Post Term Non-Compete Clauses in Agency Contracts

European Perspective and the **Italian Law**

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EU perspective

Article 20, EU Directive on Commercial Agents

1. [..]

2. A restraint of trade clause shall be valid only if and to the extent that:

*a) it is concluded **in writing**; and*

*b) it relates to the **geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract**.*

*3. A restraint of trade clause shall be valid for **not more than two years** after termination of the agency contract.*

4. This Article shall not affect provisions of national law which impose other restrictions on the validity or enforceability of restraint of trade clauses or which enable the courts to reduce the obligations on the parties resulting from such an agreement.

(**No remuneration** is required by EU Directive)

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Under Italian law

Article 1751 bis Italian Civil Code

*An agreement restricting the agent's right to compete after the termination of the contract must be **in writing**. Such agreement must relate to the **same geographical area, group of customers and kind of goods or services covered by the agency contract**, and shall be valid for **not more than two years** after termination of the contract.*

*The acceptance of the non-competition obligation implies, at contract termination, **payment to the agent of an indemnity** not having the nature of commission ("indennità di natura non provvigionale"). Such indemnity shall be proportioned to the duration of the obligation, non exceeding two years after contract termination, to the nature of the agency contract and to the goodwill indemnity.*

[…]

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Under Italian law

(1) Remuneration

- Italian rule provides for the onerous nature of the clause;
- However, according to Italian case law, this provision could be considered not mandatory (see Cass. 11.06.2015, n. 12127; Cass. 31.05.2017, n. 13796; Cass. 09/09/2025, n. 24845; Cass. 20.01.2026, n. 1226).

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Under Italian law

(2) Does the reason for termination (e.g. in the event of default of the principal) affect the enforceability of the non compete clause?

- It could be stated that the agent can be realeased from its obligation, based on the following principles: (i) «*inademplenti non est adimplendum*» under Article 1460 c.c. and (ii) «*bona fides*» under Article 1375 c.c.
- However, in order to avoid being bound by the agreement (even in case of breach of the principal), it would be safer for the agent to expressly specify such possibility in the clause.

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Under Italian law

(2) Does the reason for termination (e.g. in the event of default of the principal) affect the enforceability of the non compete clause?

Possible clause to be included in the post term non-compete clause, in the interest of the agent:

*« In the event of **termination** of the contract **for breach of the principal**, the **agent shall be released** from its non compete obligation »*

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Under Italian law

(3) Possibility to release the agent from its non-compete obligation:

(i) Can the principal release the agent from the post term non-compete obligation at the end of the relantionship?

- In principle, he cannot, since the contractual nature of the agreement means that it can be terminated only by mutual consent.
- However, the principal may waive the post term non-compete agreement if this option has been expressly included in the agreement itself (see Trib. Milano, 06/05/2021; Trib. Ravenna, 22/02/2022 n. 115).

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Under Italian law

(3) Possibility to release the agent from its non-compete obligation:

(ii) Must the principal notify the agent its decision to release the agent within a certain period (e.g. in the termination letter), or can this be done even after the relationship has ended?

- If the clause does not provide anything concerning the time by which the principal could notify such waiver, it would be safe to notify the agent no later than the termination of the contract (e.g. in the letter of termination).
- However, if the clause expressly provides for the right of the principal to waive it at its discretion, even after the termination of the relationship, it seems reasonable to assume that the principal may waive it, even if such waiver would occur after the termination of the relationship.

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Under Italian law

(3) Possibility to release the agent from its non-compete obligation:

(i) Can the principal release the agent from the post term non-compete obligation at the end of the relantioship?

(ii) Must the principal notify the agent its decision to release the agent within a certain period (e.g. in the termination letter), or can this be done even after the relationship has ended

Possible clause to be included in the post term non-compete clause, in the interest of the principal:

*« It is understood that the **Principal has the right, at its discretion**, **to waive**, in whole or in part, **even after the termination of the relationship**, the right to require the Agent to comply with the non-compete obligation. In such a case, **the indemnity shall not be due**; or, in the event of a partial waiver, it shall be due for the period during which the Principal has required compliance with the non-competition obligation »*

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Post Term Non-Compete Clauses in Agency Contracts

German Law

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§ 90a HGB (German Commercial Code) stipulates:

(1) An agreement restricting the business activities of a commercial agent following termination of the agency contract (non-compete arrangement) requires the written form, and a document signed by the trader and containing the agreed provisions is to be handed over to the commercial agent. The agreement may be concluded for not more than two years starting from termination of the agency contract; such agreement may cover only the district or group of customers assigned to the commercial agent and only the items in respect of which the commercial agent was required to employ their efforts in order to procure business or conclude transactions for the trader. The trader is obliged to pay the commercial agent a reasonable compensation for the period of the non-compete arrangement.

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- (2) The trader may waive the non-compete arrangement in writing, up until the end of the agency contract, to the effect that, after the expiry of a six-month period following such declaration, they will be free of the obligation to pay compensation.
-
- (3) Where one party terminates the agency contract for grave cause owing to culpable conduct on the part of the other party, they will be entitled to declare themselves not bound by the non-compete arrangement by means of a written declaration within one month of such termination.
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- (4) Divergent agreements to the detriment of the commercial agent cannot be made.

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Therefore, post termination non-compete clauses are accepted under German law.

Form: Written form, therefore signed by both parties.

Furthermore, a written document signed by the Entrepreneur and containing the agreed provisions needs to be handed over to the Commercial Agent.

The Agreement may be concluded for more than two years starting from termination of the Agency Contract; such Agreement may cover only the district or group of customers assigned to the Commercial Agent and only the items in respect of which the Commercial Agent was required to employ the efforts in order to procure business or concluded transactions for the Entrepreneur.

Remuneration: According to § 90 section 1 German Commercial Code the Entrepreneur is obliged to pay the Commercial Agent a reasonable compensation for the period of the non-compete arrangement. The amount is not exactly fixed, the remuneration needs to be “reasonable”. Numbers between 75 and 100 percent of the last remuneration of the Commercial Agents are discussed.

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Does the reason for termination (default of the agent, default of the principal, expiry of the term, or other grounds) affect the enforceability of the non-compete clause?:

According to § 90a section 3 German Commercial Code both parties may declare themselves not bound by the non-compete arrangement by means of a written declaration within one month of such termination of they have terminated the Agency Contract for good cause due to culpable conduct of the other party.

– How can an agent be released from its non-compete obligation? In particular, can the principal release the agent from the post-contractual non-competition obligation provided in the contract at the end of the relationship? If so, must the principal notify the agent within a certain period (e.g. in the termination letter), or can this be done even after the relationship has ended?

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– The entrepreneur may waive the non-compete arrangement in writing, up until the end of the agency contract, to the effect that, after the expiry of a six-month period following such declaration, they will be free of the obligation to pay compensation. This is in accordance with the maximum termination period of § 90 German Commercial Code.

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Post Term Non-Compete Clauses in Agency Contracts

New Zealand Law, Australian Law, USA Law and UK Law

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Question 1: The validity of post-termination non-compete clauses

(a) New Zealand

If a non-compete clause is drafted too wide then the court has the power under section 83 of the Contract and Commercial Law Act 2017 to change it.

Section 83 sets out the position in relation to restraints of trade or non-compete clauses together with case law.

83 Restraints of trade

(1) The court may, if a provision of a contract constitutes an unreasonable restraint of trade,—

(a) delete the provision and give effect to the contract as amended; or

(b) modify the provision so that, at the time the contract was entered into, the provision as modified would have been reasonable, and give effect to the contract as modified; or

(c) decline to enforce the contract if the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand.

(2) The court may modify a provision even if the modification cannot be effected by deleting words from the provision.

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Question 1: The validity of post-termination non-compete clauses (…cont)

(b) Australia

Agents often obtain confidential information in the course of their agency, whether disclosed to them specifically for the purpose of carrying out the agency, or simply by virtue of their position. During the agency, agents cannot, without the consent of the principal, for their own benefit, disclose or use any information derived in the course of the agency for this would breach the fiduciary no-profit rule. Any such breach would trigger the restraint of trade legal protection which exists in Australia.

(c) USA

The position varies from state to state. In summary, if a non-competition agreement or a non-solicitation covenant was too broad then it could be subjected to the blue pencil doctrine under which a court would sever unreasonable, divisible portions of the agreement and then enforce reasonable parts that remained.

(d) UK

The UK is the only jurisdiction with specific regulations covering commercial agents being The Commercial Agents (Council Directive) Regulations 1993 and Regulation 20 states as follows:

> *A restraint of trade clause in a commercial agency agreement will only be valid if it is concluded in writing and it relates to a geographical area or group of customers entrusted to the commercial agent and to the kind of goods covered by the agency agreement. Such a clause will only be valid for a maximum two year period.*

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Question 2: Does the reason for termination (default of the agent, default of the principal, expiry of the term, or other grounds) affect the enforceability of the non-compete clause?

(a) New Zealand

Yes, because the reason for termination is very important

- *Rascals International Ltd v Taylor* [2025] NZHC 2413
- *Raine & Horne New Zealand Pty Ltd v Normans Road Real Estate Ltd* [2024] NZHC 2706
- *Team Group Realty Ltd v Cardno* [2024] NZHC 553

(b) Australia

- If there is a valid non-compete clause then the reason for termination will be relevant
- The form of a restraint of trade is not crucial in determining its validity as the courts will look to the substance of the restraint
- The lack of any direct means of enforcing a restraint of trade will not save it from being void if it is unreasonable
- A reasonable restraint of trade will not be interfered with by the courts
- The test of reasonableness will normally be applied as at the time the agreement was entered into by the parties and by reference to what the restraint entitled the parties to do, rather than by reference to what they have actually done
- Reasonableness is a question of law for the purposes of the common law doctrine of restraint of trade

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Question 2: Does the reason for termination (default of the agent, default of the principal, expiry of the term, or other grounds) affect the enforceability of the non-compete clause? (…cont)

(c) USA

- The position will differ state to state but overall it can be said that the specific reasons for termination will affect the enforceability of any non-compete clause
- The enforceability of non-competition agreements will depend upon the state and nature of the services involved. In many states, non-competition agreements will be enforced by the court if the terms are found to be commercially reasonable
- Generally, the court will not enforce a non-competition agreement if:
  - (i) The geographical scope exceeds the territory in which the agent or distributor was authorised or licensed to act;
  - (ii) The prohibited activities are broader then necessary; or
  - (iii) The duration is too long.

(d) UK

Regulation 20 of the Commercial Agents (Council Directive) Regulations 1993 will be relevant and the reason for termination will affect the enforceability of the non-compete clause.

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Question 3: How can an agent be released from its non-compete obligation?

(a) New Zealand

- The principal can release the agent by notification in writing
- An agent is not entitled to remuneration for a transaction that results from his or her efforts if it arises wholly after the agent has been released
- A contract that expressly makes unpayable any commissions falling due after release or termination is not a restraint on the agent's trade

(b) Australia

The position is similar to New Zealand

(c) USA

Having regard to the many states of USA, the position is similar to New Zealand

(d) UK

The position is similar to New Zealand

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