

out in its intention to protect intellectual property.

It is hoped that pharmaceutical research and manufacturing companies will act fairly and become conscious of the economic capacity of the inhabitants of countries where their products are on sale.

*Contributed by Natalia Tobón,
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Italy

New law to discourage late payments

On 9 October 2002, the Italian Government adopted Legislative Decree No 251 (published in the Italian *Official Journal* of 23 October 2002, Issue No 249) to implement Directive 2000/35/EC.

The EU Directive introduces in the European Union a uniform standard to eliminate excessive delays in fulfilling payment obligations under commercial transactions. For small and medium-sized enterprises in particular, such delays have serious economic repercussions as they contribute to high levels of insolvency and unemployment.

The Decree provides a series of remedies aimed to discourage late payments.

Liability of the debtor for late payments

Such liability is automatically established (without the need for formally placing the debtor in default as per article 1219 of the Italian Civil Code) once the terms provided by the contract or by the Legislative Decree in question have expired.

Penalty interest applies to all commercial transactions

The new rules contained in Legislative Decree No 251/02 apply to all contracts concluded after 8 August 2002.

To whom do the new rules apply?

All commercial relations (defined as 'transactions') referred to as 'entrepreneurs' (subjects carrying on organised economic activities or practising a profession) that involve a payment are subject to the new rules: contracts between companies and between companies and Italian public administrations (independent of the kind of contract) implying the delivery of goods or the providing of services on payment. The new rules will not apply to:

- (1) requests for payments of interest less than five euros;
- (2) payments carried out as compensation for damages; and
- (3) debts related to bankruptcy proceedings referred to the debtor.

Scope of liability

Late payments will not accrue interest if the debtor can demonstrate that the delay was not caused by his or her own actions. The rule does not change the contractual terms related to the risk of delivery (and therefore, of payment), but it will not impose interest if, due to external factors beyond the debtor's control, compliance with the payment deadline was impossible. For example, a liquidity crisis or an accident that does not affect the local management of the debtor's business cannot be considered an external factor.

Commencement dates

The practice of payment times is different across Europe. The same can be said for the general use of late payments. For this reason, Article 4 of Decree 251/02:

- (1) leaves the parties free to fix their terms of payment;
- (2) eliminates the need to establish interest on arrears provisions (by registered mail or other deed ordering payment);
- (3) provides that no interest is payable for the first 30 days, if a deadline is not fixed by contract.

The 30 days start:

- (1) from the delivery to the debtor of the good or the providing of a service;
- (2) from the receipt by the debtor of the invoice (which therefore should be sent by registered mail) or of a request for payment sent by the creditor;
- (3) from the moment at which the debtor has accepted the good or the service (or has carried out checks on the good or services provided by the law).

For perishable food items, there is an extended period of 60 days from the date of delivery or withdrawal, without any reference to the invoice.

Parties may set different deadlines, but only by written agreement (article 4), the terms of which are not grossly unfair (article 7), under the supervision of organisations representing small and medium-sized enterprises (article 8).

Interest rate

Article 5 of the Legislative Decree quantifies the interest due in the event of late payment; there is a statutory interest rate that is provided by the sum of the

reference interest rate (from the European Central Bank), plus at least seven percentage points. The interest rate will be reviewed every six months and the total will be published in the *Official Gazette*. It will always apply unless the parties have agreed otherwise.

Recovery costs

Recovery procedures provide further incentive, as they often amount to a higher cost than the incurred interest. The creditor may therefore take action against the debtor knowing that he can rely on the reimbursement of the costs of collection (which in any case, in the event they are contested, must be liquidated by the judge). The amount of the fees is based on lawyers' rates for out-of-court activities (ie not for litigation, but for the drafting of contracts and agreements).

Other than the recovery of costs, the creditor can also claim compensation for most forms of damage, eg damages derived from not having been able to profit from an advantageous market position, or damages incurred because of lack of liquidity due to late collection. Compensation will not be required if the debtor who is late in making payments demonstrates (as already provided under article 3) that the delay was not due to his or her own fault. The Decree legitimises primary organisations to assist small businesses operating in affected jurisdictions.

Consequences

The parties may agree to terms different from those involving a 30-day time limit, but they risk claims for damages if the terms of payment are so disproportionate as to be grossly unfair (article 7).

In determining whether a term is grossly unfair, the Decree uses the principle of equivalency, in the sense that every debtor must treat (ie pay) his or her creditor in the same way as when the debtor acts as a creditor.

Changes to injunctions

Article 9 provides that the injunctive decree, that the creditor can obtain with a shortened proceeding, will be issued by the court within 30 days, with an order for payment within a fixed deadline, that may be reduced to a minimum of 20 days in Member States. If the debtor contests only some of the terms or some of the amounts due, the injunctive decree can be effected for the uncontested part.

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Letter to the Editor

Dear Sir

A A Sommer Jr

I wanted to add a bit to Don Calvin's tribute to the late A A (Al) Sommer ((2002) 56 IBN 28) about Al's special contribution to the SBL.

Al demonstrated a selfless willingness to help all the young 'up and comers' in the SBL which, in my experience, was unequalled. For example, when I chaired Committee Q many years ago and badly needed experienced securities lawyers to assist me, I went to Al. He had chaired the Committee before and certainly didn't need to accept a Vice-Chair post to help me out, but he did so without hesitation, and was invaluable to me and the

Committee. When I co-chaired the Capital Markets Forum, it was Al to whom its Officers frequently turned when organising their Capital Markets Seminars, held around the world, together with the IOSCO annual meetings. It was difficult to obtain 'name' speakers and panellists to travel around the world. A phone call to Al, who seemed to know everybody, would produce not just a name but a personal request from Al to appear. Al was also invaluable to the International Capital Markets Group (ICMG) when it operated in the 1990s. The ICMG included the SBL, the International Federation of Accountants and the Fédération Internationale des Bourses de Valeurs. Al's

experience and prestige lent weight to the SBL's contribution to the ICMG. As Don Calvin pointed out so well, Al was a kind, caring professional who was respected – no beloved – by all who worked with him. He also represented the very best of the SBL's traditions, of passing the torch to the younger members. Al not only passed it on, but stayed around to help to keep it burning brightly.

Al and his charming wife Starr (Storrow) will be sorely missed by his very many friends and admirers.

Yours faithfully

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