
LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest. We would welcome any comment you might have.

THE AGENCY RELATIONSHIP IN THE ITALIAN CIVIL CODE: A LEGISLATIVE OVERVIEW

Civil Code Articles 1703 – 1730

Civil Code Articles 1742 – 1753

D.Lgs. No. 303 of September 10 1991

D. Lgs. No. 65 of February 15, 1999

Law No. 526 of December 21, 1999

Law No 422 of December 29, 2000

INTRODUCTION

Save for the several amendments introduced in 1999 (D.Lgs. 65/1999 and Law 526/1999), domestic Agency Law has not changed during the recent years.

The provisions that the Civil Code sets forth apply to any principal-agency relationship. In particular, Chapters IX-X, Section I of the Civil Code establish the main provisions of law regulating the relationship among principal and agent.

While provisions of articles 1703 through nr. 1730 constitute the general rules for mandate contracts, provisions of articles 1742 through 1753 set forth a specific discipline of Agency Law.

CONTRACT OF AGENCY

According to Civil Code, Article 1742, by the contract of agency one party undertakes, for compensation, to promote the entering of contracts on

behalf of another person within a specified territory.

The contract must be in writing and each party is entitled to obtain by the other party a copy of the contract signed by such other party. Such right cannot be waived.

The principal cannot engage more than one agent at the same time, in the same area and in the same line of business, nor can the agent carry on business in the same area and in the same line on behalf of more than a single business entity.

The agent cannot collect claims of the principal.

If such power has been granted to him by the principal, the agent cannot grant discounts or delay without specific authorization.

Whenever the contract has been entered into through the activity of the agent, any claim about contract performance as well as any complaint relating to non-performance of such contract, can validly be made to the agent.

The agent can demand precautionary measures in the interest of the principal and submit claims which are necessary to preserve the rights of the principal.

THE DUTIES OF AGENT

According to Civil Code, Article 1746, the agent shall fulfil his tasks in the interest of the principal and must act in good faith.

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Specifically, the agent must act in accordance with the instructions received and shall give his principal all information concerning market conditions within the territory assigned to him, as well as any relevant information which may be useful in appraising convenience of single business transactions. Any agreement to the contrary would be void.

He shall likewise act observing the duties that Civil Code, Article 1731-6 set forth, insofar as such duties are excluded by the nature of the agency contract.

Any agreement establishing that the agent undertakes either in whole or in part default of a third party is null and void.

As an exception, the parties may agree upon the granting of a specific guarantee by the agent, provided that:

1. The guarantee is referred to specific transactions of a special nature and amount identified on a case by case basis
2. The guarantee undertaking by the agent cannot be of an amount greater than the commission, which the agent would be entitled to receive for that business transaction
3. The agent is entitled to specific compensation.

The agent, who is not in the position to fulfil his duties shall immediately notify his principal, otherwise he responds of eventual damages occurred.

THE RIGHTS OF AGENT

The agent is entitled to receive a commission for all business transactions which have been duly completed, provided that the transaction has been entered into as a consequence of his action.

The commission is due as well, for the transactions entered into by the principal

with third parties that the agent has previously acquired as clients for transactions of the same kind or pertaining to the territory, category, or group of clients reserved to the agent, unless otherwise agreed upon.

It is important to mention that the agent is entitled to the commission on those transactions entered into after the date of termination of the agency contract if the relating proposal reached the principal or the agent on a previous date or the transactions are entered into within a reasonable time from the date of termination of the contract, and if the entering into of the transaction is mainly due to the previous activity performed by the agent.

In such cases, if a subsequent agent takes on the business, the commission is due only to the previous agent, unless, due to specific circumstances, it appears equitable to split the commission among the agents.

Unless otherwise agreed, the commission is owed to the agent at the time and in the amount in which the principal has performed or should have performed the transaction on the basis of the contract entered into.

The commission is due to the agent at the latest from the time and in the amount in which the third party has performed or should have performed the transaction, had the principal performed its part.

If the principal and the third party agree not to perform in whole or in part the contract, the agent is entitled for the part not performed to a commission reduced by the amount determined on the basis of commercial usage or, in their absence on an equitable assessment by the Court.

The agent is required to reimburse the commission paid only in the event and in the amount it is certain that the contract between the third party and the principal will not be performed, unless the non-performance is attributable to the

principal. Any agreement more favourable to the agent is null and void.

The agent is not entitled to the reimbursement of the agency costs.

THE DUTIES OF PRINCIPAL

The principal, in his relationship with the agent, must act with loyalty and good faith.

He has to make available to the agent the necessary documentation relating to the goods and services dealt and supply to the agent any information required to the extent of contract performance.

Specifically, the principal has to inform the agent within a reasonable time, as soon as he reason to believe that the amount of expected commercial transaction will drop substantially.

In addition, the principal must inform the agent within a reasonable time about the acceptance or refusal and/or about the lack of performance of a transaction the agent was involved with.

The principal delivers to the agent a periodic report about the fees due to him at the latest on the last day of the month following the actual quarter when the fee falls due.

Within the same term, the agent fees accrued must be paid off to the agent.

The agent is entitle to receive all necessary information in order to verify the amount of fees accrued and may ask for accounting evidence.

Any agreement contrary to the above provision would be null and void according to Article 1749.

DURATION OF CONTRACT

An agency contract for a definite time, which the parties continue to perform after its termination date is deemed to be an indefinite time contract.

If the agency contract is for an indefinite time, each party can withdraw from the contract by giving notice to the other party within the period of time that the contract sets forth.

The notice period cannot be less than one month for the first year of the contract, then two months for the second year, three months for the third year and so on up to six months for the six year and all the subsequent years.

The parties may agree on notice period of a longer duration, provided that the notice period for the principal is not shorter than that required for the agent.

Save as otherwise agreed upon by the parties, the expiration of the notice period shall be on the last day of a calendar month.

TERMINATION INDEMNITIES

According to Civil Code, Article 1751, upon termination of the relationship the principal has to pay an indemnity to the agent, on the following conditions:

- that the agent has either procured new customers to the principal or has substantially developed business with the existing customers and the principal – at termination of the relationship - is still receiving business advantages arising from the relationship with such clients
- that the payment of the indemnity is equitable, taking into account all circumstances, including the fees that the agent loses arising from the business with such clients.

The indemnity is not due:

1. When the principal terminates the contract as a result of a material breach by the agent that does not allow carrying

forward of the relationship even on a provisional basis

2. When the agent withdraws from the contract, unless withdrawal is justified by either circumstances attributable to the

principal or by events like age, disability and illness of the agent, as a result of which continuation of his activity may no longer be reasonably requested

3. When, pursuant to an agreement with the principal, the agent assigns the agency contract to third parties.

The amount of indemnity cannot exceed a sum equivalent to an annual indemnity calculated on the basis of the average of the fees accrued by the agent during the last five years and, if the contract dates back to less than five years, on the basis of the average of the relevant period.

Besides indemnity, the agent has always the right to claim for eventual damages.

The agent forfeits his right to the above indemnity if within one year from termination of the relationship he does not give notice to the principal that he intends to claim the indemnity.

The indemnity is also due if the relationship terminates because of death of the agent.

NON-COMPETITION

Any agreement to limit competition by the agent after dissolution of the contract shall be made in writing.

The agreement shall relate to the same area, customers, kind of goods of services that the agency contract has provided for and its term may not exceed two years following the termination of the contract.

The acceptance of non-competition agreement requires, at the time of termination of the relationship, the payment to the agent of a specific indemnity.

The indemnity is to be determined on the basis of:

- the duration of the non-competition obligation
- the nature of the contract of agency
- the indemnity due for termination of the relationship.

Determination of the indemnity on the above basis is left to negotiation of the parties, keeping into account the national collective agreements.

In the absence of an agreement the indemnity is determined by the Court on an equitable basis making also reference to:

1. the average of the payments received from the agent during the contractual relationship and their influence on the aggregate volume of business during the same period
2. the reason for termination of the contract
3. the extension of the area attributed to the agent
4. the existence or not of the commitment to act for a sole principal.

The above provision is only applicable to the agents who operates on an individual basis, to general partnerships or limited liability companies with a sole shareholder as well as, when national collective agreements provide for, to limited liability companies if the majority of their stockholders are agents.