Indemnity for termination of the agency contract and 'new customers'

New prospects for agents and possible burdens placed on principals following the recent ruling issued by the Court of Justice on 7 April 2016

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In this month's issue of Market Place, I will examine and comment the interesting decision of the European Court of Justice issued on 16/04/2016 in Case C-315/14, which could open up new prospects − at least in certain cases and under certain circumstances − for calculating the termination indemnity of the agency relationship.

It must first be recalled in this regard that unlike employee severance pay (TFR in Italy) for which there are straightforward and unambiguous calculation methods, the determination of the severance indemnity for commercial agents has been the object − for more than fifteen years – of a broad debate in legal literature and case law on which alternative calculation criteria should be applied in practice.

Termination indemnity according to the basic criterion (Article 1751 Italian Civil Code)

The 'basic' criterion for determining the termination indemnity is that referred to in Art. 1751 of the Civil Code, which is the result of the implementation in our country of a European directive (Directive 86/653/EEC), pursuant to which:

"1. On termination of the agency contract, the principal shall pay the commercial agent an indemnity if and to the extent that: he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and - the payment of this indemnity is equitable having regard to all the circumstances of the case and, in particular, the commission lost by the agent on the business transacted with such customers. 2. (omitted). 3. The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question. 4. and 5. (omitted). 6. Agreements derogating from this Article to the disadvantage of the agent shall not be permitted. 7. (omitted).

Thus Art. 1751 of the Civil Code does not actually contain any calculation method, but simply specifies that the amount of an indemnity is capped at a maximum figure corresponding to one year's commission calculated on the average commission over the last five years and subordinates the entitlement to it to two conditions: (a) the commercial agent must have introduced new customers and/or 'boosted' the turnover with the existing ones; and (b) the indemnity "*is equitable"* in view of "*all circumstances of the case*", including the commission that the agent loses as a result of the termination of the contract.

Termination indemnity according to Collective Economic Agreements (AEC) for the commercial and industrial sectors

The Collective Economic Agreements, both that for agents of the commercial sector of 16/02/2009 and that for agents of the industrial sector of 30/06/2014, provide instead three different indemnities, to be paid on termination of the contract, also in the case of fixed-term contracts.

(1) The first indemnity (the one usually for a lesser amount of the 3 foreseen) is called FIRR (Contract Termination Indemnity Fund) and it is set aside on regular basis at ENASARCO (National Board of Assistance to Commercial Agents and Representatives) to be then directly paid to the agent in the event of contract termination. The FIRR is always payable to the agent, even in case of termination for just cause by the principal.

(2) The second is the supplementary customer indemnity reserve, payable if the contract has a duration of at least one year. It is based on a scaled percentage of the commissions paid during the agency contract: 3% for the first three years, 3.5% for the following three years and 4% from the beginning of the seventh year (included) onwards. The supplementary indemnity is not however due if it is the agent who terminates the contract, unless this was justified by circumstances attributable to the principal or on grounds of health, age, etc.

The aggregate amount of the Supplementary indemnity and Merit-related indemnity CANNOT under any circumstances exceed one year's commission calculated according to the average of the last five years, pursuant to Art. 1751 of the Civil Code.

(3) The third, merit-related indemnity, is only foreseen if (i) the aggregate amount of the first two indemnities (FIRR and supplementary indemnity) is lower than one year's average commission calculated according to the last paragraph of Art. 1751 (last five years' average commission) and (ii) the agent can claim some merits in terms of business development.
The merit-related indemnity is NOT due if the agent has himself terminated the agency contract (unless there are certain objective circumstances, such as illness, disability and retirement). The indemnity is calculated using fairly complex criteria that vary according to whether the applicable collective economic agreement (AEC) is that for the commercial or industrial sector: in either case, however, the agent is entitled to indemnity which will be higher the more his role has been effective in developing business with customers and/or turnover with the same.

Does Art. 1751 of the Civil Code apply, or do Collective Economic Agreements apply?

As a result of recurring and widespread disputes − between agents and principals on the criterion to apply at the termination of the agency relationship − and of fluctuating case law, which, from 2004 onwards had, however become well established in the sense of uniformly considering as prevailing the provisions laid down by the collective economic agreements, on 23 March 2006 the European Court of Justice, in reply to a question posed by the Italian Supreme Court about two years earlier, intervened on the subject with a ruling in favour of the provisions referred to in Art. 1751 of the Civil Code (excepting the case where the collective economic agreements provisions prove, in practice, to be more favourable to the agent).

Then intervened the Italian case law, also from the Supreme Court, according to which – since Art. 1751 of the Civil Code does not contain a real calculating criterion but only general principles and an overall cap – the collective economic agreements provisions are in fact absolutely valid, given that in the proceedings between the agent and principal it is the former who has the burden "... *to prove with detailed calculations in accordance with both criteria (collective economic agreements and Art. 1751 of the Civil Code), legal and contractual, the pejorative conditions, while the principal has the burden of proving the contrary, also by taking into consideration all the clauses and related compensation of advantages and disadvantages* …" (Supreme Court Labour Division, 19 May 2009, No 11598), with the result that the provisions referred to in the collective economic agreements will continue to apply in all cases in which, and to the extent that, the Agent − in the judicial proceedings − is UNABLE to demonstrate that in the specific case he is entitled to a higher indemnity amount.

The Court of Justice ruling of 16 April 2016 on 'new customers'

Intervenes in this context the decision of the Court of Justice in Case C-315-14.

It must be underlined that as we have seen, expect for the burden of proof on the agent, collective economic agreements cannot derogate (in worse) from the termination indemnity established according to the criteria laid down in Art. 1751 of the Civil Code, which include having the agent "... *brought new customers to the principal*".The 16 April 2016 ruling refers to the following case occurred in Germany (Bavaria) and summarised here:

"Ms Karaszkiewicz, who worked as a commercial agent for Marchon between September 2008 and June 2009, was given responsibility by Marchon for the sale of frames of brands C. K. and F. To that end, Marchon had made available to her a list of opticians with whom it already had business relations with regard to other brands of frames. Ms Karaszkiewicz negotiated, primarily with those opticians, the sale of the frames entrusted to her. Following the termination of her contract, Ms Karaszkiewicz brought a claim against Marchon for an indemnity in respect of customers pursuant to Paragraph 89b of the Commercial Code" broadly corresponding to Art. 1751 of the Italian Civil Code. ***"In this regard, she submitted, inter alia, that the opticians who had purchased for the first time, through her involvement, the frames of brands C. K. and F. should be regarded as 'new customers' within the meaning of that provision, even though they had already been on the list of customers that Marchon had made available to her".***

Consequently, in the case at hand, the agent is not exclusive and the contract assigns to him only some of the brands of frames marketed by the principal, while the customers entrusted to him were acquired by the principal in relation to other brands entrusted to other agents.

However, the ECJ held that can be considered 'new customers' acquired by the agent also those passed on to him by the principal and who had that already bought from the same other brands other than those negotiated by the agent, provided the latter "…***has managed, through his efforts, to initiate business relations between that person and the principal for the goods which the agent has been assigned to sell***". (…..) "***In that regard …the fact that the principal entrusted a commercial agent with the marketing of new goods to customers with whom the principal already maintained certain business relations may indicate that those goods relate to a different portion of the range to that which those customers had purchased up to that point and that the sale of those new goods to the latter customers would require the commercial agent to set up specific business relations, this, however, being a matter for the referring court to determine*** ".

The Court of Justice's findings are based on the interpretation of Directive 86/653/EEC on the co-ordination of laws relating to agency contracts and in particular: (a) on the definition of agent (which is independent from the specific mark entrusted to him) and, (b) on the aim to protect the commercial agent in his relations with the principal, both provided for by Article 17, para 2, letter a) of that directive.

Practical consequences

It should noted that attaching to the agency contract a list of customers already acquired by the principal and entrusted to the agent is a proper and correct practice much used also in Italy when drafting agency contracts; this is to prevent that for the purposes of calculating the termination indemnity the agent may claim that also such clients have been acquired by him.

However, in the case of (i) a contract with a non-exclusive agent, (ii) to whom are entrusted only some of the brands marketed by the principal, also the customers passed on by the principal (and acquired by the same in relation to other brands or products) can be included into the category of 'new customers' acquired by the agent, but only if and to the extent that in the particular case, which must be assessed each time by the referring court, he has significantly contributed to the promotion of the business in respect of new products sold to them and not limited himself to just 'inherit' them.

Such principle appears properly motivated and logical. Therefore, we could expect − the use of the conditional tense is deliberate – that it can be invoked in disputes of similar character and may become established in our country's case law.

With all the consequences this can have for the proper management of agency contracts.