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Breach of the Prohibition of Del Credere Clauses in Commercial Agency Contracts

Italian Supreme Court of Cassation, Civil Division, Order no. 1226 of 2026: the simulated sale of goods to a commercial agent breaches the mandatory prohibition of del credere clauses under Article 1746 of the Italian Civil Code

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Reading time 10 min

Current Legal Framework as of 6 November 2026: The Italian Supreme Court of Cassation consolidates the mandatory boundaries of contractual autonomy in commercial agency relationships, declaring void any preliminary purchase of goods imposed upon a commercial agent in order to circumvent the statutory prohibition of *del credere* guarantees.

ABSTRACT

In Order no. 1226 of 2026, the Italian Supreme Court of Cassation, Civil Division, examines the statutory limits governing ***del credere*** **clauses in commercial agency contracts** and their compatibility with the mandatory prohibition laid down by Article 1746 of the Italian Civil Code. The Court establishes the **nullity for unlawful cause** pursuant to Article 1344 of the Civil Code of any contractual arrangement compelling a commercial agent to purchase goods in advance for subsequent resale, thereby shifting the entire **third-party insolvency risk** onto the intermediary. At the same time, the decision reaffirms party autonomy in structuring **post-contractual non-compete covenants** under Article 1751-bis of the Civil Code, confirming that the statutory indemnity requirement may be derogated from both as to whether remuneration is due (*an*) and as to the manner of its payment (*quomodo*).

Key Takeaways

- **Mandatory prohibition:** Article 1746 of the Italian Civil Code prohibits any agreement placing liability upon a commercial agent for a third-party customer's default outside the strictly defined and exceptional statutory conditions.
- **Evasion of mandatory law under Article 1344 Civil Code:** Compelling the agent to purchase goods forcibly or transferring title to merchandise in lieu of accrued commissions constitutes a generalized transfer of customer insolvency risk that is void *ab initio*.
- **Ineffectiveness of compensatory adjustments:** Granting higher commission rates or allowing the agent to dispose freely of unpaid merchandise cannot cure the unlawful distortion of the typical legal cause of commercial agency.
- **Post-contractual non-compete covenant:** The natural remuneration requirement attached to the post-contractual indemnity under Article 1751-bis of the Civil Code is dispositive as to both its existence (*an*) and its payment mechanics (*quomodo*), permitting advance instalments during the life of the agency relationship.

CASE DOSSIER

JURISDICTION
Italy (Civil Law)

SUBJECT AREA
Labour & Employment Law & Enterprise & Self-Employment

LEADING DECISION
Italian Supreme Court of Cassation, Civil Division, Order of 20 January 2026, no. 1226 — On the nullity as a contract in fraud of

Legal Principle / Editorial Headnote

Any covenant within a commercial agency relationship that transfers the risk of customer default onto the commercial agent on a generalized basis is void as a contract in fraud of the law (contratto in frode alla legge), even where structured as a preliminary purchase and subsequent resale of merchandise, insofar as it circumvents the mandatory prohibition of del credere clauses under Article 1746 of the Italian Civil Code and distorts the typical legal cause of the agency contract.

01. PROHIBITION OF DEL CREDERE CLAUSES IN COMMERCIAL AGENCY CONTRACTS AND THE MANDATORY NATURE OF ARTICLE 1746 OF THE CIVIL CODE

The statutory framework governing ***del credere* clauses in commercial agency contracts** (*star del credere*) stands among the most stringent protective safeguards established by Italian private law to preserve the economic balance between contracting parties. Through the reform enacted by Legislative Decree no. 65 of 15 February 1999, implementing Council Directive 86/653/EEC on self-employed commercial agents, the legislature redrafted Article 1746 of the Italian Civil Code, introducing in its third paragraph an express prohibition against any agreement requiring the agent to guarantee third-party performance of obligations arising out of the transactions promoted. That prohibition serves to safeguard the **typical legal cause of commercial intermediation**, under which the principal bears the entirety of the entrepreneurial market risk and customer insolvency, whereas the commercial agent solely assumes the organizational expenses inherent in conducting promotional operations.

The narrow statutory exception set out in the current wording of Article 1746, paragraph 3, of the Italian Civil Code allows the contracting parties to stipulate a solvency guarantee only on a strictly occasional basis, in relation to individually specified transactions and subject to tight quantitative and financial caps. Even in such exceptional instances, the guarantee may never exceed the commission payable on that specific transaction and must be matched by a **dedicated**

supplementary remuneration in favour of the intermediary. Consequently, a blanket guarantee against customer non-payment is not a negotiable ancillary term, but a covenant expressly barred by statute whose insertion infringes a mandatory rule of economic public policy designed to prevent the unwarranted shifting of **commercial solvency risk**.

In the contractual practice of distribution networks, principals have repeatedly sought to circumvent this codified prohibition by devising multi-layered transactional structures. Prominent among such arrangements are schemes involving the advance or compulsory transfer of title to products to the commercial agent, formally framed as commercial supply contracts or distribution agreements yet functionally embedded within the promotion of sales across an assigned territory. Addressing this practice in Order no. 1226 of 2026, the Italian Supreme Court of Cassation, Civil Division, clarified that the statutory bar against solvency guarantees cannot be evaded through the formalistic overlay of title-transferring contracts, thereby reaffirming the inviolability of the statutory synallagmatic allocation of risk[1].

As is likewise confirmed by the principles developed in the economic regulation of commercial agency contracts, the legal characterization of a transaction does not depend on the *nomen iuris* chosen by the contracting parties, but on the substantive allocation of interests operating in practice. Whenever the ultimate economic outcome results in the systematic imposition of bad-debt losses upon the self-employed intermediary, the arrangement triggers the sanction of **absolute nullity of the clause** (voidness *ab initio*), restoring the principal's unconditional obligation to pay the accrued commissions in full.

02. SALE OF GOODS TO THE COMMERCIAL AGENT AND CONTRACTS IN FRAUD OF THE LAW

2.1 — When Does a Preliminary Sale of Goods Breach the Prohibition of Del Credere Clauses?

Determining in practice **when a preliminary sale of goods breaches** the statutory prohibition requires a close examination of how the promotional mandate is concretely performed. In the dispute adjudicated by the Supreme Court of Cassation, the agreement concluded between the principal and the commercial agent provided for the formal transfer of ownership over the marketed products in lieu of paying cash commissions already accrued over time. Although outwardly structured as an ongoing sequence of business-to-business supplies or sales, that mechanism shifted onto the commercial agent the entire financial burden arising from any default by customers located throughout the assigned contractual territory.

The lower courts on the merits had initially upheld the validity of the arrangement, emphasizing a purported structural departure from the statutory model of commercial agency: the passage of title to the merchandise to the agent allegedly enabled the latter to **dispose autonomously of the goods** in the event of third-party non-payment while simultaneously enjoying a substantially enhanced commission rate. The Italian Supreme Court of Cassation firmly rejected that reasoning, pointing out that the side agreement did not operate as an independent commercial venture, but remained inextricably subordinated to the management of the principal's sales network.

Compulsory purchase of merchandise or its transfer in settlement of commissions amounts to a manifest circumvention of the mandatory statutory rule whenever the concrete legal cause (*causa in concreto*) of the transaction is aimed at shielding the principal enterprise from ordinary market credit risks. Indeed, the Supreme Court reiterated that shifting customer default across an entire geographical territory onto the commercial agent distorts the very essence of commercial intermediation and falls squarely within the statutory ban on unauthorized patrimonial guarantees[1].

2.2 — Nullity for Unlawful Cause Under Article 1344 Civil Code and Ineffectiveness of Commission Enhancements

Characterizing the arrangement as a **contract in fraud of the law** (*negozio in frode alla legge*) pursuant to Article 1344 of the Italian Civil Code represents the linchpin of the Court's reasoning. Italian Civil Law visits absolute nullity not only upon contractual clauses that openly contravene prohibitive statutes, but also upon the combined deployment of formally lawful transactional instruments designed to achieve a practical result equivalent to the prohibited outcome. Compelling the agent to purchase and subsequently resell products operates in substance to construct an atypical *del credere* obligation borne by the agent without any statutory authorization whatsoever.

> *Compelling a commercial agent to purchase merchandise in substitution for accrued commissions conceals a surreptitious transfer of customer insolvency risk, constituting a contract in fraud of the law under Article 1344 of the Italian Civil Code that is void ab initio.*

Of decisive significance in this respect is the Court's dismissal of the putative economic offsets negotiated by the contracting parties. The principal company had pleaded that the arrangement granted the commercial agent an **enhanced commission margin** compared to standard remuneration rates, together with the right to recover unpaid goods. The Civil Division countered that an increase in remuneration can in no way validate a void covenant: the structural gravity of shifting insolvency risk precludes private financial compensation from overriding a statutory prohibition enacted to protect overarching public-order interests.

Declaring the clause void for evasion of mandatory law highlights the sharp asymmetry between the inderogable regime of Article 1746 of the Civil Code and the markedly different regulation governing other ancillary covenants in agency relationships, such as post-contractual non-compete agreements, where the legislature attaches no textual sanction of nullity and affords the contracting parties broader freedom in shaping their reciprocal pecuniary obligations[2].

03. REGULATION OF POST-CONTRACTUAL NON-COMPETE COVENANTS AND SYNALLAGMATIC BALANCE

3.1 — Derogability of the Indemnity Under Article 1751-bis Civil Code as to Both An and Quomodo

Within the broader regulatory architecture of commercial agency, the rules governing **post-contractual non-compete covenants** operate on a doctrinal plane altogether distinct from the mandatory provisions safeguarding entrepreneurial risk allocation. Article 1751-bis of the Italian Civil Code provides that restricting a commercial agent's professional activity after termination of the agency contract entails payment of a specific non-commission indemnity. Even so, the settled case law of the Supreme Court of Cassation has long clarified that this statutory rule is accompanied by no express sanction of textual nullity.

Omitting a dedicated financial consideration, or quantifying it on a flat-rate basis, does not invalidate the two-year obligation to abstain from competing business. The **natural onerousness of the covenant** serves a dispositive patrimonial interest of the contracting parties and remains open to free negotiation. Accordingly, the parties may lawfully stipulate that the non-compete undertaking is gratuitous, deeming the restraint borne by the intermediary to be adequately compensated by the overall commission structure enjoyed throughout the performance of the contract.

That freedom to derogate extends fully not only to whether the indemnity is payable at all (*an*), but also to the modalities of its disbursement (*quomodo*). A contractual clause providing for advance, instalment-based payment of the indemnity during the course of the agency relationship, bundled into ordinary commission payments subject to final reconciliation, is therefore entirely lawful and entails no infringement of the synallagmatic equilibrium protected by the legal system[2].

3.2 — Distinction Between Commercial Agency and Business Brokerage in Regulating Remuneration

Accurate legal characterization of the underlying relationship proves decisive in determining which economic and termination protections genuinely accrue to the intermediary. The **distinction between commercial agency and occasional business brokerage** (*procacciamento d'affari*) or kindred arrangements lies in the stability of the mandate and the temporal continuity of promotional activity across a defined geographical territory. Where the collaborator's tasks are confined to episodic promotional outreach or scientific information activities, systematic negotiation and promotion of contracts on the principal's behalf are lacking, thereby barring application by analogy of protective agency rules.

Absent a stable bond of commercial intermediation, neither the termination indemnities established by collective economic agreements — such as the supplementary clientele indemnity (*indennità suppletiva di clientela*) or the termination indemnity fund (*FIRR*) — nor the mandatory rules protecting accrued commissions can apply. Conversely, within genuine commercial agency relationships, the agent acquires an entitlement to commissions and ancillary fees for debt collection or cash receipt activities only where express contractual stipulations tie those duties to separate remuneration, particularly when no contractual liability for accounting errors has been agreed upon.

The boundaries of the contractual type likewise shape the enforceability of post-contractual non-compete obligations: the validity of the post-termination restraint is unaffected by the absence of a separate lump-sum payment upon termination, provided that the implementation mechanics agreed upon between the parties reflect a coherent allocation of contractual interests rather than an abusive imposition by the stronger contracting party[3].

3.3 — Distinguishing Criteria and Scope of Application in Authorized Distribution Agreements

Rigorous doctrinal **distinguishing** makes it possible to delineate with precision the **boundaries of application** of the nullity sanction triggered by a breach of the *del credere* prohibition. Nullity for unlawful cause strikes down compulsory purchases of merchandise imposed upon a commercial agent where such purchases disguise the shifting of customer bad-debt risk within a continuing promotional agency relationship. By contrast, the prohibition under Article 1746 of the Civil Code has no application to a genuine authorized distribution or sales concession agreement (*concessione di vendita*), in which the distributor acts as an independent buyer-reseller bearing full entrepreneurial risk, freely setting resale prices and earning a net commercial margin.

Unlike a commercial distributor, a commercial agent does not purchase goods in order to pursue an independent market strategy on its own account, but acts in the principal's interest to build and consolidate the principal's customer portfolio. A hybrid transactional structure that artificially grafts a sale of goods onto the intermediary solely to hold the latter liable for credit losses vis-à-vis third-party buyers cannot be qualified as a distribution agreement; rather, it constitutes an evasive scheme that is void *ab initio*.

Contractual Dimension	Del Credere Clause (Art. 1746 Civil Code)	Non-Compete Covenant (Art. 1751-bis Civil Code)
Character of the Statutory Rule	Mandatory and non-derogable for general solvency guarantees	Default (dispositive) and derogable as to both *an* and *quomodo*
Sanction for Evasive Clauses	Absolute nullity (voidness *ab initio*) under Art. 1344 Civil Code for evasion of law	Full validity of the covenant even where unremunerated
Protected Legal Interest	Protection of economic public policy and allocation of enterprise risk	Disposable individual patrimonial interest of the commercial agent
Payment Mechanics	Extraordinary supplementary fee solely for specifically identified transactions	Payable in advance as well, including through ongoing commission instalments

04. PROCEDURAL REMEDIES, DEFENCE OF NON-PERFORMANCE, AND LITIGATION STRATEGY

Qualifying the sale of merchandise to the agent as an evasive covenant circumventing the *del credere* prohibition carries far-reaching procedural consequences for **litigation defence strategy** between commercial agents and principals. Whenever the principal brings judicial proceedings seeking payment for consignments of goods formally invoiced to the agent, or raises set-off claims deducting those sums from accrued commissions, counsel for the agent should promptly plead the **absolute nullity of the clause under Article 1344 of the Civil Code**. Capable of being raised *ex officio* by the court at any stage and instance of the proceedings, that defence defeats the company's pecuniary claim and mandates a full recalculation of the commissions earned for promoting business.

With regard to the **burden of proof in court**, it rests upon the commercial intermediary to plead and prove the functional integration of the supply arrangement within the principal's distribution program, demonstrating that purchasing the merchandise did not reflect an autonomous commercial choice, but operated as a contractual condition imposed for carrying out promotional duties within the exclusive territory. Producing commission statements, delivery notes addressed to third-party customers, and internal corporate correspondence enables the agent to establish that the transaction was designed solely to shift market insolvency risk.

Additional operational complexities arise in adjudicating reciprocal claims for damages, particularly where the principal alleges breach of a post-contractual non-compete covenant and seeks payment of a contractual penalty clause. As a matter of substantive defence, the commercial agent cannot merely invoke delayed or omitted payment of the post-contractual indemnity so as to release itself automatically from the negative obligation not to compete, nor may it assume that the principal's payment obligation operates as a condition precedent to the enforceability of the restraint.

As clarified by the Supreme Court of Cassation in relation to Article 1460 of the Italian Civil Code, the defence of non-performance (*exceptio inadimpleti contractus*) requires a **comparative assessment of reciprocal breaches** anchored in

the principles of proportionality and contractual good faith. The court hearing the merits must ascertain whether failure to pay the indemnity on time is sufficiently grave to justify breaching the non-compete obligation, having regard to the overall synallagmatic balance and the concrete prejudice suffered by each party in the specific dispute[4].

References & Authorities Cited

Statutory Provisions

- Article 1746 of the Italian Civil Code — Obligations of the commercial agent and prohibition of *del credere* clauses
- Article 1749 of the Italian Civil Code — Obligations of the principal and economic transparency of the agency relationship
- Article 1751-bis of the Italian Civil Code — Post-contractual non-compete covenant and indemnity
- Article 1344 of the Italian Civil Code — Contract in fraud of the law (*contratto in frode alla legge*) and unlawfulness of cause
- Article 1460 of the Italian Civil Code — Defence of non-performance (*exceptio inadimpleti contractus*) and proportionality in accordance with good faith

Case Law Cited

1. **Italian Supreme Court of Cassation, Civil Division, Order of 20 January 2026, no. 1226** — On the nullity as a contract in fraud of the law under Article 1344 of the Italian Civil Code of a covenant transferring goods to a commercial agent in substitution for commissions so as to circumvent the prohibition of *del credere* clauses under Article 1746 of the Civil Code. Outcome: upheld in part; quashed and remanded. Para.: 6.1 and 7.

2. **Italian Supreme Court of Cassation, Civil Division, Order of 29 August 2024, no. 23331** — On the derogability as to both *an* and *quomodo* of the natural remuneration requirement governing post-contractual non-compete covenants under Article 1751-bis of the Italian Civil Code, and on the lawfulness of advance payment alongside commissions during the agency relationship. Outcome: dismissed. Para.: 4.5 and 5.

3. **Italian Supreme Court of Cassation, Civil Division, Order of 27 February 2023, no. 5883** — On the distinction between commercial agency contracts and occasional business brokerage or promotional outreach, and on the statutory prerequisites for termination indemnities and post-contractual non-compete covenants. Outcome: dismissed. Para.: 2 and 7.

4. **Italian Supreme Court of Cassation, Civil Division, Order of 31 July 2024, no. 21524** — On the application of the defence of non-performance under Article 1460 of the Italian Civil Code to post-contractual non-compete covenants governed by Article 1751-bis of the Civil Code, and on the required comparative proportionality assessment of reciprocal breaches. Outcome: main appeal upheld in part; quashed and remanded. Para.: 18 and 26. ↑

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