

THE EXTENSION OF THE REGIME OF JOINT AND SEVERAL LIABILITY BEYOND SERVICE AGREEMENTS

By way of judgment no. 254 of 6 December 2017, the Constitutional Court extended to contracts with sub-suppliers (i.e. *subfornitori*) the regime of joint and several liability provided for employees of contractors by art. 29 of Law 276/2003 within service agreements (i.e. *contratti di appalto*).

The employees of sub-suppliers can therefore bring action directly against the principal in order to obtain the salary, social security and insurance payments that have not been paid by the employer.

The grounds for this innovative judgment make possible the extension of the regime of joint and several liability to all forms of indirect work and therefore, potentially beyond service agreements and sub-supply contracts governed by Law 192/1998.

In view of the extension of the regime of joint and several liability, it is accordingly appropriate that the contracts contain specific clauses protecting the principal.

THE JUDGMENT OF THE CONSTITUTIONAL COURT

On the basis of principles set out in the Italian constitution, the Constitutional Court deemed that the regime of joint and several liability, provided for by the so-called Biagi Law (no. 276/2003), should also be applicable to amounts claimed by employees of the undertakings that entered into a sub-supply agreement with a principal.

Sub-supply is defined by Law 192/1998 as the contract through which a principal avails itself of a supplier for the production of finished or semi-finished products.

The regime of joint liability under the Biagi Law provides that the principal is jointly liable with the contractor and any sub-contractors for remuneration, including severance pay, and social security contributions and insurance

Main aspects

- Extension of the regime of joint and several liability to contracts with sub-suppliers;
- the employees of the sub-supplier may bring action directly against the principal;
- the regime of joint and several liability may be extended to all forms of indirect work;
- it is appropriate to include specific measures in the commercial agreements.

premiums due in relation to the period of performance of the service agreement. This regime of liability is enforceable until two years after the end of the agreement.

According to the decision under consideration, the regime was introduced in order to prevent the mechanisms of decentralisation and disassociation between the ownership of the employment contract and the use of services from causing damage to the employees engaged in the performance of the commercial agreement. As clarified by the Constitutional Court, the exclusion of the employees of the sub-supplier would entail a breach of the principle of equality under article 3 of the Constitution.

The ratio of the judgment of the Constitutional Court could entail a further extension of the scope of application of joint liability. In particular, the regime provided for by the Biagi Law could be applied to all non-standard or hybrid contractual forms which provide for "indirect work" or work for the benefit of a third person, which consequently entails for the principal an economic burden which may be significant in size.

Above all, after the amendments made to the Biagi Law by Decree Law no. 25/2017 (converted by Law no. 49/2017), the employees concerned could obtain directly from the principal the payment of the amount due from their employer, without the principal being able to request the preventive collection from the employer jointly and severally liable, without prejudice to any action for recovery.

REVISION OF THE CONTRACTS

In light of the decision under consideration, in order to limit the possible consequences arising from the regime of joint and several liability, it is appropriate for the principal to insert provisions to safeguard itself not only in the service agreements but also in the supply contracts and in others for various reasons entered into with all the undertakings involved in its production cycle.

It is possible to insert provisions that allow monitoring of the fulfilment of obligations by the supplier (including through the DURC) and to agree on the right to suspend the payments and/or terminate the agreement in the event that: (i) the supplier is not able to demonstrate compliance with employment laws; and/or (ii) the employees of the supplier or third parties bring or threaten litigation in relation to claims of payments or in any case concerning the commercial agreement. Further, it is possible to ask the supplier to include specific indemnities accompanied by suitable bank guarantees.

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