

12. PRINCIPAL'S TRADEMARKS

According to the law of your country is it sufficient that the principal simply authorises the agent to use his trademark (or other proprietary rights) in the context of his promotional activity, or is it necessary for the parties to sign a separate licence agreement for that purpose?

A clause authorising the agent to use the principal's trademarks is sufficient.

If the agent registers in your country the principal's trademark, in breach of Article 10.2 of the IDI balanced and principal-friendly model contracts, will

[19] Cass.31-10-2016, No. 21994.

this clause allow the principal to obtain the cancellation of such registration?

Under Italian law an agent cannot register the trademark of his principal, without the approval of the latter. Should the agent nevertheless register the principal's trademark in Italy, the principal shall be entitled to obtain the transfer of such right from the agent to himself (Article 6 *septies* of the Paris Convention for the Protection of Industrial Property, of March 20, 1883 – Cass. 17-3-2000/3100). This principle applies even in the absence of a contractual prohibition for the agent to register the trademark.

13. TERM AND TERMINATION OF THE CONTRACT

13.1 Contract for a fixed period with automatic renewal.

Is a clause, contained in a contract for a fixed term, providing that the contract will be automatically renewed for a further term and so on (like Article 17.2, alternative B, of the IDI models) admissible under the law of your country?

Or would a contract of this type be converted into a contract for an indefinite period?

This solution is commonly used in Italy and the courts consider admissible that a long-lasting relationship is made of a series of subsequent annual contracts (see for instance Cass. 4-2-87/1083). There should be no doubt that, after the renewal, there is a new contract for a fixed term and so on (since the conversion into a contract for an indefinite period applies in the case where the contract continues to be performed after its end, which is a different situation: see hereunder 13.2).

If the automatic renewal clause is admissible, may the successive contracts be considered all together as one contract (e.g. for calculating the goodwill indemnity)?

It is doubtful whether the subsequent contracts should be considered together for certain purposes, like the determination of the minimum termination notice (which varies according to the contract duration: see § 13.3) or the determination of the average commission on five years for the calculation of the indemnity.

Italian case-law tends to consider successive contracts separately, without cumulating their effects, particularly with reference to the term of notice[20].

It should be noted that the collective agreements consider a series of successive contracts as one contract for the purpose of calculating the termination indemnity. The Supreme Court stated that such principle, which is provided by collective agreements applicable erga omnes, shall be deemed as implicitly referred to by Article 1751 of the civil code, which regulates the agent's goodwill indemnity[21].

13.2 Contract for a fixed period which continues to be performed after its expiry.

What happens, under your law, if a contract concluded for a fixed term (and

[20] Cass. 20-10-2005 n. 20265; Cass. 14-02-2011, n. 3595.
[21] Cass. 17-03-2009, n. 6481.

not containing a clause for automatic renewal) continues to be performed after its term?

Article 1750 c.c. states, in accordance with the EC Directive, that a contract for a fixed period which continues to be performed after its expiry becomes a contract for an indefinite term.

Considering the clear wording of Article 1750, this provision should not apply to the automatic renewal of a contract for a fixed term, which will give rise to a new contract for a fixed term. To our best knowledge there is no case law expressly dealing with this problem.

Article 17.2, Alternative B, of the IDI models should therefore be considered as fully effective.

13.3 Termination notice (contract for an indefinite period)

Does the legislation of your country require a minimum period of notice for the parties to terminate an agency contract made for an indefinite term?

If so, is such a period mandatory? For both parties?

According to Article 1750/3 c.c. the minimum termination notice is one month within the first year of duration of the contract, two months during the second year, three months during the third year, four months during the fourth year, five months during the fifth year and six months during the sixth year or thereafter. Unless otherwise agreed termination is effective at the end of the calendar month.

It would seem that in order to decide which termination period is applicable, one should consider the contract duration when the notice of termination is given. However, the Court of Cassation (Cass. 11-03-2003, n. 4982) has stated that, since the contract produces its effects until the end of the termination period, also the latter should be considered in this context.

The above provisions are mandatory and cannot be modified to the detriment of the agent by agreeing upon shorter terms for the case of termination by the principal[22].

The collective agreements provide the following terms for termination by the principal: three months within the first three years of duration of the contract, four months during the fourth year, five months during the fifth year and six months during the sixth year or thereafter (longer terms are foreseen for the so-called «agente monomandatario»: see, above, § 4.2). If it is the agent who terminates the contract the term is three months (5 months for the «agente monomandatario»). Under the collective agreements the termination is effective on the day on which it falls (and not at the end of the respective month).

13.4 Form of termination and effectiveness

Is there a form (e.g. registered letter) that must be respected for the termination notice to be effective?

Termination can be communicated in any form, also orally.

[22] To this regard, the Italian Supreme Court stated that a liquidated damages clause provided for the case of breach of the notice period only by the agent (and not by the principal) was null and void (Cass. 16-11-2006, n. 24274).

Is the notice of termination considered to have been validly given when it is sent or when it is received?

The termination notice is effective when it is received by the other party.

If the addressee is a company, is there a specific person to whom the notification must be given in order to be effective?

No. It is sufficient that the notice is sent to the address of the company.

If the form imposed by law or prescribed in the contract (see for example Article 19.1 of the IDI model) has not been respected, what are the consequences?

If the contract prescribes a particular form, a termination notice not made in that form is in principle to be considered as ineffective. However, the answer may be different if the terminated party de facto accepts the termination notice given without respecting the required formalities.

13.5 Earlier termination

There is no express provision in the civil code on earlier termination of agency agreements.

The courts consider that the principles on termination for good cause («recesso per giusta causa») provided for labour relations apply by analogy to agency contracts both concluded for a definite and for an indefinite period.

However, parties may also have recourse to the general rule on termination for breach («risoluzione per inadempimento») and in particular to Article 1456 c.c. according to which the parties may provide that the contract will be terminated in case of breach of certain obligations indicated in the clause («express termination clause», «clausola risolutiva espressa»).

What reasons can normally justify earlier termination by the agent and/or by the principal?

Reasons which normally justify earlier termination are mainly material breaches of contract:

- competitive activity by the agent,
- unlawful appropriation of sums due to the principal;
- non payment of commissions by the principal,
- a systematic refusal to accept orders by the principal.

Also circumstances which do not necessarily amount to a breach of contract but in the presence of which the other party cannot be requested to continue the contract (such as for example bankruptcy) may justify earlier termination.[23.]

The parties may contractually determine situations which justify the earlier termination. In this case the seriousness of the reason (and thus the fact that it justifies the earlier termination) should be implied, although this should not apply if the reason is clearly of no importance.

From this point of view the recourse to the «express termination clause» under Article 1456 c.c. is generally more effective, due to a case law principle that the

[23] See, for instance, Cass. 1-4-2014, n. 7567, referred to a case of termination by the agent, as a consequence of the transfer of the business by the principal to one of its competitors.

courts cannot interfere with the choice of the parties to consider certain contractual breaches as sufficiently important to justify earlier contract termination. The applicability of such Article to 1456 c.c. to agency agreements has always been confirmed by case law. However in some recent cases (Cass. 30-11-2015 n. 24368, Cass. 18-5-2011, n. 10934; Trib. Reggio Emilia 10-05-2017; Trib. Pescara 08-07-2016; Trib. Bologna 21-01-2015; Trib. Bari 16-1-2014; Trib. Como n. 230 of 29/10/2018), all referred to the non attainment of minimum targets by the agent, the Courts stated that the termination of the contract by the principal could not be considered justified simply on the basis of such Article 1456 c.c.; on the contrary, Courts shall evaluate whether the breach for which the agent is responsible is of such importance as not to permit the continuation, not even temporarily, of the contractual relationship (as provided by Article 2119 c.c. – applicable to employment contracts). As a consequence of the above, in the cases at issue, the agent was granted damages for lack of notice. More recently, also the principle of good faith has been considered with reference to the "clausola risolutiva espressa", stating that the party terminating the contract in application of such clause (and the Court thereafter), shall apply the good faith principle in establishing whether the other party's behaviour can be regarded as a breach or default[24].

Is it necessary that termination for breach be notified within a short period after the breach is discovered?

Yes, in principle the terminating party should notify termination and indicate the reasons[25] within a reasonably short time (principle of «immediatezza del recesso per giusta causa[26]»). However there is some flexibility, for example when a party needs time to ascertain if there is a breach (typical the case of rumours about the agent selling competitive products) or to decide if the breach is important enough. The flexibility is even higher when the agent is the terminating party.

Can a party terminate the contract for a breach which such party has tolerated in the past without complaining?

In principle the answer is no, particularly if the previous conduct shows that the parties did not attach importance to the respect of a certain clause, but the solution may vary from case to case. So, for example, a party may prove that it tolerated certain breaches trusting that the other party would remedy and that it was forced to terminate the contract when the breach became unbearable.

Would the result be different if the contract contains a «waiver clause» (e.g. a clause saying that «Any waiver on the part of either party hereto of any right or interest shall not imply the waiver of any other right or interest, or any subsequent waiver»)?

Difficult to say. If the «waiver clause» is very general (i.e. if it does not refer to a specific breach) such clause would probably not be effective if its application would go against the principle of good faith. On the contrary, a clause referring to a specific situation (e.g. a clause saying that the fact of not making use of the possibility of terminating the contract when the minimum amount of orders is not

[24] See. Trib. Milano 14/12/2015 in a case on commercial agency; but see also Cass. 6/4/2018 n. 8574 and Cass. 23/11/2015 n. 23868, which confirmed such principle with reference to «express termination clauses» provided in other contracts.

[25] There are different approaches followed by Italian case law on this aspect: in some case it has been decided that the principal (but not the agent) shall specifically indicate the reasons in the termination letter (e.g. Cass. 16-12-2004, n. 23455); pursuant to other judgments such indication is not necessary, if the other party has knowledge of them anyhow (e.g. Cass. 9-6-2009, n. 13261).

[26] Cass. civ., 12-10-1993, n. 10088; App. Perugia, 13-07-2012.

attained does not prejudice the principal's right to make use of the clause in the future) is more likely to be effective.

Article 18 of the IDI model contracts provides specific cases of substantial breach and exceptional circumstances, which shall justify an earlier contract termination. To what extent the parties are free to choose contractual clauses, violation of which would justify the earlier termination?

As said before, the Courts give a certain importance to the fact that the parties have agreed to consider certain situations as justifying earlier termination (particularly in the context of Article 1456 c.c. according to which the parties may provide that the contract will be terminated in case of breach of certain obligations indicated in the clause («express termination clause», «clausola risolutiva espressa»). At the same time, the parties cannot agree that situations of no importance (or that any of the agent's obligation) become reasons for earlier termination by the principal, because this would conflict with the mandatory rule which grants the agent a period of notice.

Is Article 18 in compliance with your law?

In principle Article 18 complies with Italian law. However, a reference in the clause to trivial breaches (or to circumstances of insufficient importance), is unlikely to be effective. In other words, the effectiveness of the clause will be higher to the extent reference is made to really material breaches.

13.6 Unjustified earlier termination

What is the effect of an unlawful earlier termination of an agency contract under the law of your country?

Does the contract remain in force until a further valid termination notice is given by one of the parties, or does the contract end in any case (with the terminating party being responsible for the damages arising out of the unlawful termination)?

If the contract is for a fixed term an unlawful termination will be in principle ineffective and the contract will continue until its final term. However, since it is practically impossible to force the other party to perform the contract, the final result will actually be that the terminated party will be entitled to damages for the lost profit until the term of the contract.

If the contract is for an indefinite period, it is discussed whether the unlawful termination produces nevertheless the effect of putting an end to the contract (although giving the terminated party a right to damages)[27] or if, on the contrary, the contract continues. In any case, the practical difference should not be very important, for the reasons expressed above.

In any case, by using clause 18.6 of the IDI balanced and principal-friendly model contracts (as well as Article 18.5 of the agent-friendly model) any problem should be solved because such clause expressly states that an unjustified earlier termination must in any case be considered as an effective earlier termination with payment of a termination indemnity.

13.7 Compensation for unjustified earlier termination

Please explain whether there are legal rules (or principles established by

[27] For instance, Trib. Salerno, 27-1-2010, n. 5961 follows this approach.

case law) for calculating the amount of compensation for unjustified earlier termination.

As a general rule, compensation for earlier termination is a sum equal to the commission of the previous year for the time the contract would have continued, if the termination had been lawful.

The collective agreements provide precise rules on the calculation of such indemnity for unjustified earlier termination («indennità di mancato preavviso»).

Would Article 18.6 of the IDI balanced and principal-friendly model contracts, as well as Article 18.5 of the IDI agent-friendly model be valid under your law?

In principle the clause, which conforms to the principles contained in the collective agreements, should be valid.

14. GOODWILL COMPENSATION (INDEMNITY).

Does the law or jurisprudence of your country recognise a goodwill compensation to the agent?

Is that right subject to specific conditions (i.e. increase of business of the principal)? What are they?

Is a minimum – maximum amount of compensation provided by law or jurisprudence?

The present situation is rather confused due to the presence of two different methods of calculating the indemnity: the direct application of Article 1751 c.c. and the method of the collective agreements.

14.1 Goodwill indemnity under Article 1751 c.c.

Italy has implemented the EC directive by choosing the «German» indemnity. Article 1751 c.c. almost literally takes over Article 17/2 of the Directive.

The indemnity is due (Article 1751/1) when the following conditions are met:

- the agent has brought new customers or has considerably increased business with the existing customers and the principal continues to derive substantial benefits from the business with such customers and
- the payment of such indemnity is equitable having regard to all the circumstances and in particular the commission lost by the agent on the business with such customers.

The indemnity is not due (Article 1751/2):

- where the principal terminates the contract for a breach by the agent of such importance that the relationship cannot continue, not even temporarily;
- where the agent terminates the contract, unless termination is justified by circumstances for which the principal is responsible or by circumstances regarding the agent, such as age or illness, under which he cannot be reasonably requested to continue his activity;
- where, by virtue of an agreement with the principal, the agent assigns his rights and duties under the agency agreement to a third party.

The amount of the indemnity cannot exceed a sum equal to a yearly indemnity calculated on average of the commissions earned in the last five years (Article 1751/3).

Is there a method of calculation of the compensation provided by law or jurisprudence?

What is the amount of compensation generally accepted by law or jurisprudence for agents?

As to the calculation of the indemnity under Article 1751, the solutions given by the courts which have directly applied this provision (without using the criteria of the collective agreements) are not at all homogeneous.

In many cases no indemnity at all has been granted considering that the agent had not provided sufficient evidence either of the development of new customers and/or of the circumstance that the principal still derives substantial benefits with the business with those customers after the contract termination.

At the other extreme, there are cases where the maximum amount (one year commission on the average of the last five years) has been granted without an in-depth evaluation of the various circumstances.

Finally, in several cases a reduction of the maximum amount has been made (recognising an indemnity ranging from 30% to 80% of the yearly average) taking into account a number of elements, such as the importance of the new customers, the impact of the principal's trademark and advertising, the advantages for the principal, etc. Only in few cases an attempt has been made to use the system of calculation developed by German courts.

14.2 The indemnity of the collective agreements

When the new Article 1751 which implements the EC directive was introduced in 1991 the trade organisations of the principals and the agents agreed upon a set of collective rules (the so-called «accordi ponte» of 1992), which substantially reinstated the system of calculation previously in force, but at least formally within the framework of the new provision of the civil code.

The «accordi ponte» has been at first replaced by new collective agreements of 2002, with some minor modifications. Subsequently, new collective agreements applicable to commercial undertakings have been signed in 2009 (amended in 2010 and in 2017), and new collective agreements applicable to industrial undertakings have been signed on July 30, 2014.

The calculation system of the collective agreements is based on a percentage of the commissions earned by the agent during the contract, in the following amounts:

A. Fondo Indennità Risoluzione Rapporto (FIRR) - paid year by year by the principal to Enasarco

4%	on yearly commissions up to 12.400 Euro
2%	on yearly commissions from 12.400 Euro up to 18.600 Euro
1%	on yearly commissions over 18.600 Euro

B. Indennità suppletiva - paid directly to the agent

3%	on all commissions earned by the agent during the contract
0,5 %	on commissions earned after the fourth year within a ceiling of 45.000 Euro per year
0,5 %	on commissions earned after the sixth year within a ceiling of 45.000 Euro per year

C. A further indemnity - called indennità meritocratica

This indemnity is calculated in a very complicated way, which also differs between the collective agreements of 2009/2010 (applicable to commercial undertakings) and the agreements of 2014 (applicable to industrial undertakings[28]).

The indemnity of the 2002 collective agreements can be roughly estimated to be about 4 to 5% of the total amount of commissions earned by the agent during the whole life of the contract. By way of contrast, the "indennità meritocratica" provided by the 2009 and 2014 collective agreements in most cases grants to the agent much higher amounts of goodwill indemnity, close to the maximum amount provided by Article 1751 of the civil code.

The indemnities indicate at points A and B are due irrespective of the fact that agent has developed new customers; moreover the FIRR indemnity (which is paid yearly by the principal to Enasarco - the social security institution of the agents - which pays it to the agent at the time of contract termination) is due also if the contract is terminated for reasons for which the agent is responsible or in case of termination by the agent himself. The indemnity indicated in point C is due only if the conditions of Article 1751 c.c. are met, i.e. if the agent has developed new customers.

The indemnity of the collective agreements applies only to those who are parties to the associations having signed the collective agreements, or when the collective agreements have been incorporated by reference. Consequently, this type of indemnity will apply to contracts with foreign principals or agents only in case of express incorporation of the collective agreements into the agency contract.

Since 1992 there has been discussion about the validity of the method of calculation of the indemnity provided by the collective agreements, since it implies a derogation to Article 1751 c.c., which is a mandatory rule. The majority of the courts decided that the system of calculation of the collective agreements was valid because it was more favourable to the agent (by comparing the two methods in abstract ex ante). A minority of courts, however, decided, on the basis of a comparison made ex post, that the indemnity of the collective agreements was invalid whenever the agent would have obtained a higher amount through the direct application of Article 1751 c.c.

In 2004 the issue has been brought before the European Court of justice[29]. The European Court stated that the goodwill indemnity cannot be replaced by an indemnity determined in accordance with criteria other than those prescribed by Article 17 of the European directive, unless it is established that the application of such an agreement guarantees the commercial agent, in every case, an indemnity equal to or greater than that which results from the application of Article 17. The Court also specified that, to that aim, the two methods should be compared in abstract, ex ante.

Thus, considering that the collective agreements cannot guarantee in all cases an indemnity equal or greater than which results from the application of Article 17 of the directive (implemented by Article 1751 c.c.), the European Court substan-

[28] Those new provision will apply to contracts already in force on 30/7/2014 (and signed before 1/1/2014), only from 1 January 2016 and provided that they remain in force for at least five quarters starting from 01/01/2016. Articles 10 and 11 of the previous collective agreement (of 2002) will continue to apply where those conditions are not met.

[29] European Court of Justice, March 23, 2006, C-465/04, *Honyvem Informazioni commerciali srl* v. *Mariella De Zotti,* (text downlodable from the EU Section of the IDI website).

tially declared the calculation system provided by collective agreements contrary to Article 17 of the EC directive[30].

Notwithstanding that, some lower Courts continue to apply the collective agreements (see, for instance, the Court of Appeal of Rome in its decision of 24-5-2007, n. 2358; also Trib. Monza, 26-3-2007, n. 707), while the Supreme Court has taken the position that the indemnity provided by collective agreements (points A and B) is due to the agent even where the conditions provided by Article 1751 c.c. are not met (i.e. a sort of "minimum guaranteed" to the agent due to him in almost all cases); in addition to that, whenever the agent is able to prove in Court that the conditions provided by Article 1751 c.c. are met (i.e. that he has brought new customers or has considerably increased business with the existing customers and the principal continues to derive substantial benefits from the business with such customers), Article 1751 prevails over the collective agreements and the agent is granted a higher amount of indemnity, up to the maximum mentioned by Article 1751 (see, for instance, Cass. 3-10-06, n. 21301, Cass. 3-10-06, n. 21309, Cass. 12-3-2007 n. 5690, Cass. 23-4-2007, n. 9538, Cass. 30-9-2009, n. 20982, Cass. 1-8-2013, n. 18413).

This interpretation is in contrast with the decision of the Court of Justice, considering that the comparison between the two systems is made on a case by case basis and, thus, in concrete and *ex post.* In any case, it is certainly in favour of the agents, since they are granted the goodwill indemnity calculated in accordance with the collective agreements, even in cases where they would not be entitled to it under Article 1751.

Are the rules on indemnity mandatory or even considered to be "international public policy" (lois de police)?

There is no case law on this point. However, the Court of Justice in the Ingmar case (Case C-381/98, Judgment of 9-11-2000) decided that «Articles 17 and 18 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country.» Therefore, Article 1751 c.c., which implemented Article 17 of the Directive shall be deemed as internationally mandatory.

Is there a time limit for the agent to claim goodwill compensation? If so, what is it?

The agent shall claim the goodwill indemnity within one year from contract termination, according to the European directive. It is sufficient for the agent to send a letter to the principal, without being necessary to start a legal proceeding; however, the letter shall provide a clear reference to the request of goodwill indemnity by the agent. For a case of application of this principle, see Cass. 17-04-2013, n. 9348, in which the Supreme Court confirmed that such term is in any case congruous.

Is Article 21.4 of the IDI balanced and principal-friendly model contract in

[30] This approach has been followed (and is still followed) by some lower Courts, notwithstanding the different interpretation given by the Supreme Court. See, for instance, Trib. Milano, 31-10-2006, n. 3352; Trib. Trento, 29-1-2007, n. 13; Trib. Pistoia, 2-2-2007; Trib. Bassano del Grappa, 5-3-2008, n. 5; Trib. Treviso, 29-5-2008, n. 160.

compliance with your legislation? If not, could you please suggest an alternative clause consistent with your jurisdiction?

According to Article 21.4 a) the indemnity is not due if the principal has terminated the contract according to the conditions of Article 18 (and thus for reasons stated in such provision), while Article 1751 of the civil code requires «a breach for which the agent is responsible of such importance as not to permit the continuation, not even temporarily, of the contractual relationship». Consequently Article 21.4 a) could be considered not to comply with Article 1751 civil code to the extent it has a wider scope of application. For instance, cases of termination of the contract by the principal through the «clausola risolutiva espressa», for non attainment of the minimum turnover by the agent shall in principle not deprive the agent from his right to goodwill indemnity (considering that the lack of attainment of the minimum turnover is not «a breach for which the agent is responsible of such importance as not to permit the continuation, not even temporarily, of the contractual relationship». However, several courts decided that in such a case the goodwill indemnity was not due to the agent (Trib. Rovigo, 16/1/2018; Trib. Roma 19/4/2017; Trib. Palermo 1/2/2017; Trib. Bologna 21-01-2015; Cass. 04-10-2013, n. 22722; Trib. Milano 18-11-2013; Trib. Bari 22-10-2013; Trib. Milano 16-07-2010, n. 9344; Trib. Modena 16-03-2010; App. Bologna 17-03-2008; Cass. 14-06-2002, n. 8607). In this respect, it is important to also consider the decisions mentioned under the previous paragraph 13.5, which considered the «clausola risolutiva espressa» not applicable (and therefore the termination by the principal not valid), and granted the goodwill indemnity to the relevant agents.

A similar issue – in the opposite sense - arises with respect to the case of termination by the agent. While under Article 21.4 b) the agent maintains the right to indemnity if he terminates the contract for a reason justifying termination under Article 18 of the contract, Article 1751 of the civil code considers sufficient that «termination is justified by circumstances attributable to the principal».

All this means that in some cases where the agent would not be entitled to indemnity under Article 21.4 he may nevertheless obtain the indemnity showing that he has such right under Article 1751 of the civil code.

15. LIMITATION OF ACTION

Does your legislation provide limitation periods (or similar systems) for the exercise of the rights of the parties under the commercial agency agreement and what is their duration?

Italian law provides two types of limitation periods:

«Prescrizione», i.e. a period of time within which a right must be exercised, which is interrupted by a court action or request by the interested party,

«Decadenza» where a right must be exercised within a certain time in order not to be lost, without possibility of interrupting the period.

The rights under the agency agreement fall under the general prescription term of 10 years, except for those regarding periodical obligations (like the payment of commission) to which the shorter term of 5 years applies. However, “indirect commissions”, i.e. those due to the agent for direct sales made by the principal or through third parties in breach of the exclusivity are subject to the normal limitation period of 10 years.

The right to goodwill indemnity is submitted to a «termine di decadenza» of one

year from contract termination (see § 12 above). If the indemnity is not claimed within such time limit the agent loses the right to indemnity. If the above term is respected, the limitation period of 10 years will apply.

Can the limitation periods be contractually modified under your law?

Article 2936 of the civil code expressly states that the rules regarding limitation periods («prescrizione») cannot be contractually derogated.

16. APPLICABLE LAW.

16.1 Legal sources.

What are the rules of your legal system concerning applicable law to commercial agency contracts?

The rules applicable are those contained in the 1980 Rome Convention and, for contracts concluded after December 17, 2009, the EC-regulation 593/2008 ("Regulation Rome I"), which however does not apply to Denmark.

16.2 Applicable law in the absence of choice

If there is no choice of law by the parties, what criteria are used by the courts of your country to determine the applicable law in the event of a commercial agency contract with a foreign counterpart?

The criteria of Article 4 of the 1980 Rome Convention (i.e. characteristic performance) will be applied, which means that almost inevitably the applicable law will be the law of the country where the agent is domiciled. Analogously, pursuant to Article 4 of Regulation Rome I, in case of contracts for the provision of services (as the commercial agency agreement), the law of the country where the service provider has his habitual residence (i.e. the agent) will apply.

16.3 Effectiveness of a choice of law excluding the law of the agent's country

Is it possible to submit to the law of a foreign country an agency contract with a party domiciled in your country?

Does your legal system contain provisions on agency law considered to be "international public policy" (loi de police), i.e., applicable even where the parties choose to submit the contractual relationship to the law of a foreign country?

In principle the parties are free to choose the applicable law (see Article 3 of the Rome I Convention – Article 3 of Regulation Rome I).

However the choice of a foreign law could be ineffective with regard to rules according to which the Italian legal system must be applied whatever law governs the contract («norme di applicazione necessaria», «loi de police», «overriding mandatory provisions»). Italian law does not provides that the provisions protecting the agent have this character of «internationally mandatory rules», nor Italian case law.

In any case the choice of the law of a country outside the European Union would be ineffective to the extent it would imply that the rules of the EC directive on indemnity are not applied: see the judgement of the European Court of Justice in the Ingmar case, mentioned above.

16.4 Application by the courts of your country of foreign rules having «internationally mandatory» character

If the contract with a foreign agent contains a choice of law clause which provides for the application of the law of your country and assuming that some provisions of the law of the agent's country are "internationally" mandatory (see § 3.2 of the report on Applicable Law & Jurisdiction) would the courts of your country take these rules into consideration, and if so, to what extent?

There is almost no case law on this issue. The courts will make reference to Article 7.1 of the Rome I Convention (see § 3.2.4 of the Report on Applicable Law & Jurisdiction). However, since this provision leaves a wide discretionary space to the courts, it is impossible to foresee if and to what extent Italian courts will apply foreign internationally mandatory rules.

Regulation Rome I contains an even stricter rule than the Rome convention: Article 9.3 provides:

> "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

17. JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS.

17.1 Legal sources

What are the rules of your legal system concerning jurisdiction as well as recognition and enforcement of foreign decisions?

As regards contracts with parties of the European Union, EU Regulation 1215/2012 of the Council of 12 December 2012 will apply. In the relations with Norway, Iceland and Switzerland the Lugano Convention of 30 October 2007 will apply.

With respect to contracts with parties of other countries the «general» rules on jurisdiction and enforcement of foreign judgements contained in the law on private international law of 31 May 1995, n. 218 will apply.

17.2 Jurisdiction without a choice of jurisdiction clause

If there is no valid jurisdiction clause, is an agent of your country entitled, under the procedural rules of your country to bring a claim before his courts against a foreign principal?

In case Regulation 1215/2012 applies the Italian agent should be able to bring the claim before the Italian courts. If the principal is outside the EU (or the countries of the Lugano convention) the Italian agent must make reference to Article 3 of the law of 31 May 1995, n. 218 (Law on private international law) which refers to the provisions of the Brussels convention of 1968 and successive modifications. It is not clear if the successive modifications includes also Regulation 44/01 (and now Regulation 1215/2012) and consequently if reference should be made to Article 5 of the Brussels convention or to the corresponding provision of Regulation 1215/2012.

Considering the above, it is rather likely that the Italian agent will be able to bring a claim before his courts.

If there is no valid jurisdiction clause, is a principal of your country entitled, under the procedural rules of your country to bring a claim before his courts against a foreign agent?

If the agent is within the EU and Regulation 1215/2012 applies, it is almost impossible for the Italian principal to bring a claim before his courts, because he cannot base the claim on Article 7.1 which makes reference to the place where the party which provides a service (in our case the agent) performs such activity.

If the agent is in a country outside the EU, the rules the law of 31 May 1995, n. 218 will apply. These rules incorporate by reference the rules on jurisdiction of the Brussels convention and future modifications. Since it is not clear if Regulation 1215/2012 should be considered as a modification of the Brussels convention the question is still open whether one should refer to Regulation 1215/2012 or to the Brussels convention.

Considering all the above, it is rather unlikely that the Italian principal may be able to bring a claim against a foreign agent before his courts.

17.3 Effectiveness of a jurisdiction clause in favour of foreign courts

Do judges in your country have exclusive jurisdiction to settle disputes concerning agents, who carry out their activity between the boundaries of your country?

As regards agents-physical persons without an important organisation, there is a rule of the code of civil procedure under which the courts of the domicile of the agent are exclusively competent.

However, this rule should only apply to the issue of sharing territorial competence between Italian courts and not the matter of international jurisdiction (i.e. the issue of distributing jurisdiction between Italian and foreign courts).

This means that, where the principal (or the agent) has his place of business abroad, the general rules on jurisdiction of the law on private international law of 31 May 1995, n. 218 or EU Regulation 1215/2012, or of the Brussels or Lugano conventions (where applicable) will apply, as the case may be.

Would a clause contained in a contract between a foreign principal and an agent of your country under which a foreign court has jurisdiction on disputes arising out of the contract be valid in your country?

In principle, yes.

This is certainly the case if EU Regulation 1215/2012, or the Brussels or Lugano conventions are applicable, since they recognise the validity of clauses on jurisdiction and prevail over possible domestic rules which provide otherwise.

If the parties choose a contractual forum outside the countries where the above regulation or conventions apply, reference must be made to Article 4/2 of the law on private international law of 31 May 1995, n. 218, which says that Italian juris-

diction can be validly derogated in favour of foreign courts or arbitration if the clause is proved in writing and the dispute regards rights of which the parties can dispose («diritti disponibili»).

The notion of rights of which the parties cannot dispose is unclear. It should be interpreted narrowly. However, in one case the Court of Cassation (judgement of 30 June 1999, n. 369, Air Malta v. Scopelliti) has considered that the agent's right to indemnity under Article 1751 c.c. was a «non disposable right» and that consequently the derogation of the Italian jurisdiction was invalid[31]. The position taken by those courts in this case is certainly wrong, since they confuse mandatory rules and rules protecting right of which the parties are not free to dispose. However, we cannot exclude that this approach would be followed by other Italian courts.

Would a clause contained in a contract between a foreign agent and a principal of your country under which a foreign court has jurisdiction on disputes arising out of the contract be valid in your country?

If the court having jurisdiction is in the EU (or in a country adhering to the Lugano convention) the provisions of Regulation 1215/2012 or of the Brussels and Lugano conventions, which recognise the right to choose jurisdiction, will prevail over possible domestic rules which could prohibit such a choice.

If the court is in another country, the clause could in principle be considered null and void if the agent is a physical person to which the special rules on the «labour process» would apply. However, this conclusion is not very likely, considering that the purpose of the above rules is to protect Italian agents, while in this case the clause would normally favour the foreign agent.

17.4 Recognition - enforcement.

Is it possible to recognise and enforce a foreign judgment against citizens of your country? Is recognition or enforcement subject to particular limits or conditions? What are they?

Recognition is possible under the rules listed under 17.1 according to the circumstances of the case.

If EU Regulation 1215/2012, the Brussels or Lugano convention are to be applied reference must be made to the relevant provisions of such texts.

If domestic Italian rules are to be applied (i.e. for judgements of other countries) reference must be made to Article 64 of the law on private international law of 31 May 1995, n. 218, according to which:

> A judgment rendered by a foreign authority shall be recognised in Italy without requiring any further proceedings if:
> a) the authority rendering the judgement had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law;
> b) the defendant was properly served with the document instituting the proceedings pursuant to the law in force in the place where the proceedings

[31] Also a lower court (Trib. Modena, 11-3-2009) follows this approach and declared null an arbitration clause stating that jurisdiction of Italian courts could not be excluded when dealing with mandatory rules such as those on the agent's goodwill indemnity (Article 1751 c.c.). More recently the Supreme Court in an *obiter dictum* confirmed the same reasoning, quoting it precedent Air Malta (see Court of Cassation No. 27072 of December 28, 2016).

were carried out, and the fundamental rights of the defence were complied with;

c) the parties proceeded to the merits pursuant to the law in force in the place where the proceedings were carried out, or default of appearance was pronounced in pursuance of that law;
d) the judgement became final according to the law in force in the place where it was pronounced;
e) the judgement does not conflict with any other final judgement pronounced by an Italian court or authority;
f) no proceedings are pending before an Italian court between the same parties and on the same object, which was initiated before the foreign proceedings;
g) the provisions of the judgement do not conflict with the requirements of public policy *(ordre public).*

If enforcement is possible, how long does the proceeding take?

The first step in order to enforce a foreign decision in Italy is to obtain an enforcement decree from the competent Court of Appeal: this stage takes approximately six months.

Then, if the other party appeals against such decision, the proceedings may continue for other two/three years before the Court of Appeal and for a further year, if recourse is made before the Court of Cassation.

18. ARBITRATION.

18.1 Legal sources.

Is your country part of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)?

Italy is party to the New York Convention of 1958 and to the Geneva convention of 1961.

Are there other rules applicable to international arbitration provided by the law or jurisprudence of your country?

Until March 2006 there was a distinction between domestic and international arbitration in Italy. Particularly, Articles 832-838 of the code of civil procedure governed international arbitration.

Legislative Decree 2-2-2006 n. 40 (in force since March 2, 2006) repealed Articles 832-838 of the code of civil procedure, which now apply to domestic arbitration only.

Articles 839-840 (still in force) regulate recognition and enforcement of foreign arbitral awards.

18.2 Arbitrability.

Are agency contracts considered a subject matter capable of settlement by arbitration, under your legislation?

If so, does this apply to all agency agreements or only to certain situations (e.g. agents who are not physical persons)?

There is one judgment of the Supreme Court (n. 369 of 1999) in the sense that

issues regarding goodwill indemnity of agents should be considered in general terms as non arbitrable[32], but such judgment appears to be clearly erroneous.

Another issue is that of disputes involving agents to which the rules of the labour process («processo del lavoro») apply. In this case it is clear that such disputes are reserved to the «labour courts» and cannot be submitted to arbitration. Agents-physical persons will fall under these rules, unless they have an important organisation (with several employees). This means that actually most agents who are not companies will fall under these special rules.

It is consequently not advisable to submit disputes with agents who are physical persons to arbitration.

18.3 Arbitration clauses.

Would an arbitration clause providing for arbitration abroad, contained in an agency agreement be valid in your country?

Arbitration clauses with agents physical persons not having an important organisation will not be valid. If the agent brings the dispute before the labour courts («tribunale del lavoro») such courts will accept jurisdiction notwithstanding the arbitration clause.

Would the courts in your country refuse jurisdiction with respect to an agency contract containing such a clause?

Except for the case examined above, the courts must respect an arbitration clause.

18.4 Recognition of foreign awards.

Would a foreign arbitration award dealing with an agency agreement be recognised by the courts of you country?

Except for the problems described hereabove, there are no particular problems in recognising foreign awards.

[32] See also Trib. Modena, 11-3-2009.

LIST OF CLAUSES THAT MIGHT NOT BE FULLY EFFECTIVE OR THAT SHOULD BE DELETED OR MODIFIED

Clause	Model	Advice
5.4	principal-friendly	The clause that gives the principal the right to unilaterally determine the minimum turnover may not be effective if not applied following objective criteria: see § 3.3 of the Report.
6.4	principal-friendly	The clause is valid but the law (Article 1751 bis, civil code) requires payment of an indemnity. Since the courts have wide discretion in fixing the amount, unless it has been agreed by the parties, a clause determining the criteria for calculating the amount is advisable. See clause in § 4.3 of the Report.
9.3	principal-friendly	Del credere obligations are almost impossible: for alternative solutions see § 11 of the Report.
13.1	all models	Cash discounts must be deducted from the amount on which commission is calculated.
14.2	principal-friendly	There is a risk that some of the situations considered as not falling under the principal's responsibility may be evaluated differently by the courts and thus give rise to a right to commission. See § 7.2 of the Report.
18.3	all models	The inclusion of trivial breaches in the events listed in such clause is unlikely to be effective.
20	balanced and principal-friendly	The clause may go beyond the law to the extent specific time limits are fixed, but it is unlikely that this will give rise to problems.
21.4 (a)	balanced and principal- friendly	The clause refers to Article 18 for the determination of the reasons which justify termination by the principal without indemnity. However, Article 21.4 might not be effective in cases where Article 19 is wider than the definition of Article 1751 (... reasons which ...)
21 - B	balanced and principal- friendly	Needless to say that alternative B of Article 21 does not comply with Italian law.