Giuffrè Scorcelli Rosa & Partners
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Giuffrè Scorcelli Rosa & Partners periodically reports and comments on the most significant statutory and case law developments.

THIS ISSUE:

Business Finance

PROVISION OF INVESTMENT SERVICES

The first resort decisions issued upon conclusion of proceedings started by "dissatisfied" investors against brokers, accused of having not complied with the applicable provisions of law (legislative decree no. 58/1998 – article 21 and following and the "brokers' rules", adopted by Consob resolution no. 11522 of 1st July 1998 – article 21 and following) in the matter of investment services, are increasingly more numerous.

The above-mentioned provisions, in addition to imposing the written form for agreements relating to the supply of investment services, subject the brokers to specific behavioural obligations, which go from having to inform the client about the nature, risks and implications of each investment transaction, and the obligation to abstain from the execution of transactions that are incompatible with the risk profile of the client.

The different trends originally appeared in case law on the merits about the consequences deriving from the omitted compliance by the broker with the behavioural obligations to which he is subject, seem to have been replaced in the last few months by more unanimous opinions.

In particular, between the trend according to which from such default the nullity would derive of the purchase orders given by the client (expressed for the first time by Mantua Tribunal by decision of 12th November 2004) and the trend which causes the typical consequences of the termination of the agreement and the indemnification of damages to derive from such default, the latter trend seems to prevail. Above all, in the case law of Milan Courts (no. 8671/05; no. 7555/05) the statement is now univocal whereby the failed compliance by the broker with the behavioural rules to which he is subject would only permit to enforce the (contractual) remedies of the termination of the agreement and the compensation of the damages; the nullity, in fact, would derive from the failed compliance with the formal requirements provided by the law.

Such trend also matches a recent decision by the Supreme Court (decision no. 19024 by the First Division, 29th September 2005), according to which "*the lack of information useful for evaluating the convenience of a transaction does not determine the nullity of the agreement*".

Company and Commercial Law

FOR A *DE FACTO* CORPORATION "THE EXTERNAL APPEARANCE" IS SUFFICIENT

By decision no. 1131 of June 20, 2006 the Supreme Court has ruled that, for a *de facto* corporation to exist, it is not necessary that the essential elements of company agreement actually exist (such as contributions, mutual funds, agreements about the sharing of any profits), it being sufficient that such elements adequately appear from the outside.

The case at issue concerned an Italian subject, a physical person, and a transportation company duly organized and existing under the English law, which carried out together commercial activity in Italy. The presence of statements of account, premises intended for storage and a register, where the activity carried out by each of the above-mentioned subjects was described, have been considered

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as sufficient elements for considering the existence of a *de facto* corporation under Italian law.

The Supreme Court has so assessed, on the basis of clues at its disposal, the existence of an Italian *de facto* corporation with the express purpose of enabling the identification of a taxable income in Italy.

Insurance

NEWS IN THE MATTER OF DISTRIBUTION OF CAR INSURANCE POLICIES

Law decree no. 223 of 4 July 2006 (the "*Bersani* Decree") enacted various new rules aimed at promoting competition in a variety of activities including the distribution of car insurance policies.

In particular, article 8 of the *Bersani* Decree provides that agreements between insurance companies and agents shall no longer contain exclusive distribution rights and/or the obligation to provide minimum prices or maximum discounts.

The insurance agents, therefore, shall no longer be entitled to offer customers car insurance policies of an insurer only and to fix prices or discounts in accordance with the guidelines set forth by the insurer.

Any provision conflicting with the said new rules shall be null. Conflicting provisions contained in agreements entered into prior to the *Bersani* Decree will remain applicable until 1 January 2008.

Needless to say that a great debate has arisen among the insurers with regard to the impact of such new rules, also considering that the latter are not applicable to foreign entities performing insurance activity in Italy under the freedom of services or freedom of establishment regulation which, in fact, are subject to the laws and regulation of the country where they have been incorporated.

NOVELTY IN THE SUBJECT MATTER OF INSURANCE FOR NOTARIES PUBLIC AND LAND SURVEYORS (GEOMETRI)

By Legislative Decree no. 182 of 4*th* May 2006 new rules were introduced in the matter of civil liability insurance deriving from the exercise of the notary public's activity.

The decree that came into force on 2nd June 2006, provides for the possibility of the *Consiglio Nazionale del Notariato* (National Board of Notaries Public), to enter into a collective insurance cover – which shall be uniform throughout the entire Italian territory and for all notaries public – at the expense of the Board, with an insurance company to be chosen according to a public procedure.

As regards land surveyors, failure to enter into an individual insurance policy for protecting against professional civil liability shall represent a disciplinary tort punished by article 9 of the Deontological Code recently approved by the *Consiglio Nazionale dei Geometri* (National Board of Land Surveyors).

Labour and social security

INCENTIVE TO RETIRE: NO TAX BENEFITS ANY MORE

No tax benefits are applicable any more to the amounts paid on the occasion of the termination of the labour relationship for the purpose of promoting the retirement of those workers who are already 50 years old, in the event of women, and 55 years old, in the event of men. Article 36, paragraph 23, of Law Decree no. 223, "*Urgent provisions for economic and social re-launching* (Official Gazette no. 153 of July 4, 2006) has in fact abrogated the paragraph 4-bis of Article 19 of TUIR. Such rule provided that, "*for amounts paid on the occasion of the termination of the relationship for the purpose of promoting the retirement of workers who are over 50, as to women and over 55 as to men*", the applicable rate was reduced by half (50% of the rate utilized for the taxation of the Employment Termination Treatment).

Effective July 4, 2006, i.e. date of coming into force of the new Law Decree, the amounts paid as incentive for inviting workers to leave have, therefore, been subjected – i.e. regardless of the worker's age – to separate taxation with respect to the rate applied to the Employment Termination Treatment.

DEMOTION: THE BURDEN OF PROOF LIES ON THE EMPLOYER

According to the recent decision no. 4766 of March 6, 2006 by the Supreme Court, in the matter of proof of demotion of the worker the general principle applies in the matter of proof of the default in the performance of the contractual obligations, pursuant to which the defendant debtor is subject to the burden of proving the fact extinguishing the enforced right. Therefore, the employer (debtor) is subject to the burden of proving the exact performance of the obligation provided by Article 2103 of the Italian Civil Code (according to which the employee was to be assigned to the duties for which he/she had been hired) through the proof of the absence, in concrete, of any demotion or through the proof that such demotion was justified by the rightful exercise of the business and/or disciplinary powers or the impossibility deriving by a cause not attributable to the employer.

THE COURT OF JUSTICE CLARIFIES THE MATTER OF TERMINATION OF THE AGENCY RELATIONSHIP

By decision of 23rd March 2006 in the lawsuit C-465/04, the Court of Justice ruled on the age-old matter of the compatibility with Articles 17 and 19 of EEC Directive no. 653 of 18th December 1986, relating to the Coordination of the rights of the Member States concerning Independent Commercial Agents (the "Directive"), of the discipline in the matter of termination indemnity of the agency relationship contained in the applicable Collective Bargaining Agreements.

The issue had been raised by the Italian Supreme Court by order no. 20410 of 18th October 2004 with reference to the bridge agreement of 27th November 1992 for the trade sector.

The Supreme Court had submitted to the Court of Justice two prejudicial issues. In the first place, the Court of Justice had been requested to evaluate whether, in the light of the content and purposes of Article 17 of the Directive and the quantification criteria of the indemnities provided therein, a collective bargaining agreement (entered into in the framework of domestic implementation rules) may be considered legitimate, which provides, on one hand, for the payment of an indemnity without specific reference to the preconditions provided by paragraph 2 of the above-mentioned Article 17 (considerable development of the principal or increase in the number of clients and, in both cases, existence of substantial benefits for the principal deriving from business deals with such clients) and, on the other, the quantification of such indemnity – not according to the criteria inferable from the Directive (and, should this be the case, in the maximum amount provided therein) – but on the basis of different criteria even though inspired by equity.

Moreover, the Supreme Court has demanded the Court of Justice to rule about the rightfulness of the calculation criteria contained in the collective bargaining agreement, which, in concrete, could penalize the agent not permitting him to receive the indemnity for the termination of the agency relationship in the same extent

he could expect if the criteria of Article 17 of the Directive were applied; such criteria provide for the payment of the indemnity "*if and in the extent in which*" the preconditions according to equity mentioned before occur "*taking into account all the circumstances of the case, in particular, the commissions that the commercial agent loses and which derive from the business deals*" with the clients procured to the principal.

With regard to the first issue, the Court has, first of all, observed that Articles 17 and 19 of the Directive dictate imperative mandatory rules for the protection of the agent and that Article 19 permits the parties to derogate from the provisions of article 17 prior to the expiration of the agency agreement only if it appears, on the basis of an evaluation to be made at the time when the derogation is agreed upon, that the same is not unfavourable to the agent.

From the above the Court of Justice derived the conclusion that the provisions governing bargaining collective agreements could be considered rightful only if it appeared that their application is never unfavourable to the agent ensuring "*systematically*" and "*in the light of all the legal relationships, which may be started between the parties, a higher indemnity or an indemnity that is at least equal to that resulting from the application of Article 17 of the Directive*" or, however, enabling the agent to add up the two treatments (this hypothesis is full excluded by the collective bargaining agreements).

Again according to the Court, from this standpoint, no importance may be ascribed to the issue – often considered conversely conclusive by our case law – according to which collective economic agreements would ensure the agent the payment of an indemnity in all events of termination of the agency relationship and, therefore, even when no indemnity would be due to him in application of Article 17 of the Directive.

With regard to the second issue, the Court – even though it wishes the adoption of criteria that take into account the indications contained in the report by the EU Commission of 23rd July 1996 on the state of application of Article 17 of the Directive – has concluded observing that the Directive leaves to the member States a certain discretionary power in identifying analytical calculation criteria, which must take into account, however, the equity criterion and, more in general, the principles contained in the above-mentioned article 17.

Litigation and Arbitration

ON THE TERM FOR THE SERVICE OF THE REQUEST FOR SETTING DOWN THE DATE OF HEARING PURSUANT TO ARTICLE 8 OF LEGISLATIVE DECREE NO. 5/2003.

By a detailed long order, filed with the Court's Clerk Office on 9*th* May 2006, Bologna Tribunal handled the debated issue of the term for the service of the request for setting down the date of a hearing in the corporate law procedure, the failed compliance with which, according to the provisions of article 8 of Legislative Decree no. 5/2005, shall entail the abatement of the proceeding.

The matter on which the Tribunal has ruled is the following: in a proceeding started according to corporate law procedure, after an abundant exchange of briefs, the defendants had granted the plaintiff a 30-day term for the service of any additional brief in reply, pursuant to Article 7, paragraph II, of Legislative Decree no. 5/2003. The plaintiff had not replied and had, conversely, served a request for fixing the date of a hearing 27 days after the service of the defendants' briefs. The defendants had objected that the request had been filed late and, therefore, the abatement of the proceeding had occurred due to the fact that the 20-day term provided by Article 8, first paragraph of the above-mentioned decree had elapsed after the service of the brief, which the plaintiff did not intend to reply. The plaintiff had challenged the objection, maintaining the timeliness of its activity, since the fourth paragraph of Article 8 makes reference to "*twenty days following the expiration of the terms provided in the preceding paragraphs*".

As admitted by the Judge who took the decision, the reason for the raising of this issue is the unclear wording of the rules on corporate law procedure, which had not had till now a univocal solution in the case law precedents referred to in the order under review.

The interpretative doubts derive from the fact that, whilst the first three paragraphs of Article 8 define in a complete manner the terms granted to the parties for the service of the request, the fourth paragraph provides for the abatement due to the expiration of the terms, referring to the "*failed service in the 20 days following the expiration of the terms provided above*" without clarifying whether the 20 days are the same provided by the preceding first, second and third paragraphs or are 20 additional days.

Bologna Tribunal has ruled that the fourth paragraph of Article 8 does nothing but confirm the general 20-day term provided by the preceding paragraphs and, therefore, such term starts running from the expiration of the term granted to the adverse party for the reply.

Real Estate

SALE AND PURCHASE AGREEMENTS OF REAL ESTATE PROPERTIES

On 6th July 2006 Law Decree no. 223/2006 (published on the Official Gazette no. 153 of 4th July 2006) came into force and with it the obligation, inter alia, to include in the sale and purchase deeds of real estate properties received by Notary Public more analytical data about the terms of payment of the price and whether the sale and purchase took place through a real estate broker.

In particular, the sale and purchase deeds of real estate properties must indicate, for the payments made prior to the Notary's deed and those made simultaneously: whether the payment occurred in cash (in this case the amount shall not exceed € 12,500, otherwise a monetary penalty will be levied equal to 1% to 40% of the amounts paid); whether the payment occurred by bank transfer (indicating the relevant data) or by bank, postal check or banker's drafts (indicating the relevant data). The analytical mention of the payment procedure does not apply to preliminary sale and purchase agreements since, should this be the case, there is no transfer of actual real estate rights. The new set of rules requires, moreover, that the contracting parties who availed themselves of a broker declare it in the deed, indicating specifically: who is the broker and the VAT or fiscal code number; the amount of expenses incurred for the brokerage; the specific payment modalities of the broker. In the event of omissions or incorrect or untruthful representations, specific monetary and criminal sanctions are provided against the contracting parties. ■