Indemnity for termination of the agency contract, limitation period and grounds for forfeiture

If, when and how is the commercial agent entitled to the termination indemnity provided for by law and Collective Bargaining Agreements and grounds for the loss of such right due to limitation periods or forfeiture, also in light of the most recent case-law.

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Two different criteria for calculating the termination indemnity

It should be made immediately clear that, unlike the employee severance indemnity (TFR in Italy) – for which there are straightforward calculation methods – the determination of the agents' termination indemnity has been for decades and still is in Italy the subject of a broad debate in legal literature and case-law in which two contrasting and different alternative calculation criteria are being compared.

Article 1751 of the Italian Civil Code (1st criterion)

The first criterion refers to Article 1751 of the Italian Civil Code (implementing in Italy Council Directive 86/653/EC on self-employed commercial agents): in point of fact this Article does not contain any calculation method, but merely provides an upper limit to the termination indemnity (amounting to the average annual commission earned over the last 5 years) and subordinates the payment of the indemnity to three conditions:

(1) the agent has brought the principal new customers or has significantly increased the volume of business with existing customers;
(2) the principal derives benefits from the aforesaid activity;
(3) the payment of the indemnity is fair having regard to all circumstance of the case, including the loss of commissions the agent will suffer by reason of the contract termination.

Collective Bargaining Agreements or AEC in Italy (2nd criterion)

The second criterion (alternative to the previous one) is provided by the current Italian Collective Bargaining Agreements (hereafter "CBAs") applicable to the Trade and Industry sectors, which both provide an exact and precise calculation method falling into three different categories:

1- a first indemnity for contract termination, so-called FIRR (severance compensation fund) in Italy;
2- a second supplementary customer indemnity;
3- a third merit indemnity (if any).

Let us briefly examine these three indemnities:

1- Indemnity for contract termination (FIRR)

This termination indemnity is not due only in case of cessation of the relationship in the event of undue retention by the agent of amounts owed to the principal.

2- Supplementary customer indemnity

This indemnity is not due if it is the agent himself who withdraws from the agency contract, unless such withdrawal is attributable to the principal or to special circumstances (agent's retirement, infirmity or death). This indemnity is due also in case of a fixed-term contract, and the aggregate amount of the supplementary indemnity and the indemnity for contract termination (FIRR) may, where necessary, exceed one year commission calculated on the average of the last 5 years in accordance with Article 1751 of the Italian Civil Code (hereafter "ICC").

3- Merit indemnity

This indemnity is only foreseen if the aggregate amount of the first two indemnities is lower than one year's average commission determined according to the last paragraph of Article 1751 ICC and the agent can claim some merits in terms of business development.

The merit indemnity, together with the first two indemnities, can never exceed one year commission calculated pursuant to Article 1751 ICC

Entitlement to the payment of the supplementary and merit indemnities is conditional upon the signing of a labour union settlement agreement at the territorially competent Conciliation Commission (agent's address) within 60 days from the termination of the agency relationship (non-mandatory time-limit).

In other words, the agent can reject in its entirety the system provided by the new CBA regarding the termination indemnity or definitively accept it, without the possibility of subsequent appeals.

Advantages and disadvantages of the two calculation systems

- As regards the indemnity under Article 1751 ICC, the following shall apply:

Advantages:

- It can often be higher than the indemnity referred to in the CBAs.

Disadvantages:

- It does not provide any calculation criterion but only a maximum amount;
- The agent has the burden of proof;
- It is (almost) NEVER due in case of withdrawal by the agent.

- As regards the indemnities under the CBAs, the following shall apply:

Advantages:

- Clear and defined calculation criterion;
- The indemnity for contract termination (FIRR) is always due (save for one exception), even in case of withdrawal by the agent;
- No burden of proof is placed on the agent.

Disadvantages:

- The total amount of the indemnity obtained may be lower than that pursuant to Article 1751 ICC.

The European Court of Justice case-law

According to the Court of Justice of the European Union (CJEU), which on 23 March 2006 expressed its view on the validity of the Italian CBAs (Honyvem v. De Zotti, Case C-465/04):

(1) CBAs may derogate from Community regulations on agency contracts and from Article 1751 ICC (derived from the implementation of Directive 86/653/EC cited above) only if it is proved that the application of the CBAs guarantees to the agent " …*in any event, at least as much as he would have received under the Directive"*.

(2) Member States (and thus also Italy) may legislate on calculation criteria by setting out synthetic criteria of fairness which allow to more easily establish whether and to what extent the termination indemnity is due to the agent.

See also the subsequent CJUE Decision of 26/03/2009 (Turgay Semen v. Deutsche Tamoil GmbH, Case C-348/07).

Therefore, according to the CJEU, between the CBAs and Article 1751 ICC shall prevail the provisions of the latter, in having to assess in an abstract (non-concrete) way the result obtainable by the agent pursuant to the CBAs (**ex-ante assessment**).

The consolidated Italian case-law

According to the Italian case-law, reaffirmed also by the Court of Cassation (e.g. Decision No. 89295 of 25/05/2012), since Article 1751 ICC provides an upper limit to the termination indemnity but not a calculation criterion, in any proceedings between agent and principal, it is the agent who has the burden of "…*proving with detailed calculations according to both criteria (CBAs and Article 1751 ICC), while the principal has the burden of proving the opposite, also on the basis of the overall consideration of the clauses and the corresponding advantages and disadvantages compensation*".

In line with the consolidated case-law of the Court of Cassation, the consequence is that the provisions referred to in the CBAs apply in all cases in which, and to the extent that, the agent – in the context of inter partes proceedings – is UNABLE to prove that he is actually (not abstractly) entitled to a higher indemnity (**ex-post assessment**): this criterion appears to be unavoidable under Italian law, given that Article 1751 ICC does not contain a method for calculating the termination indemnity but only the criteria for establishing whether it is due or not and the maximum amount.

Loss of entitlement to indemnities due to limitation periods

Let us now examine the grounds for the loss of the right to the termination indemnity due to limitation periods or forfeiture.

With regard to limitation periods, the following rules must be considered:

Article 2934 ICC:

"*Every right is extinguished by the limitation period when the holder does not exercise it within the time prescribed by law. Are not subject to limitation periods inalienable rights and other rights provided by law*."

Purpose: protect the value deriving from situations consolidated over time and prevent re-litigation of issues already decided.

If the limitation period is interrupted, a new limitation period starts to run.

The limitation period may be suspended.

The limitation period cannot be raised by the judge of his own motion.

The limitation period is not (preventively) waivable.

Article 2946 ICC:

"*Except in cases where the law provides otherwise, rights are extinguished by the limitation period after the lapse of ten years."*

Article 2948 ICC:

"*Shall lapse after five years: 5) the indemnities payable for the termination of the employment relationship"*.

- However, according to a first, more remote, case-law orientation also from the Court of Cassation (Decision No. 1629/1966; Decision No. 2643/1968, Decision No. 1268/1984, Decision No. 9438/2000, Decision No. 9636/2003), termination indemnities for commercial agents do NOT fall under Article 2948 No. 5), which refers only to subordinate working relationships, and therefore lapse after a period of 10 years.

- According to a subsequent, more recent, orientation and to most learned opinions (Court of Cassation Decision No. 10923/1994; Decision No. 10626/1997; Decision No. 15798/2008), since the 'rationale' of Article 2948 No. 5) is to not leave open for too long situations of uncertainty related to rights arising from the termination of the relationship (subordinate or self-employed), all termination indemnities fall within its scope, including those related to self-employed work such as that of commercial agents, and therefore lapse after a period of 5 years.

In conclusion:

- Commissions, bonuses, various entitlements:
  the agent's right extinguishes in 10 years.
- Indemnity in lieu of notice and termination indemnity:
  according to the most recent legal literature and case-law they are extinguished after a period of 5 years, while according to other 'more dated' legal assumptions after 10 years.

Forfeiture of the right to indemnities

As regards the forfeiture of the right to indemnities, the following rule should be first considered:

Article 2964 ICC:

"When a right must be exercised within a specified period under the penalty of forfeiture, the provisions that regulate the interruption of the limitation period do not apply ... likewise also the suspension causes do not apply..."

Purpose: establish certainty by requiring the exercise of a right within a mandatory time-limit.

Forfeiture of the right to indemnities is prevented (not interrupted).

Forfeiture of the right to indemnities cannot be suspended.

Forfeiture of the right to indemnities may be raised by the judge of his own motion.

Forfeiture cannot be preventively waived, but can be prevented by granting another party's right.

Article 2966 ICC:

"*Forfeiture cannot be prevented other than the fulfilment of the obligation required by law or the contract. However, in the case of a time-limit established by the contract or a provision of law concerning available rights, forfeiture may also be prevented by granting the right of the person against whom the right subject to forfeiture must be enforced."*

As for the forfeiture of the right to the termination indemnity, **Article 1751 ICC, paragraph V**, should be considered:

"*The commercial agent loses the right to the indemnity provided for in this Article if, within a year from the termination of the relationship, he fails to notify to the principal the intention to exercise his rights*."

With reference to this time-limit, the following must be considered:

(1) Forfeiture of the right to the indemnities provided for by the CBAs: according to certain case-law of the Court of Cassation (Decision No. 9348 of 17/04/2013; contrary: Decision No. 1705 of 05/08/2011), in addition to the termination indemnity pursuant to Article 1751 ICC, this time-limit applies also to:

- Supplementary customer indemnity;
- Indemnity for contract termination (FIRR) not paid to ENASARCO (National Board of Assistance to Commercial Agents and Representatives) and thus due to the agent;
- Merit indemnity.

(2) Form and specific content of the notification: the notification preventing the forfeiture may be given in any form (including by telephone, even though verbal communication is difficult to prove) but must specifically state the termination indemnity. There are no restrictions on the use of letters that refer, for example, to:

- credit items other than the termination indemnity, as for instance, commissions, indemnity in lieu of notice (see Decision No. 186 of 01/12/2017, Labour Division of the Court of Rome);
- claims related to an allegedly subordinate working relationship (see Court of Cassation Decision No. 3851 of 14/02/2017).

(3) Personal notification: the notification preventing the forfeiture must be personally made by the agent himself as the sole holder of such right: it is therefore doubtful whether a letter sent in the

name and on behalf of the agent by his lawyer (or others) is sufficient to ensure the interruption of the forfeiture pursuant to Article 1751 ICC.

In the case of limited partnership companies (Sas in Italy), the letter must be signed by the legal representative of the company in the exercise of his functions (e.g. by the managing partner acting in such capacity specified in the letter) and not on his own behalf (see Court of Ivrea Decision of 26/02/2015).

Reaching pensionable age and continuation of the activity

Let us now examine some situations associated to old age retirement, starting with the following:

(1) Retired agent who continues his activity: reaching pensionable age and consequent withdrawal from the agency contract does not affect the agent's right to the termination indemnity (Article 1751 ICC and CBAs); the question arise as to what happens if the agent starts a new agency contract with another party. In my opinion, in such case he is not obliged to return the termination indemnity to the previous principal as there is no law preventing the agent, once acquired entitlement to the retirement pension, from continuing his activity with another principal (see in this regard the Court of Ivrea Decision of 26/02/2015).

(2) Discrepancies between indemnities within the same CBA:

CBA Trade sector

- Supplementary indemnity: due also in case of withdrawal by the agent following entitlement to old-age or early old-age and/or ENASARCO and /or INPS pension (additional agreement of 29/03/2017).
- Merit indemnity: due also in case of withdrawal by the agent if this is due to "*circumstances attributable to the agent such as age, infirmity or illness*..." (Article 13 - III).

There is therefore a discrepancy between the two indemnities.

(3) Lack of harmonization between CBAs:

CBA Industry sector

Supplementary indemnity and merit indemnity: due also in case of resignation by the agent following entitlement to old-age or early old-age ENASARCO pension (Article 10 - II and III).

There is therefore lack of harmonization between the CBA of the Trade sectors, more articulated and detailed, and that of the Industry sector.

Express termination clause

An express termination clause (regulated by Article 1456 ICC) is a clause included in a contract that imposes a condition upon which occurrence the party in whose favour the clause operates may withdraw from the contract with immediate effect, without any damage compensation and without the possibility for the judge – to whom supposedly the subsequent dispute between the two parties may be referred to – being able to rule on the severity or otherwise of the event.

For example:

In a contract concluded between the principal and the agency's company, it is stipulated that in case of changes to the ownership or business structure of the latter company, the principal may immediately withdraw from the contract (valid provision): "*In the performance of his assignment the Agent is obliged to respect the minimum sales targets (contractual minimums) agreed with the Principal at the start of each sales campaign ... The Parties attach key importance to the achievement of the contractual minimums ... Therefore, in case of failure by the Agent to achieve the aforementioned minimum targets, the Principal has the right to terminate the agency contract with immediate effect, thus without notice or payment of any indemnity in lieu of notice or for the contract termination, other than the indemnity (FIRR) already accrued at ENASARCO*".

However, a judge who is called upon to assess the validity of an express termination clause must first ascertain whether the alleged failure is attributable to the defaulting party. In the field of contracts law, fault is presumed (Article 1218 ICC) but the agent has the possibility of proving that no fault is attributable to him in case of failure to achieve a sale target that is unattainable and unrealistic since set without regard to the objective market trend.

But that is not sufficient. In addition to the fault, there must be:

- "*a default attributable to the agent, which due to its seriousness does not allow the continuation, even provisional, of the relationship*".

Furthermore,

- such default has to be proven by the principal intending to make use of the express termination clause.

Failing that, the clause is NULL and VOID.

IN FACT:

The most recent case-law points out that withdrawal from the agency contract is governed by certain mandatory provisions of the ICC:

- Article 1750 (which subordinates the withdrawal from the agency contract to a prior notice whose minimum duration is envisaged therein);
- Article 2119 (which nevertheless provides for the possibility of immediate withdrawal without prior notice "...*in the event of a just cause which does not allow the continuation, even provisional, of the relationship*");
- Article 1751 ("*the indemnity for termination of the relationship is not due ... when the principal terminates the contract for a default attributable to the agent, which due to its seriousness does not allow the continuation, even provisional, of the relationship"*);
- Directive 86/653/EC on agency contracts contains mandatory provisions applicable at national level to termination indemnities.

FURTHERMORE:

Collective Bargaining Agreements exclude the entitlement to termination indemnities only in certain well-identified, strict cases (e.g. Article 13 of the CBA for the Trade sector: indemnities termination

other than the indemnity for contract termination (FIRR) are not due "... *in case of early termination of the relationship by the principal in the event of undue retention by the agent of amounts owed to the same*").

In conclusion:

According to the most recent case-law, the express termination clauses contained in the agency contract are valid only if and to the extent that they do not justify a withdrawal with immediate effect (i.e.: without any indemnity in lieu of notice or for the termination of the relationship), which would NOT be legitimate under the existing legislation and according to the CBAs.

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