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Agency and Distributorship Laws in Italy: Guidelines for the Foreign Principal

Most foreign companies doing international business through local agents and distributors are aware that local laws can often protect the agent or distributor in unusual ways. Although in some countries there may be a significant amount of contractual and statutory freedom in appointing and terminating agents and distributors, special municipal statutes can offer protection for certain kinds of dealerships and franchises. In other countries, the appointment of a local agent or distributor may constitute more of a commercial "marriage" than an arm's length relationship.

This article examines the situation for Italy. In particular it highlights the laws and regulations which govern the appointment of agents and distributors in Italy by United States or other foreign principals.

I. Preliminary Observations

Initially, there are important distinctions among "sales agents," "distributors" and other categories of representatives, which help explain the obligations of a principal toward its exclusive agents and distributors in Italy. When a company has to determine the best vehicle for marketing its products or services in Italy, its two main options will be to find either an exclusive agent or a distributor. In Italian law and practice, as is the case in most European countries, the responsibilities, rights and duties of an exclusive agent are different from the responsibilities, rights and duties of a distributor. The *exclusive agent* acts in the name and on behalf of his principal, promoting the sale of goods on the principal's account

*Members of Brown & Dobson, located in New York City, and in Milan and Rome, Italy.

in a specific territory, while the *distributor* buys goods from a company and resells them with or without an exclusivity agreement. *Exclusive agency agreements* are specifically governed by the Italian Civil Code, as well as by Italian national contracts, while *distributorship agreements* are governed by the provisions of sale contract laws in general.

Italian provisions of law specifically provide, in the case of the appointment of an exclusive agent, for compensation rights upon termination of the agreement. The Italian laws and regulations governing exclusive agency agreements are very specific, binding and detailed. The Civil Code forms the basic reference point for an exclusive agency agreement, while the applicable National Contracts impose certain additional terms on private contracts.

On the other hand, there is no specific statutory provision for rights upon termination of distributors, whose only remedies are those which may be contained within the pertinent distribution agreement and damages for breach of contract.

II. Independent Sales Agents

A. DEFINITION AND DISTINCTIONS

According to the Italian Civil Code,¹ an *agent* is a party who is appointed by one or more persons or companies to promote sales contracts within a specified territory. An agent differs from an employee, independent contractor, broker and a (legal) mandatory in the following ways:

- (1) *From an employee*—as an employee, one is not free and independent, but subject to the close control of his employer. Attention should be paid in practice to avoid that an individual, formally appointed to act as an *agent*, be considered an employee, since the Italian labor laws might become applicable with their much heavier costs and consequences for the principal in case of termination. Therefore, it is advisable that the principal grant the maximum independence to the agent both in fact and in the agreement;
- (2) *from an independent contractor*—as an independent contractor, one receives no exclusivity obligation and his activity is not permanent and continuous as is an agent's;
- (3) *from a broker*—as a broker, one has no specific obligation toward his principal as does an agent;
- (4) *from a mandatory*—a mandatory is appointed to fulfill only legal functions rather than commercial ones.

1. Civil Code, arts. 1742-1752.

B. ITALIAN LAWS AND NORMS REGARDING AGENCY AGREEMENTS

The following provisions are directly applicable to exclusive agency agreements and impose various requirements: Italian Civil Code provisions art. 1742 through art. 1752, together with law no. 204 of May 3, 1985 and Ministerial Decree 21.08.1985; the National Contract dated June 20, 1956 enforced as law by Presidential Decree no. 145, 1961 for agents appointed by industrial companies (i.e., manufacturers); National Contract dated Oct. 13, 1958 enforced as law by Presidential Decree no. 1842 of Dec. 26, 1960 for agents appointed by commercial companies (i.e., sales organizations); and the National Contracts dated Dec. 19, 1979 and June 24, 1981, which are in force for agents appointed by industrial and commercial companies.

Under the Civil Code, an agent is a party who is appointed by one or more companies for the promotion of sales within a specific territory, in the name and for the account of such companies.² A specific set of rules stating the exclusivity obligations during the agreement and the general behavior obligations of the agent are provided in the Civil Code.³

The specific and binding obligations of the principal in case of termination of the agreement are also determined by the Civil Code in articles 1750 and 1751. These obligations toward the agent consist of an advance notice period before termination (or an indemnity for insufficient advance notice) and a termination indemnity for time in service. In addition, the National Contracts provide for a "clientele indemnity" in case of termination of the agreement by the principal without any material default on the part of the appointed agent.

C. TERMINATION

Therefore, the normal risks which have to be taken into consideration by a foreign principal who wishes to terminate an agency agreement (especially an agreement which is for an indefinite period of time) are the above three indemnities, as described in the following discussion.

1. *Advance Notice Period; Indemnity for Insufficient Notice*

In determining the termination and compensation rights imposed by the law governing agency agreements, a distinction must be made between agreements valid for indefinite periods and those for limited periods. For

2. Civil Code, art. 1742.

3. See Civil Code, arts. 1743 and 1746, respectively.

those of indefinite period (of the agency), the principal can terminate the contract provided that advance notice or, *in lieu* of advance notice, an indemnity is provided. In this respect, the Civil Code does not specify the notice period, but the National Contracts establish a standard in the case of termination by the principal.⁴ The standard for agents appointed by industrial companies is at least four months' advance notice if the contract has been in force for less than eight years, and six months' advance notice if the contract has been in force for more than eight years. For agents appointed by commercial companies, four months' advance notice must be given if the contract has been in force for less than five years, five months' notice if the contract has been in force for more than five years but less than eight years, and six months' advance notice if the contract has been in force for more than eight years. If the termination is to be immediately effective (i.e., there is no advance notice), an indemnity must be paid in lieu of the termination notice. The amount of this indemnity is calculated roughly by multiplying (i) the average monthly commission earned during the year previous to termination by (ii) the months of notice which should have been given.

2. Termination Indemnity

For agreements valid for indefinite periods, in case of termination by the principal even with proper notice, the Civil Code requires that a separate indemnity be paid to the agent.⁵ Payments are to be made annually to the government entity ENSARCO as termination rights accrue or, depending on the facts, can be paid to the agent directly at the end of the contractual relationship as a lump sum. This indemnity is proportional to the amount of commissions paid to the Agent during the entire contract period, to be calculated according to the relevant agreement. Should the National Contract of 1979 be taken as a standard (as it may be applied in case of litigation), then the termination indemnity for agents appointed by one company will be: four percent of commissions up to Lit.⁶ twelve million per year, plus two percent of the amount of commissions between Lit. twelve to eighteen million per year, plus one percent of the amount exceeding Lit. eighteen million per year. For Agents appointed by more than one company: four percent on commissions up to Lit. six million per year, plus two percent on commissions between Lit. six to nine million per year, plus one percent on commissions exceeding Lit. nine million per year.

4. National Contracts dated Dec. 1979 and October 1981, arts. 9 and 9, respectively.

5. Civil Code, art. 1750.

6. "Lit." is the abbreviation for Italian lira, the currency unit used in Italy. 1528 Italian lira are equal to approximately \$1.00 (accurate as of June 15, 1986).

These percentages are subject to change and, in fact, were last modified significantly in 1979 (for industrial companies) and in 1981 (for commercial companies). The above percentages may be viewed as the maximum due. Lower percentages, i.e., the minimum established by law, may be applied by the courts if the agency contract between the foreign and Italian party has either waived or made no reference to a National Contract, or has applied an earlier version of the National Contract. The minimum percentages are as follows. For agents appointed by more than one company: four percent on commissions up to Lit. two million per year, plus two percent on commissions between Lit. two to three million per year, plus one percent on commissions exceeding Lit. three million per year. For agents appointed by one company: four percent on commissions up to Lit. two and a half million per year, plus two percent on commissions between Lit. two and a half million to three and a half million per year, plus one percent on commissions exceeding Lit. three and a half million per year.

3. *Clientele Indemnity*

In addition to the forementioned rights of the agent (advance notice period or substitution indemnity plus termination indemnity), if an indefinite period contract is terminated by the principal without any default on behalf of the agent, the National Contracts require an additional indemnity to be paid the agent.⁷ Effective January 1, 1975 for agents appointed by industrial companies and January 1, 1977 for agents appointed by commercial companies, the clientele indemnity is equal to three percent of the total amount of commissions paid during the duration of the contract (back to 1975 or 1977 as may be the case), plus 0.5 percent of the total amount of commissions due after the third year of the contract period. (For industrial agents the extra 0.5 percent applies only to the first Lit. thirty-six million of annual commissions.)

D. LIMITED PERIOD AGENCY CONTRACTS

Contracts valid only for limited periods may actually be considered contracts for an unlimited period, with all the consequences listed above,⁸ if the limited period contracts are normally renewable. Italian law does not expressly grant the termination indemnity for limited term contracts, referred to above.⁹ However, the prevailing National Contracts do not make any distinction between an agency agreement entered into for a

7. National Contracts dated Dec. 1979 and Oct. 1981, arts. 11 and 14, respectively.

8. See *supra* II.C. of article.

9. See *supra* II.C.2 of article.

limited term from one for an unlimited term. Therefore, the termination indemnity is also due at the end of the limited term contractual relationship, as well as in case of advance termination. The in-lieu-of-notice indemnity¹⁰ is not due in case of termination at the end of a true limited term agreement, while there are discrepancies in interpretation on whether the clientele indemnity¹¹ is due or not.

It is worthwhile to mention, also with respect to limited term agency agreements, that an advance termination might provoke an action for damages by the agent. Therefore, it is advisable, in case of a limited term agency agreement with Italian agents, to make reference only to the Italian Civil Code as applicable law, excluding any reference to the National Contracts. Italian courts may still apply the terms and conditions of the National Contracts, but the risk of this will be reduced. It is also advisable in indefinite term agreements to exclude any reference to the National Contracts; this increases the chance that a court would apply only the minimum liquidation percentages.

E. APPLICABLE LAW

As for the law applicable to agency agreements in Italy, the Civil Code permits the parties to choose in their contract to apply foreign law.¹² In such a case, the foreign law may be deemed applicable even if it does not provide for a termination indemnity. Therefore, if a foreign law is formally indicated by the parties and accepted in the very formal method normally required by Italian law¹³ and if the foreign law does not provide for a termination indemnity, then no right of this kind can be claimed by the agent acting in Italy. In any case, when Italian law is chosen by the parties, or when it naturally applies, the provisions of the Civil Code will be used, while the National Contracts will probably serve as a standard for the judge to determine the sums due the agent upon termination.

III. Distributorship

Under Italian law a distributorship is not a typical contract. It falls between the sale-contract¹⁴ and the supply contract.¹⁵ A distributorship can be defined under Italian law as a contract by which a party agrees to

10. See *supra* II.C.2 of article.

11. See *supra* II.C.3 of article.

12. Civil Code, art. 25.

13. See Civil Code, arts. 1341 and 1342, requiring a double signing procedure and an express waiver of Italian law.

14. See Civil Code, arts. 1470 *et seq.*

15. See Civil Code, arts. 1559 *et seq.*

purchase certain goods from a producer at specific conditions for the resale of such goods to third parties. There are no general provisions for the protection of a distributor, and a distributorship does not fall into the range of labor law provisions.

However, article 1569 of the Civil Code (which is generally applicable to supply contracts but which is also applicable to distribution agreements) requires an advance notice of the termination by either party for contracts of an unlimited duration; such notice must be given "within the time agreed upon, or established by usage, or, in the absence thereof, within a reasonable time with regard to the nature of the supply." The principal should expect to give advance notice of termination to the distributor or be liable for damages in lieu of notice.

Exclusivity clauses and fixed resale prices are considered valid by Italian courts, provided they are connected with specific needs of the producer and not determined by a monopolistic attitude. It should be noted, however, that the exclusivity clause is valid only between the parties and may not affect third parties who are allowed to sell in the exclusive territory. Clauses which limit the activity of the distributor after termination of the agreement may not exceed five years.

IV. Summary

This is only a general guide to the common problems in appointing an agent or distributor in Italy. The specific terms of each agreement should be reviewed to protect the foreign principal as best possible under Italian law and to reduce the company's risk should the agent or distributor need to be terminated. At the same time care can be taken to protect patents, copyrights, know-how and other commercial assets which may be made available to the agent or distributor, and to preserve injunctive and other emergency remedies for his possible misconduct.

