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"Made in Italy": something you need to know when managing commercial relationships with Italian manufacturers

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Introduction

The Italian manufacturing industry is composed of many firms which are family businesses, are small/medium-sized and, generally speaking, are not assisted by attorneys or a law firm in their day to day activities. As a consequence, it is very common that parties entering into a commercial relationship do not sign a comprehensive supply agreement. This is it particularly true in the case of a language barrier, i.e. the other party comes from a foreign country.

Under Italian Law, except for in specific cases where it is required (as below reported), a contract does not need to be in written form in order to be valid and enforceable. Therefore, the common practice described above, under certain circumstances, meets the very basic Italian legal requirements.

Absent a written contract, the relationship is ruled according to both the oral agreement and the contents of the purchase orders. In addition, parties sometimes make reference to their general terms and conditions.

As a matter of fact, the lack of a written contract triggers some uncertainties regarding the legal qualification of the relationship and, as a consequence, on the rules applicable in cases of: (i) termination/withdrawal; (ii) labor aspects; and in general, (iii) potential litigation.

That having been clarified, following this is a general overview based on our experience regarding some aspects of the two Italian disciplines that could apply when an Italian firm is entrusted to manufacture products and goods pursuant to the requests and the directives of the buyer.
Indeed, Italian law adopts two different approaches where: (i) raw materials necessary to manufacture the goods requested by the buyer are responsibility of the contractor. In this case, the contract is qualified as "*appalto*." Or (ii) the buyer provides to the contractor raw materials and components needed to manufacture the goods. In this case, the contract is qualified as "*subfornitura.*"

Appalto

As a preliminary point, "*appalto*" does not require a written form in order to be valid and enforceable. That being said, we focus here on: (i) the defectiveness of the goods; (ii) the possibility of withdrawal from the contract; and (iii) the employment issue.

(i) Defectiveness: The contractor shall grant the buyer immunity from any defectiveness of the goods manufactured. However, the guaranty is not due when the buyer was aware of the defectiveness or defects were recognizable, but has nevertheless accepted the goods. Regarding the terms applicable to enforce his or her rights, the buyer shall communicate to the contractor about the defectiveness of a product within 60 days of the discovery. In addition, the buyer forfeits his or her right if a trial is not initiated within 2 years of the delivery of the goods. These terms are peremptory and cannot be modified by the parties.

(ii) Withdrawal: The buyer can withdraw from the "*appalto*" at any time, even without adequate notice. In order to protect the reliance of the contractor, however, it is provided that, in the case of withdrawal, the buyer has to hold the contractor harmless in connection with: (a) costs and expenses incurred for the production of the goods; (b) the production already carried out; and (c) the loss of profit.

(iii) Employees: From an employment standpoint, Italian law provides that, for two years from the termination of the "*appalto*" (regardless the reason of the termination), both parties are jointly liable for the possible unpaid remunerations or social security contributions due to the employees for the duration of the contract. Therefore, the buyer could be sued by contractor's employees for the possible unpaid remunerations and social security contributions for a period of two years from the date of termination of the "*appalto*". Indeed, the buyer would then have the right to recover from the contractor the possible amount paid to such employees.

As a suggestion for dealing with defectiveness, attention should be given to the "acceptance" of the goods. Indeed it does not coincide with the delivery of the goods, but can be inferred by the behavior of the buyer, as for instance, on the full payment of the goods. Moreover, the buyer should double check whether employees are fully dedicated to the "*appalto*" or not (the risk of being jointly liable towards contractors' employees is not avoidable when, for example, the buyer is the only customer of the contractor).

Subfornitura

In the event that raw materials and components needed to manufacture the goods are provided by the buyer, parties enter into a "*subfornitura*" relationship. This contract is specifically ruled by Law 192/1998. We will focus on the following aspects:

(i) Written form: *Subfornitura* agreements must be concluded in writing, otherwise they are null and void. Absent a dedicated written and validated contract and the conditions thereof, it is likely inferred by the correspondence exchanged between the parties on a case by case basis. Absent written evidence of different agreements reached between the parties on such specific conditions, the supplier is in any case entitled to ask for: (a) the payment of the goods manufactured and (b) the reimbursement of the expenses occurred for the performance of the contract.

(ii) Termination: The buyer is entitled to terminate the contract entered into with the supplier only by adequate notice. The law does not specify the "reasonable" time period , however, prominent doctrines and case law state that it should take into account the following criteria:

1. The quantity and quality of the goods;
2. The length of the relationship;
3. The initial investments made by the supplier;
4. The fact that the supplier has a unique customer the buyer; and
5. The possibility that the supplier has to find another buyer in the market.

Lacking the reasonable notice or in the case that the period is not adequate, the supplier is entitled to ask for the compensation of damages.

(iii) Abuse of economic dependence: In addition to the above, in the case of termination, when the supplier has as a unique client (the buyer) and it has a low probability to easily/quickly find in the market other companies replacing the buyer (e.g. the production is highly tailored to the necessity of the buyer), independently from the presence or not of any adequate notice, it can raise an issue of abuse of economic dependence. Also in this case, the supplier is entitled to ask for the compensation of damages as well as for any necessary interim measures.

As a suggestion, it is highly advisable to negotiate and agree with the supplier on which specific term of notice is "reasonable" for the buyer to terminate the relationship (taking into account, for example, also customary operational schedule of the fashion business). In addition, a preliminary risk assessment, including investigation on the business of the supplier (how many buyers) is highly advisable.

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