

# Consultancy agreements (short form) Q&A: Italy

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Italy specific information concerning the key legal and commercial issues to be considered when drafting secondment documents for use internationally.

This Q&A provides country-specific commentary on *Practice note, Secondment agreements: International*, and forms part of *Cross-border employment*.

See also *Standard document, Secondment agreement: International*, with country specific drafting notes.

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## CONSULTANCY AGREEMENTS

### 1. Is there a risk in your jurisdiction that a consultant could be deemed to be an employee of the company and then acquire employment rights?

First, it is important to clarify that in Italy, consultancy agreements fall under the larger category of “autonomous employment”, which includes professionals such as lawyers or architects. However, these categories are subject to specific rules as access to the profession is strictly regulated (for example, admission to the bar).

A consultant is, therefore, an autonomous worker whose contract with the employer differs from a normal contract of employment.

However, it has recently been clarified that the consultant will be considered an employee and will acquire all employment rights linked to that employment status if the consultant:

- Has a working space inside the company’s offices or working environment.
- Is subordinated to the employer and therefore follows the employer’s directives when accomplishing tasks (such as following the work schedule defined by the employer, working under the employer’s direct instructions, and operating with little or no liberty in choosing how to organise and accomplish work).

### Factors indicating a genuine consultancy relationship

A consultant must be the individual undertaking the job. The consultant can, of course, collaborate with others by employing subordinates or a replacement (although this must be permitted either by contract or by usage, and it must not be incompatible with the object of the obligation).

If the consultant has, generally, an obligation of means where they are not legally required to reach a certain outcome but only to try to reach it, this indicates a genuine consultancy relationship. An obligation of outcome can be stipulated in the contract, but it is not required.

The consultant is not subordinated to the employer and can therefore determine their own working schedule, use their own tools and organise their own work.

Both parties can agree freely on the value of the compensation.

### Factors indicating an employee relationship

If the employee has, generally, an obligation of outcomes where they are legally required to reach certain results, this indicates an employee relationship.

The employee is subordinated to the employer, and must therefore follow the employer’s instructions and organisation of the working environment.

### 2. Could the consultant acquire any other status as a result of the agreement?

No, the consultant cannot acquire any other status as a result of the agreement.

### 3. If there is a risk of the consultant being deemed to be an employee in your jurisdiction, what are the tax consequences that could arise for:

- the consultant;
- the company.

## RESOURCE INFORMATION

### RESOURCE ID

W-007-0622

### RESOURCE TYPE

Country Q&A

### STATUS

Law stated as at 31-Mar-2017

### JURISDICTION

Italy



### Consultant

There is no tax consequence for the consultant.

### Company

The company must pay an additional contribution to the consultant's public pension scheme equivalent to approximately 10% of the salary of the consultant-employee. The employer must also pay a fine of up to 50% of the consultant-employee's salary.

#### **4. If there is a risk of the consultant being deemed to be an employee in your jurisdiction, how can the agreement be worded in order to minimise or eliminate this risk?**

The consultancy contract must avoid clauses that refer to:

- Hourly or monthly remuneration.
- Holidays.
- Tools provided to the consultant for their work.
- Work schedules.
- Premises.
- Any other common aspect of a subordinate employment relationship.

#### **5. To minimise any risk of the consultant being deemed to be an employee, is it common practice for provisions to be included in the agreement for:**

**a) the appointment of a substitute at any time as set out in *Standard document, Consultancy agreement (short form)*: International: clause 2.4?**

**b) the consultant to carry out other activities for other parties as set out in *Standard document, Consultancy agreement (short form)*: International: clause 4?**

- **Are there any consequences of these clauses that the parties need to be aware of?**

The appointment of a substitute for the consultant is rarely seen in Italy, but it is lawful. There is no problem to include such a clause in the agreement.

A consultant that carries out activities for third parties is also not very common in Italy, but it is lawful and it is sometimes included in contracts.

As a result, there are no specific consequences that the parties need to be aware of.

#### **6. Does the law in your jurisdiction stipulate that the company could be responsible for the consultant's acts and behaviour, if they cause loss or damage to the company, its employees, customers or suppliers, during the term of the agreement?**

##### **Vicarious liability**

Yes, the concept of vicarious liability is understood and applied in Italy.

However, this concept does not apply automatically in Italy because of the nature of the relationship between the consultant and client. As the consultant is independent from the client and is not subordinated to them, the company cannot be held automatically responsible for their consultant's actions.

Furthermore, since 2013, the consultant must have professional insurance to carry out their job. This insurance covers (up to a certain amount) any civil damages caused by the consultant's actions or negligence while performing their obligations. Therefore, the consultant is legally responsible for their own actions towards the company and its employees, customers or suppliers during the term of the agreement. However, the insurance does not cover damages attributed to malicious actions. Any damage must have been caused by the consultant's genuine error. In addition, any damages caused by the consultant's collaborators or substitutes are also covered by the insurance. The insurance covers the consultant in every country, except for the USA and Canada.

Therefore, the company is not responsible for the acts of the consultant.

#### **7. Are there any limitations or requirements in law that the consultant or the company needs to be aware of in relation to the term or duration of the consultancy agreement (*Standard document, Consultancy agreement (short form)*: International: clause 1)?**

No, the contract can be either for a fixed term or an indefinite term. However, a fixed-term contract may be more difficult for the employer to terminate before the termination date because, contractually, both parties agreed on the date the agreement would end. The company must then prove there was a just cause to end the contract, whereas normally there would be no such requirement.

#### **8. Are there any duties or services that would be standard practice to include within the agreement (*Standard document, Consultancy agreement (short form)*: International: clause 2)? Are there any duties imposed by national law on consultants?**

No, the consultant's duties included in the consultancy agreement depend entirely on the scope of the contract. Therefore, there are no standard defined duties in Italy.

**9. In your jurisdiction, is it permissible to include provisions for any sums due to the company to be deducted from the amounts owed to the consultant as set out in *Standard document, Consultancy agreement (short form): International: clause 3.4 and clause 10.4*?**

Yes, it is possible to include these clauses.

**10. What tax, social security or other payments will each party be liable to make in your jurisdiction as a result of the consultancy agreement and how should they be dealt with in the agreement (*Standard document, Consultancy agreement (short form): International: clause 3*)?**

- The consultant
- The company

### Consultant

#### Tax

The consultant is subject to VAT in Italy. The consultant must produce an invoice to their client.

#### Social security

Depending on the consultant's profession, an Italian resident is subject to a withholding tax of 20% of the invoice. If the consultant is not an Italian resident, this tax increases to 30%. In addition to this tax, the consultant may be taxed up to 43% on their overall income. The consultant is also subject to an additional 4% social security contribution, which may be charged to the client.

#### Other payments

Most consultants who are residents of Italy must also pay a maternity contribution, which varies depending on their profession.

### Company

#### Tax

The company, if based in Italy, as a client, acts as an agent for the withholding tax, which is equivalent to 20% of the invoice for consultants who are Italian residents and 30% for non-Italian residents.

#### Social security

The consultant may charge the company their security contribution, which varies according to the consultant's professional activities.

**11. What national and international anti-bribery and corruption legislation may the consultant be required to comply with in relation to services performed in your jurisdiction (*Standard document, Consultancy agreement (short form): International: clause 2.7*)?**

A consultant may be required to comply with Law 231/2001 (*Disciplina della responsabilit  amministrativa delle persone giuridiche, delle societ  e delle associazioni anche prive di personalit  giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300*) which regulates anti-bribery and corruption. The consultant may also be required to comply with the company's own anti-bribery and corruption policy.

**12. What data protection and privacy issues arise in your jurisdiction as a result of this arrangement and where personal data is transferred internationally? Is *Standard document, Consultancy agreement (short form): International: clause 6* sufficient to address these issues?**

No, *Standard document, Consultancy agreement (short form): International: clause 6* is not entirely lawful or sufficient to address issues of data privacy and data transfer. In fact, *Standard document, Consultancy agreement (short form): International: clause 6* (a) and (b) would be illegal in Italy and therefore cannot be included in an agreement applied during the consultancy period.

**13. Other than where it is explicitly stated in the agreement, who will own any intellectual property rights created by the consultant during the term of the agreement under the laws of your jurisdiction (*Standard document, Consultancy agreement (short form): International: clause 7*)?**

Under the laws of the Italian jurisdiction, the client owns any intellectual property rights related to the consultancy created during the term of the consultancy agreement.

According to Article 63 and 64 of the Industrial Property Code as well as Article 22 of Law no 633 on Copyright, the consultant always has the moral right to be recognised as the author of any invention. In Italy, moral rights are inalienable and any clause stating the contrary is void under Italian law. However, it is the client who will be able to use that invention as they see fit and who will own all patrimonial rights.

Nevertheless, it is very important to specify in the contract that any inventions created during the term of the consultancy agreement are property of the client and that the client has the right to use them. In Italy, proving intellectual property rights is one of the few exceptions to the law that requires a written contract

and not only a verbal agreement. Therefore, it is very important to include in the contract a clause regarding who will own the intellectual property rights to avoid any legal ambiguities.

Finally, it is important to know that the simple presence of a bonus not specifically related to inventions does not count as a retribution for those inventions. Therefore, if the inventions are paid by bonus it is important to specify this in the contract.

A clause stating that the consideration for the inventions is included in the fee paid under the agreement so that nothing other than the amounts being paid under the agreement will be payable could be easily challenged and declared void. Therefore, it is advisable to include a clause fixing the consideration separately from the general compensation.

**14. Does your national law recognise the concept of one party indemnifying the other as set out in *Standard document, Consultancy agreement (short form)*: International: clause 10 of the consultancy agreement? If not, what can be included in the agreement to create such protection?**

Yes, Italian law recognises the concept of one party indemnifying another. *Standard document, Consultancy agreement (short form)*: International: clause 10 of the agreement is lawful.

**15. Is the consultant protected against discrimination during the term of the agreement and if so, can any wording be included in the agreement to minimise the risk for the company against a potential claim from a consultant?**

Yes, autonomous workers (such as consultants) are protected against discrimination in Italy, as anti-discrimination is a general rule under Italian law. However, a specific law as for employees does not exist and no additional wording need be suggested.

**16. Can a confidentiality clause be included as set out in *Standard document, Consultancy agreement (short form)*: International: clause 5 that continues after termination of the agreement? Could such a clause suggest that the consultant is an employee instead of an independent contractor?**

Yes, a confidentiality clause that continues after the termination of the agreement can be inserted in the consultancy agreement. If the other factors that could indicate an employment instead of a consultancy are not present, this clause will not suggest that the consultant is an employee instead of an independent contractor.

**17. Can restrictive covenants be included for agreement by the consultant? Is the limitation in *Standard document, Consultancy agreement (short form)*: International: clause 4 permissible in your jurisdiction?**

Yes, restrictive covenants can be included in the agreement. In contrast to the rules for employees, there is no limitation of non-competition covenants. Therefore, the covenant might be completely discretionary. However, it is advisable to follow the rules fixed for employees, otherwise the consultant can challenge the non-competition covenant.

Restrictive covenants cannot be longer than three years and must be paid. The consideration must be proportional to the limitation (area) and length of the covenant. The law does not fix any rule and the proportionality of the covenant is evaluated on a case by case basis by the labour courts.

Generally speaking, 15% of the annual compensation is considered fair providing that the limitation is not too wide (that is, restricting the area to a particular Italian region, like North West or North East, but not all Italy).

**18. Under what circumstances can the consultancy agreement be terminated without notice as set out in *Standard document, Consultancy agreement (short form)*: International: clause 8 by:**

- **The consultant**
- **The Company**

**Without notice termination for other causes**

**Consultant**

According to Article 2237(2) and (3) of the Italian Civil Code, the consultant can only terminate the consultancy agreement for cause, and without causing prejudice to the client. The consultant then has the right to be reimbursed for the expenses incurred and to be compensated for the work already done (depending on the results achieved up to that point). However, the consultant cannot cause prejudice to the client. The Supreme Court of Italy ruled that the consultant cannot simply terminate the contract and leave (*Decision Cass. civ. Sez. II, Sent., 23-04-2014, n. 9220*). The consultant must give a sufficient amount of time (although how much time is not established by law or jurisprudence) to the company to try and find a replacement.

**Company**

According to Article 2237(1) of the Italian Civil Code and given the fiduciary nature of the relationship between the consultant and the company, the company has the right to terminate the agreement at any point, even without cause. This right can, however, be limited or excluded in the contract by agreeing on a fixed term for the contract, for example. The company is, however, obligated to reimburse all the expenses incurred and to compensate the work done by the consultant.

The Supreme Court has ruled that even if the contract stipulated a specific termination date, this does not imply that the company's power to unilaterally terminate the contract is excluded (*Decision Cass. civ. Sez. II, Sent., 14-01-2016, n. 469*). The company can therefore choose to prematurely terminate the contract, especially if there is cause to do so.

### Procedure

The termination procedure should be included in the contract, which must always be in writing.

### 19. On termination, does the law in your jurisdiction stipulate that any mandatory notice period or payments are to be made to the consultant?

There are no specific requirements regarding a mandatory notice period to be made to the consultant. However, the company must reimburse all the expenses incurred and it must compensate the work done by the consultant up to that point. A consultant who is deemed to be an agent is not covered by this agreement as agency is regulated separately.

### 20. Is it suitable in your jurisdiction to include a CEDR international core mediation clause?

No, mediation clauses are not commonly used in the Italian jurisdiction, but they are possible. However, this type of clause must provide that the mediation or arbitration is carried out in Italy by one of Italy's national bodies.

### 21. Does the law in your jurisdiction dictate which governing law and jurisdiction will apply to this agreement (*Standard document, Consultancy agreement (short form): International: clause 14 and clause 15*)?

No, the parties may choose which law and jurisdiction governs the agreement.

### 22. How does this agreement need to be executed in order to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

#### Execution formalities

The contract does not need to be in writing, but it is strongly recommended. It will be very hard to prove anything in case of any legal problems or disagreements if the contract is only oral.

#### Registration formalities

There are no formalities to register the consultancy agreement.

### 23. Does the agreement need to be in a language other than English in order for it to be valid and enforceable (*Standard document, Consultancy agreement (short form): International: clause 16*)?

The parties can choose the form of the consultancy agreement, so it can be drafted in any language. However, it is important that both parties understand the contract and it is therefore recommended that it also be translated in Italian.

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## CONTRIBUTOR DETAILS

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